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Case note

# Request for sentencing schedule database

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| **Legislation** | Official Information Act 1982, s 6(c) |
| **Agency** | Ministry of Fisheries |
| **Ombudsman** | Anand Satyanand |
| **Case number(s)** | W44118 |
| **Date** | August 2000 |

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*Request for sentencing schedule database—request declined—release of some information 'would be likely' to prejudice maintenance of the law—information released subject to deletions*

A request was made by a firm of lawyers for an electronic copy of a sentencing schedule database held by the Ministry of Fisheries. The Ministry is responsible for a discrete area of law enforcement which involves economic issues and in respect of which quite substantial penalties have been provided in the relevant legislation.

Although portions of the database were provided from time to time to the courts for sentencing purposes, the Ministry considered that if the whole of the database, containing material which enabled defendants to be clearly identified, were released in an easily manipulated form, there would be the likelihood of prejudice to the maintenance of the law. The department therefore relied upon section 6(c) of the OIA as its withholding ground.

Section 6 states:

> *Good reason for withholding official information exists, for the purpose of section 5, if the making available of that information would be likely—*
>
> *(c) to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial.*

While the Ministry is not involved in the maintenance of the law in the same sense as the Police, Parliament has nevertheless placed upon the Minister and the Ministry the responsibility for enforcing the legislation.

The issue considered in this case was whether the release of all the information in the sentencing schedule database in the format requested *'would be likely'* to prejudice the interest intended to be protected by section 6(c).

The phrase *'would be likely'* was considered by the Court of Appeal in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385. The lengthy discussion by McMullin J at p 404, and the following extract from the judgment of Casey J at p 411 were relevant in this case:

> *It is obvious that the expression is capable of many shades of meaning conveying grades of probability. The context in which it is used—section 6—deals with matters calling for a practical and common-sense assessment of the prejudice to the various interests described. In many cases it will be almost impossible to predict the consequences with anything like the carefully balanced—almost mathematically calculated—level of assurance needed to satisfy the liberal test of 'more probable than not'. I think a more restricted approach is called for. It would be surprising if access to information was intended to be given in circumstances where its disclosure would create a real risk of prejudice to—for example—our national security or the right to a fair trial; or where such prejudice can be seen as something that might well happen. These latter meanings of 'would be likely' along the lines adopted by this Court in R v Gush and R v Piri, seem more in keeping with the maintenance of a proper balance of the interests contemplated by the Act, and they provide a common-sense test which can be more readily understood and applied.*

Elsewhere in their judgments, the Court dealt with the question of whether any burden of proof was cast on the Commissioner of Police. Again it is helpful to refer to the judgment of Casey J, where he states:

> *In the nature of things he who alleges that good reason exists for withholding information would be expected to bring forward material to support that proposition. But the review is to be conducted and the decision and recommendation made without any presumption other than those specified in the Act.*

In considering the information at issue in this request, it was apparent from the number of prosecutions that had been brought, even over the previous two years, that there are many people who think it to their advantage to try to evade the legislation. Given the limited resources of the department, it was reasonable to assume that there were more who had escaped detection. The levels of financial and other penalties that could be imposed indicated that Parliament recognised that there might be considerable economic advantage to be derived by those who succeed in evading the legislation, and also significant harm to the public interest if such evasion goes unchecked.

The Ministry advised that it would be possible to use the information contained in the database to assess where enforcement efforts were likely to be placed, and that such analysis might significantly undermine law enforcement.

Given the apparent level of financial advantage to be gained from evasion, it seemed not unlikely that such analysis would be made if the information in the database were to fall into

the wrong hands. Once the information is made available in a convenient format, there is no practical means of controlling where it may end up. Even if one were to conclude that the risk of wider dissemination were small, if it were to occur, the potential damage to the public interest could be very considerable.

The view was formed that release of the whole of the database would be contrary to the interest that section 6(c) was enacted to protect. However, it was noted that the specific information requiring protection was only that portion likely to identify offenders. In these circumstances, such identifying information could be deleted under section 17 of the OIA, thereby allowing the remaining information to be released without harm to the public interest. The case was closed on that basis.

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