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| Request for manufacturer’s information of breath-testing device used by Police  |
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| Legislation Official Information Act 1982, ss 9(2)(b)(i), 9(2)(b)(ii), 6(c); Ombudsmen Act 1975, s 17(1)(a)Agency Institute of Environmental Science and Research LimitedOmbudsman Sir Brian ElwoodCase number(s) W40882Date March 1999 |

*Request for technical data and manufacturer’s specifications for an evidential breath-testing device used by the Police—information withheld on basis release would disclose a trade secret, unreasonably prejudice commercial position of manufacturer and prejudice maintenance of the law—New Zealand case law suggested prosecution obliged to disclose sufficient information to defence counsel—investigation discontinued on basis that application to the Court provided adequate alternative remedy*

This case involved a request made to the Institute of Environmental Science and Research Limited, a Crown Research Institute, for technical data, manufacturers specifications, and operating manuals and instructions for the Intoxilyzer 500 VA, an evidential breath-testing device used by the Police. The Institute released the operating manual and instructions but withheld all the technical data and manufacturer’s specifications it held for the device, under sections 9(2)(b)(i), 9(2)(b)(ii) and 6(c) of the OIA. The reasons given for withholding this information were that if released, it would disclose a trade secret and unreasonably prejudice the commercial position of the manufacturer of the device and would also prejudice the maintenance of the law.

Comment was sought and obtained from the English manufacturer of the device on what that Company considered were the trade secrets belonging to the manufacturer that would be put at risk if the information at issue was disclosed, how disclosure would be likely to prejudice the manufacturer’s position, and why such prejudice would be unreasonable. The manufacturer’s response referred to cases decided by the English High Court and House of Lords. These cases had taken the view that it was not in the public interest for anyone, once an evidential breath-testing device had received formal approval in law, to go behind that formal approval and challenge the technical construction and general reliability of the device. The evidential breath-testing device involved in this case, was an approved device under the Transport (Breath Tests) Notice (No. 2) 1989. The English cases were not binding in New Zealand and only persuasive.

The requester drew attention to certain unreported cases decided in the New Zealand Courts. These cases appeared to be more relevant in the context of a complaint under the OIA than the English cases, and emphasised that the prosecution is obliged to disclose sufficient information to defence counsel to enable counsel to check, among other things, that a given device which is deemed to provide conclusive evidence, was working properly at the time an evidential breath test was taken.

In light of this approach by the New Zealand Courts, it appeared that the more appropriate remedy for requesters seeking information, such as that in issue in this case, was to seek the assistance of the Court to obtain the information necessary for defence purposes direct from the prosecution, rather than using the more circuitous route of seeking this information under the OIA.

After giving the requester an opportunity to comment, the final view was formed that this was an appropriate case for the exercise of the discretion which an Ombudsman has under section 17(1)(a) of the Ombudsmen Act to refuse to investigate a complaint further if it appears to that Ombudsman that under the law, or existing administrative practice, there is an adequate remedy to which it would have been reasonable for the requester to resort.

**Comment**

This issue was later the subject of consideration by the High Court in *Police v Keogh* [2000] 1 NZLR, 736. In this case, Chambers J considers the alternative avenues for obtaining information of this nature.

*This case note is published under the authority of the* [*Ombudsmen Rules 1989*](http://legislation.govt.nz/regulation/public/1989/0064/latest/DLM129834.html?src=qs)*. It sets out an Ombudsman’s view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.*