

Request for prison escort bus costs

Legislation	Official Information Act 1982, ss 9(2)(i), 9(2)(j)
Agency	Department of Corrections
Ombudsman	Sir Brian Elwood
Case number(s)	W34975
Date	April 1996

Tendering for prison escort buses was not a commercial activity—essential element of profit not present—information protected by s 9(2)(j) because costs could be used by successful tenderer to ‘negotiate-up’ rates during the negotiation stage of the tendering process

This case involved a request by a private individual for details of the costs of operating the prison escort buses, specifically, the costs of officers’ wages, overtime, meals, running costs and repairs of buses, and accommodation for officers. The Department of Corrections declined the request under section 9(2)(i) of the OIA on the grounds that disclosure of the information would prejudice the Department’s ability to carry out commercial activities.

In explaining its decision, the Department said that it was conducting an internal costing exercise with a view to the possible contracting out of the service. It was seeking to establish whether it could be provided more cost effectively by private contractors, but it was concerned that the tendering process would be affected by the release of details of in-house costs. It felt tenderers’ bids would be influenced by the departmental figures and would not provide the direct comparisons the Department was seeking to establish.

The first issue which had to be addressed in this case was whether it could be said that section 9(2)(i) applied to the information. For this section to apply, the Department had to be able to identify the ‘commercial activity’ which it considered would be prejudiced or disadvantaged by release of the information at issue. In this case, the Department saw the tendering process as the ‘commercial activity’. However, it was noted that in *Timaru Municipal Corporation v South Canterbury Electric Power Board* [1920] NZLR 174, the Supreme Court found that the ‘purpose

of profit is implied in the term “commercial purpose”. Although there did not appear to be any recent New Zealand cases dealing with the question of what constitutes ‘commercial activity’, cases found in other jurisdictions relating to the term appeared to support two basic propositions, namely:

- the intention to make a profit is essential to the nature of any ‘commercial activity’; and
- the same activity may be a ‘commercial activity’ for one party, but not for another.

The purpose for which the Department was seeking tenders for providing the prison escort buses was not to make a profit, but was to make fiscal savings. The activity was not therefore seen as meeting the test to make it a ‘commercial’ one and it was concluded that section 9(2)(i) could not apply to the information at issue.

However, it was clear from information provided by the Department about the tendering process that it would include negotiation of contract details, including the cost for the service. As a consequence, consideration was given to whether section 9(2)(j) might apply to the information which was the subject of the request. In light of the concerns expressed by the Department, it seemed that disclosure of the information could well be used by the successful tenderer to ‘negotiate-up’ rates during the negotiation stage of the tendering process. This would obviously prejudice or disadvantage the Department in its negotiations with the successful tenderer. It was therefore concluded that section 9(2)(j) applied to the information at issue, subject to any countervailing public interest considerations favouring disclosure in terms of section 9(1) of the OIA. No public interest considerations were identified which outweighed the need to withhold the information in terms of section 9(2)(j).

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