

Request for advice to Ministers on applications under the Overseas Investment Act

Legislation:	Official Information Act 1982, ss 9(2)(h), 9(2)(g)(i), 9(1)
Requester:	Campaign Against Foreign Control of Aotearoa
Agency:	Land Information New Zealand (Overseas Investment Office)
Ombudsman:	Professor Ron Paterson
Case reference(s):	334056
Date:	May 2015

Summary

The Campaign Against Foreign Control of Aotearoa (CAFCOA) complained to the Ombudsman about the Overseas Investment Office's (OIO's) decision to refuse its request for information deleted from the file relating to Kim Dotcom's applications for consent to invest in New Zealand. Although the OIO recommended that Mr Dotcom's applications be granted, ultimately Ministers declined to grant consent.

The Ombudsman found that most of the deletions were justified,¹ but queried the basis for withholding parts of the OIO's advice to Ministers on the applications. The advice was withheld in order to maintain:

- legal professional privilege (section 9(2)(h) of the OIA);
- the effective conduct of public affairs through the free and frank expression of opinions between Ministers and officials (section 9(2)(g)(i) of the OIA).

After considering the Ombudsman's comments in consultation with the Crown Law Office, the Attorney-General agreed to waive privilege. The information was released and the complaint

¹ The deletions included some legally privileged material (withheld under section 9(2)(h) of the OIA), and personal and financial details about the applicant and his family (withheld under sections 9(2)(a) and 9(2)(ba) of the OIA). In respect of the latter material, the Ombudsman found that *"there can be some expectation of privacy and confidentiality in respect of personal financial details that are volunteered as part of an application for overseas investment"*. Although there is a public interest in accountability for the advice on which ministerial decisions on overseas investment applications are based, the Ombudsman did not think that necessarily required disclosure of all of the applicant's personal financial information.

resolved. This case note contains some helpful information about how the Ombudsmen interpret and apply the legal professional privilege and free and frank withholding provisions of the OIA.

Background

1. The OIO disclosed a considerable amount of information from the file relating to applications made by Kim Dotcom for consent to invest in New Zealand.
2. Deletions had been made to some of the documents, and CAFCA requested *“the deletions from the Kim Dotcom file”*.
3. The OIO refused to supply the deleted information, relying on the withholding grounds in sections 6(b), 6(c), 9(2)(a), 9(2)(b)(ii) and 9(2)(h) of the OIA.
4. CAFCA complained to the Ombudsman.

Investigation

5. Ombudsman David McGee notified the OIO of CAFCA’s complaint and requested a copy of the information at issue and an explanation of the reasons for withholding.
6. After considering the information, Dr McGee informed the OIO of his provisional opinion that there were valid reasons for withholding most of the information at issue. However, he queried the basis for withholding parts of the OIO’s advice to Ministers on Mr Dotcom’s applications.
7. The OIO replied maintaining there was good reason to withhold this information under sections 9(2)(h) (legal professional privilege) and 9(2)(g)(i) (free and frank opinions) of the OIA.
8. Ombudsman Ron Paterson assumed responsibility for the investigation when Dr McGee’s term as Ombudsman concluded. He informed the OIO of his provisional opinion that sections 9(2)(h) and 9(2)(g)(i) of the OIA did not apply. He also drew the OIO’s attention to certain considerations favouring disclosure of the information in the public interest.
9. The OIO considered the Ombudsman’s comments in consultation with the Crown Law Office. The OIO advised that the Attorney-General had agreed to waive privilege, and in light of this it was now prepared to release the information in question to the complainant.
10. The OIO through Crown Law invited comments from Mr Dotcom’s legal representatives, who agreed with the proposed course of action.

11. The Ombudsman gave CAFCA an opportunity to comment on his opinion that the remaining information at issue was properly withheld under various provisions of the OIA.
12. All outstanding matters were resolved when the OIO released the relevant parts of its advice to Ministers to CAFCA.

The information at issue

13. In 2010, Mr Dotcom submitted three separate but closely related applications to invest in “sensitive land” (defined in section 12 of the Overseas Investment Act 2005).
14. One of the requirements for consent to invest in sensitive land is that the applicant is of good character (section 16(1)(c) of the Overseas Investment Act).
15. Ministerial consent was required for the applications, as the relevant Ministers (the Minister for Land Information, Hon Maurice Williamson, and the Associate Minister of Finance, Hon Simon Power) had not delegated their power to the OIO to make decisions on applications for consent to invest in sensitive land. The information at issue was contained in two memoranda to Ministers, setting out the OIO’s advice on the applications.

Memorandum dated 5 April 2011

16. This memorandum contained advice on Mr Dotcom’s applications and a recommendation as to whether consent ought to be granted.
17. Paragraph 6 of the memorandum (which was released by the OIO) stated:

“There are matters that call Mr Dotcom’s character into question. The Overseas Investment Office has considered these matters and is of the view that, on balance, Ministers can be satisfied that Mr Dotcom is of good character. A comprehensive analysis of Mr Dotcom’s character forms part of our report.”
18. The “comprehensive analysis of Mr Dotcom’s character” was contained in Appendix 3 to the memorandum. The information at issue was found within this Appendix.
19. The memorandum recommended that Ministers grant consent to the proposed investments.
20. On 17 April 2011, the Associate Minister of Finance recorded on the memorandum that he was not satisfied and required further advice. (The Minister for Land Information initially accepted the advice of the OIO that consent should be granted.)

Memorandum dated 26 April 2011

21. The purpose of this memorandum was to provide additional advice on the application of the good character requirement, as requested by the Associate Minister of Finance. The information at issue was certain paragraphs deleted from this memorandum.²

Personal information about Mr Dotcom

22. It should be noted that the information at issue was almost exclusively not about Mr Dotcom's character, but about the interpretation of the good character requirement more generally.

Comments received during investigation

23. The OIO considered that sections 9(2)(h) and 9(2)(g)(i) of the OIA provided good reason to withhold the advice to Ministers at issue.

Section 9(2)(h)

24. In relation to this section, the OIO noted:
- a. The advice regarding the "*good character*" test was derived from legal advice prepared by OIO legal staff.
 - a. The advice relating to ministerial decision-making was derived from generic advice obtained by the OIO from Crown Law.
 - b. The person who signed the reports holds a current practising certificate.
 - c. The information includes statutory interpretation and precedent regarding relevant legislation.

Section 9(2)(g)(i)

25. In relation to this section, the OIO noted:
- a. The information at issue constitutes free and frank expressions of opinion by officials to Ministers.
 - b. Release would be likely to inhibit future expressions of opinion on statutory interpretation.

² Ministers ultimately declined consent, notwithstanding the advice from the OIO that it should be granted.

- c. This would result in Ministers possibly making decisions under the Overseas Investment Act without the advantage of having received advice on these sometimes complex statutory provisions.
- d. Release would not promote the accountability of Ministers or officials, or promote the ability of the public to effectively participate in the administration of laws and policies.

Application of section 9(2)(h)

26. Section 9(2)(h) of the OIA applies where withholding is necessary to maintain legal professional privilege. Generally, the withholding of legally privileged information will be necessary to maintain the privilege, unless it has been waived.
27. Accordingly, there are usually two issues to consider when applying section 9(2)(h) of the OIA:
 - a. Is the information at issue legally privileged?
 - b. Has privilege been waived?
28. The question in this case was whether the information at issue was legally privileged.
29. There are two types of legal privilege: solicitor-client privilege and litigation privilege. Litigation privilege was not relevant here. Solicitor-client privilege applies to confidential communications between legal advisor and client, where the legal advisor is acting in a legal capacity, and the communications are for the purposes of obtaining or giving legal advice.
30. In this case, the information at issue was argued to be legal advice from a solicitor to a client. In that context, relevant considerations may include:
 - a. **The author:** Was the author a lawyer holding a current practising certificate?
 - b. **The capacity in which the author is acting:** Was the author acting in a legal capacity or some other executive or administrative capacity?
 - c. **The relationship between the author and recipient:** Was it in the nature of a solicitor-client relationship?
 - d. **The purpose of the document:** Was it brought into existence for the purpose of giving legal advice?
 - e. **The content of the document:** Is it in the nature of legal advice?
31. The author in this case was the Manager of the OIO, Annelies McClure. The Ombudsman accepted that she held a current practising certificate, and that the information at issue was in the nature of advice on the application of the law (being the good character requirement in section 16(1)(c) of the Overseas Investment Act). Both of these factors

are relevant but not determinative of privilege. What must be considered is the capacity in which the author was acting at the time, and the purpose for which the document was brought into existence.

32. In the case of ‘in-house’ lawyers (legal practitioners employed within agencies), particularly ones employed in roles that are not strictly or solely legal in nature, it must be “*demonstrated affirmatively*” that they have been acting as a lawyer and not simply as an employee possessing specialist skills (see *Miller v Commissioner of Inland Revenue* [1999] 1 NZLR 275 at 296).
33. The OIO is designated the ‘regulator’ under the Overseas Investment Act. One of the regulator’s functions is to “*consider each application and advise the relevant Minister or Ministers on how the application should be determined*”.³ That appeared to have been the purpose for which the memoranda at issue were brought into existence. They contained the OIO’s advice on Mr Dotcom’s application and recommendations as to how that application should be determined. They contained phrases such as: “*the [OIO] is satisfied that ...*”; “*the [OIO] recommends that*”; and “*our view is ...*”. The memoranda were signed off by the Manager of the OIO. The Ombudsman considered that that was the capacity in which she was acting, notwithstanding the fact that she also possessed specialist legal skills.
34. To be clear, the Ombudsman was not saying that advice provided by a regulator to a Minister can never be legally privileged, but that it had not been demonstrated affirmatively in this instance that the advisor in question was acting in a legal capacity. The relationship between the advisor and recipient of the advice appeared to the Ombudsman to be one of regulator and Minister, not solicitor and client.
35. Accordingly, the Ombudsman was not persuaded that legal professional privilege attached to the information at issue.

Application of section 9(2)(g)(i)

36. Section 9(2)(g)(i) of the OIA applies where withholding is necessary to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers and officials.
37. This section commonly applies where disclosure of official information would have the effect of inhibiting Ministers or officials from expressing or recording the kinds of free and frank opinions that are necessary for the effective conduct of public affairs.
38. An agency should be able to demonstrate that the predicted prejudice is so likely to occur that withholding is ‘necessary’. Relevant considerations in assessing the likelihood of the predicted prejudice include:

³ Overseas Investment Act, section 31(a).

- a. **The nature and content of the information:** What does it actually disclose? Is there any background or factual information that could be made available? Can the withheld information be described as “*opinion*”? Are the opinions free and frank, or expressed in moderate and measured terms?
 - b. **The context of the information:** Was it part of a considered consultative process, or the early stages of developing drafts? Was it conveyed formally, or was it informal and “off-the-cuff” advice conveyed under pressure of time? Early and informal drafts and working papers may be more ‘free and frank’ in nature, and more likely to require protection. In contrast, agencies may be expected to stand by their best and most-considered final advice on the matter.
 - c. **The author of the information:** Senior employees may be expected by virtue of their position to continue to express their opinions freely and frankly. Junior employees might be more likely to be inhibited if their free and frank opinions were released. Professional policy advisors (ie, departmental officials) and consultants are expected to be more robust about their opinions than individuals or private parties from outside government who volunteer their opinions.
 - d. **The relationship between the author and intended audience (if relevant):** Is advice or opinion usually conveyed between these persons in a formal manner, or is it often expressed in an informal and frank fashion? If advice is usually conveyed informally, will release of the information at issue damage such an informal and frank relationship in the future? The Ombudsmen have recognised certain relationships like this within executive government, for instance, discussions between Ministers, and between the Prime Minister and the Policy Advisory Group of the Department of the Prime Minister and Cabinet (DPMC), and the Prime Minister and the Cabinet Secretary.
39. The Ombudsman accepted that there may be situations where the opinions exchanged between Ministers and the regulator require protection; where, for instance, the pressure of time, or the controversial nature of the issues, mean that the regulator needs to express itself in a particularly blunt manner, and such frankness is required for the effective conduct of public affairs. However, the Ombudsman was not persuaded that the opinions at issue here warranted such protection.
40. The information at issue was in the nature of opinion, but it was not particularly free or frank. It was fully reasoned and expressed in measured and moderate terms. It was not a preliminary draft, but the final report, containing the regulator’s best and most-considered advice to the Minister on how the applications should be determined. It was authored by the Manager of the OIO, a senior and experienced public servant. In this instance, she appeared to have been conveying the regulator’s opinions, rather than her own personal opinions.
41. The Ombudsman noted that the second memorandum, dated 26 April 2011, was in response to a request for further advice on 17 April 2011, and therefore pressure of time may have been a factor. However, the information redacted from that memorandum did

not strike the Ombudsman as the kind of information that required protection under s 9(2)(g)(i). It appeared to draw on the OIO's established approach to the good character criterion, as opposed to being new material generated under pressure of time. Once again, it was expressed in careful, measured, and moderate terms, and it was communicated by its most senior official, Manager Annelies McClure.

42. These factors led the Ombudsman to question whether release of the information issue would be likely to inhibit future expressions of opinion on statutory interpretation, resulting in Ministers making decisions under the Overseas Investment Act without the advantage of receiving such advice.
43. This would be tantamount to suggesting that the OIO would not do its job as regulator. It is obliged to "*consider each application and advise the relevant Minister or Ministers on how the application should be determined*". The Ombudsman saw no reason to believe that release of the information at issue would cause the OIO not to continue to do to the best of its ability what it is obliged to do as regulator.
44. Accordingly, the Ombudsman was not persuaded that section 9(2)(g)(i) of the OIA applied.

Public interest in disclosure

45. The withholding provisions in section 9(2) of the OIA are subject to the public interest test in section 9(1). If they apply, an agency and the Ombudsman on review must go on to consider whether the public interest in disclosure outweighed the need to withhold the information.
46. Ombudsmen have long recognised the strength of the public interest in maintaining legal professional privilege. Legal professional privilege is recognised by the courts as "*a fundamental condition on which the administration of justice as a whole rests*" (*Shannon v Shannon* [2005] 3 NZLR 757 at 766). Given the strength of the public interest in maintaining legal professional privilege, any public interest considerations (in terms of section 9(1)), which might outweigh the interest section 9(2)(h) is designed to protect, would need to be particularly strong.
47. Given the Ombudsman was not persuaded that sections 9(2)(h) or (g)(i) of the OIA applied, it was not strictly necessary to consider the countervailing public interest in disclosure. However, the Ombudsman drew to the OIO's attention certain considerations favouring disclosure of the information in the public interest.
48. The Ombudsman saw two public interest considerations as relevant in this case.
49. The first was the public interest in promoting the accountability of officials for the advice they give to Ministers. One of the purposes of the OIA is to promote the accountability of officials (section 4(a)(ii)). There is a high public interest in the availability of advice based on which Ministerial decisions are made.

50. The OIO recommended that Ministers grant consent to the proposed investments. This recommendation was based on conclusion that *“Mr Dotcom is of good character”*. There was a public interest in release of information to show how and why the OIO reached the conclusion that Mr Dotcom is of good character, particularly given the OIO’s acknowledgement that *“there are matters that call Mr Dotcom’s character into question”*, and the fact that Mr Dotcom and his application for consent to invest in New Zealand are matters of significant public interest.
51. The second consideration was the public interest in applicants having access to internal rules affecting decisions made in respect of them. This was a relevant factor, even though CAFCOA was not an applicant. The redacted sections related to internal rules affecting decisions. They showed how the OIO interprets the requirements in the Overseas Investment Act, including the good character requirement. It is only fair and just that applicants should know this, and have the opportunity to challenge it if they think it is wrong, or it has been misapplied to their circumstances.
52. This public interest is reflected in section 22 of the OIA, which provides a right of access to internal policies, principles, rules or guidelines in accordance with which decisions or recommendations are made in respect of any person or body of persons in his, her or its personal capacity. This provision supports transparency for the public in relation to such internal rules. The Ombudsman noted that section 9(2)(h) and 9(2)(g)(i) of the OIA are not justifiable reasons for refusing a request for internal rules.
53. The Ombudsman referred to the Danks Committee’s comments on the clause later enacted as section 22:⁴

“This clause relates to what has been called ‘informal administrative law’ or ‘internal law’ – the body of rules and criteria which is applied by agencies and statutory officers in making decisions affecting the rights, privileges, or liabilities of individuals. It includes the principles and guidelines in accordance with which statutory or administrative discretions are exercised.

Some of this ‘law’, like the case law built up by Courts and judicial tribunals, is based on precedents established in the course of making decisions. Some consists of departmental interpretations on points which have not been covered by judicial decisions. Some consists of policy decisions or directions issued by Ministers or senior officials. It may be contained in manuals, circulars, or desk or other files. In short, it covers material known to and used by officers or employees in making decisions affecting individual citizens.

The premise of clause 20 is that the individual has a right to know the law that does or may affect him personally, and that this applies as much to decisions made by administrative authorities as to those of tribunals and Courts. The Committee does not consider it enough that the individual

⁴ Committee on Official Information, *Towards Open Government: Supplementary Report* (1981) vol 2, pp 75-76.

affected should know after the event the reasons for a decision (although this also is necessary and is dealt with in clause 21). He should be able to ascertain in advance the principles and rules according to which his case will be decided. As the 1968 Report of the Ontario Royal Commission of Inquiry into Civil Rights said: 'it is an unjustified encroachment on the rights of the individual to be bound by an unpublished law'.

After quoting this, the Ontario Freedom of Information Report went on to say:

'Two compelling reasons underlie our concern to make the internal law of government institutions available to the public. First, the use of secret internal law means that decisions concerning the rights and liabilities of individuals are influenced by standards or policies of which the individuals are completely unaware. The application of these criteria may effectively determine the outcome of a particular decision-making process.

A failure to disclose secret law to persons affected is an affront to the basic principles of fairness and due process. Second, the publicity accorded to statutes and regulations ensures that those who are responsible for the enactment of legislation may be held politically accountable for the public policy which they seek to implement. A similar process of evaluation and accountability cannot occur with respect to documents which remain hidden from public view.' (Vol. 2, p: 255).

A third reason is that if the internal law is known those affected will be better able to present information and representations relating to that law. The quality of the decision should, as a result, be better."

54. The Ombudsman noted that the above two public interest considerations weighed in favour of disclosure of the sort of information at issue here. It included generic guidance on how the regulator and Ministerial decision-makers interpreted and applied provisions in the Overseas Investment Act. People are entitled to know how government decision-makers are interpreting and applying the law to make decisions that affect them personally.

Outcome

55. The OIO considered the Ombudsman's comments in consultation with the Crown Law Office. The Attorney-General agreed to waive privilege, and on this basis the OIO agreed to release the information at issue to the complainant. It consulted Mr Dotcom's legal representatives before doing so. After confirming his opinion that the remaining information at issue was properly withheld under the OIA, the Ombudsman considered that release of the OIO's advice to Ministers on Mr Dotcom's applications resolved the complaint.