Ombudsman
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Case note

Request for names of 'eminent New Zealanders' consulted during preparation of Intelligence and Security Agencies Bill

Legislation	Official Information Act 1982, s 9(2)(g)(i)
Agency	Prime Minister
Ombudsman	Sir Brian Elwood
Case number(s)	W35566
Date	March 1996

Request for names of 'eminent New Zealanders' who were part of the consultative process in preparing the Intelligence and Security Agencies Bill—request refused under s 9(2)(g)(i) — individuals consulted—in respect of those who advised that disclosure would inhibit them from giving free and frank advice to the Government in future, section 9(2)(g)(i) applied—need to withhold outweighed by countervailing public interest

A political party researcher, asked the Prime Minister for the names of the *'eminent New Zealanders'* drawn from the judiciary, retired senior public servants, academics, and former Prime Ministers of New Zealand who were part of the consultative process to prepare the Intelligence and Security Agencies Bill.

The Prime Minister refused the request under section 9(2)(g)(i) of the OIA on the basis that he had sought the comments under circumstances of confidence and disclosure of the names might have resulted in the individuals concerned declining any subsequent approach from the Government for further comment or advice.

In assessing whether the predicted prejudicial effect of disclosure met the requirements for refusal under section 9(2)(g)(i), the issue for consideration was whether disclosure of the names of the *'eminent New Zealanders'* consulted in the course of the preparation of the Bill would inhibit the future *'free and frank expression of opinions'* by the individuals concerned. If this was likely, the risk was that it would undermine the *'effective conduct of public affairs'* (in this case the preparation of legislation for introduction in the House), such that it was necessary to withhold that information. In addition, given section 9(1) of the OIA,

consideration also had to be given to whether, in the circumstances of the particular case, the interest in withholding was outweighed by countervailing public interest considerations favouring disclosure.

The Prime Minister explained that the Government's intention in seeking the views of *'eminent New Zealanders'* was to obtain an independent line of advice on policy issues to be incorporated in the proposed legislation. He further noted that, given the importance of the legislation, its sensitive nature and the public attention it was likely to attract, this process of consultation was a useful and objective means of gauging the appropriateness of the policy developed by officials up to that point. In these circumstances, it was accepted that the *'effective conduct of public affairs'* was dependent on receipt of free and frank expressions of opinion from independent persons who could contribute to that process.

However, the requester had distinguished between the names of the persons consulted and the actual advice each individual gave. The requester accepted that the latter would be likely to be validly protected under section 9(2)(g)(i) and he was not seeking that information. This distinction was significant. Disclosure of the names alone would not necessarily inhibit the individuals concerned in expressing free and frank opinions to Government in future similar circumstances. Even if disclosure would have such an inhibiting effect, there was a strong countervailing public interest in disclosure of the names given the importance and nature of the legislation and the specific purpose of the consultation, namely to obtain independent advice to test the policy developed by officials to that stage.

The individuals concerned were consulted about the request, including their views on the public interest in disclosure of their names. Although there was a difference of opinion on the question of disclosure, the majority of those who responded had no objection to their names being disclosed. A number expressed varying concerns and said that disclosure of their names might inhibit them from expressing free and frank opinions to Government in future similar circumstances. In general, they were mainly concerned that disclosure of their names might result in pressure on them to disclose the free and frank advice they tendered in confidence to Government during preparation of the Bill. This was also a concern of most of the others who had no objection to disclosure of their names alone.

However, it was considered that disclosure of names alone would not inevitably lead to disclosure of individual advice. Should they be approached directly by inquirers about their involvement or personal views, they would be free to answer or decline to comment as they wished.

In the light of the foregoing considerations, it was concluded, in respect of those individuals who advised that disclosure of their names would inhibit them from giving free and frank advice to the Government in future, section 9(2)(g)(i) was relevant. Nevertheless, in the circumstances of this case, the need to withhold was outweighed by the countervailing public interest in disclosure of the names of the group of persons consulted to obtain independent advice to test the policy developed by officials at that stage. The Prime Minister released the names of the individuals concerned.

Comment

The operations of Intelligence and Security agencies are extremely sensitive. Their very nature precludes the operation of normal transparency arrangements. In this context it was not inappropriate for the Government to seek independent advice to provide contestability of official views as a check on the policy development process. Similarly, it was not inappropriate for the Prime Minister to publicly announce, in introducing the Bill in Parliament, that there had been consultation with an independent group of *'eminent New Zealanders'* and the general thrust of their overall advice.

Consequently, there was a strong interest in the New Zealand public knowing who was consulted. This is reflected in the purposes of the OIA set out in section 4, in particular in section 4(a) where the Act speaks of making available *'official information to the people of New Zealand in order ... to enhance respect for the law and to promote the good government of New Zealand'*. Given the degree of secrecy which necessarily attaches to matters of national security, public confidence in the process of preparing the Bill would be enhanced by releasing the names of those consulted for independent advice, especially where it was already publicly known that such consultation had taken place.

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