Ombudsman
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Case note

Request for legal opinion used in making submissions on proposed regulatory changes

Legislation	Official Information Act 1982, s 9(2)(h)
Agency	Ministry of Health
Ombudsman	Sir Brian Elwood
Case number(s)	W35325
Date	October 1996

Request for legal opinion—request refused under s 9(2)(h)—opinion used extensively in submissions—view formed that privilege waived—any need to withhold outweighed under s 9(1) by strong public interest consideration

The information at issue in this case was a legal opinion on proposed regulatory changes, on which public submissions had been invited. The opinion was presented to the Ministry of Health by the organisation for which it had been prepared. The supply to the Ministry was stated to be on condition that the opinion not be released to any other organisation or individual without permission.

However, the opinion was supplied to the Ministry in the context of a meeting between the organisation, its legal advisers who had prepared the opinion, and officials from the Ministry. At that meeting, the organisation, through its legal advisers, presented arguments and submissions relating to the proposed regulations, making extensive use of the opinion to support its views.

The issue was whether, in this situation, section 9(2)(h) of the OIA provided grounds for withholding the opinion.

A preliminary question related to whether section 9(2)(h) could properly apply where the claimed privilege was not vested in the holder of the information, but in a third party. It arose because of the manner in which the Courts have considered the application of legal professional privilege to claims by third parties. (*Police v Tyson* [1989] 3 NZLR 507, and *Schneider v Leigh* [1955] All ER 173.) Because of the facts of the case, it was unnecessary to

form any opinion on this question and, for the purposes of the investigation, it was assumed that section 9(2)(h) could apply.

The next issue was whether, notwithstanding that the Ministry could not assert the privilege in its own right, withholding of the opinion was necessary to maintain that privilege.

The view was formed that the use to which the opinion was put was to advance arguments against the proposed regulatory changes. The organisation was seen to be making submissions to officials and using the opinion with which it had been provided in support of those submissions. Although the organisation wanted to keep its own legal opinion confidential, it nevertheless expected that submissions from other parties would be made available to it.

It was considered that the manner in which the opinion had been used amounted to an implied waiver of legal professional privilege, and accordingly there was no longer any privilege that could be maintained by withholding the opinion. This view was based on a number of cases which demonstrate that the privilege is lost against the wish of the party claiming it, where the privilege has been abused (for example, *Equiticorp Industries Group v Hawkins* [1990] 2 NZLR 175, *Goldberg v Ng* (1995) 132 ALR 57).

In the present case, disclosure of the privileged material had been made where the Government, through the Ministry of Health, was consulting with interested parties. The organisation was seeking to influence the Government with advice which in its own hands was privileged, and yet was simultaneously seeking to deny other interested parties from contesting that advice. This was seen as unfair, and as amounting to a waiver of the privilege, making section 9(2)(h) inapplicable to the information.

Alternatively, it was considered that even if waiver had not occurred, it was not *'necessary'* to withhold the opinion to maintain the privilege. This was seen to follow from the fact that the arguments and advice given by the organisation's solicitors directly to officials at the meeting, and which consequently were not privileged communications between solicitor and client, were largely repetitious of, and an elaboration on, the information contained in the opinion. Those non-privileged communications were not seen to be readily distinguishable from the information contained in the opinion, and accordingly, withholding of the opinion was not seen as *'necessary'* to maintain the privilege.

These views were disputed by the organisation. Accordingly, the question was also addressed as to whether, if the organisation's arguments were accepted, withholding the opinion on the basis of section 9(2)(h) would be outweighed in terms of section 9(1) by other considerations rendering it desirable in the public interest to make the opinion available.

In this context, a clear and strong public interest was seen. The Government had invited submissions on proposed regulations. The purpose of the proposed regulations was to provide measures to protect public health. The information in the opinion threw into question the legality of the options under consideration. It was considered that in those circumstances it became highly important for such information to be subject to scrutiny by all relevant parties. This could not be achieved if the material could not be disclosed to persons qualified to comment on the legal issues raised.

It was concluded that even if the view which had been formed that it was not necessary to withhold the opinion in order to maintain legal professional privilege was wrong, in this instance, any need to withhold the information was outweighed by the public interest identified above. The information was released by the Ministry.

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