

## Request for land exchange agreement and valuations

<b>Legislation</b>	Official Information Act 1982, ss 9(2)(b)(ii), 9(2)(i), 9(2)(j)
<b>Agency</b>	New Zealand Defence Force
<b>Ombudsman</b>	Mel Smith
<b>Case number(s)</b>	W47626
<b>Date</b>	March 2003

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*NZDF exchanging land with private land owners under the Public Works Act 1981—OIA request made to NZDF for copies of the exchange agreement and valuations of respective properties—NZDF refused under s 9(2)(i)—Ombudsman noted majority of information in standard form and already publicly available—unable to identify ‘commercial activity’—rather transaction was for defence purposes within the terms of the Public Works Act—NZDF released the information subject to the withholding of some information under s 9(2)(j) and s 9(2)(b)(ii)*

The New Zealand Defence Force (NZDF) owned a block of land in the South Island and had arranged for it to be exchanged for land owned by a neighbouring farmer for the purposes of adding to a military training area. A man wishing to operate a commercial activity from the property made a request to the NZDF for both a copy of the land exchange agreement and the valuations of the pieces of land that were being exchanged. The NZDF refused these requests, relying upon certain provisions of the OIA including section 9(2)(i).

The requester considered the refusals to be untenable because all land valuations are recorded by a number of public authorities to which the public has always had access. Further, the requester considered it was in the public interest that the land exchange agreement be accessible by taxpayers when the State is disposing of publicly held land. On this basis, the requester wrote to the Ombudsman requesting an investigation of the NZDF’s decision.

The Ombudsman clarified with the complainant exactly which valuations he was seeking; that is, private valuations or those on the district valuation roll. The relevant territorial local authority is obliged to maintain a district valuation roll which contains basic valuation

information regarding each rateable property in its district, and this information is part of a public register which must be supplied to requesters by the local authority upon payment of the prescribed fee. If the complainant was seeking these valuations, it was the Ombudsman's view that he should obtain the information that way rather than via a request under the OIA. However, if the parties to the transaction had obtained valuations from valuers in private practice, and these were the valuations the complainant was seeking, the Ombudsman acknowledged that such information held by the NZDF would be official information subject to the Act. The complainant confirmed that he was seeking the private valuations.

In response to the complaint, the NZDF explained that the land exchange agreement was the culmination of over twelve years of negotiations and was a land for land exchange that reflected the current usage of the properties. The NZDF confirmed that it was still effecting the exchange agreement and, while the parties were contractually bound, there were still matters requiring agreement before the new titles could be issued and the documentation finalised. The NZDF also said it was considering the purchase of additional land in the area from other private owners. In these circumstances, the NZDF advised it was concerned that the specific matters dealt with in this agreement might become standard issues for negotiation, thereby weakening its commercial position in any such future negotiations if the information contained in this particular exchange agreement was released.

With regard to the private valuations requested, the NZDF submitted that this advice was gathered for the express purpose of facilitating an exchange agreement of land for land and was therefore relevant only to that agreement.

With respect to the exchange agreement, the Ombudsman was unable to identify any unique features in this document. It was on the Auckland District Law Society standard form. Therefore, the printed standard terms were readily available to the public. Secondly, the price or value of the properties stated in the exchange agreement would also become a matter of public record by virtue of the combined effect of:

- section 106(2) of the Rating Powers Act 1988;
- section 41 of the Rating Valuations Act 1998; and
- regulation 12 of the Rating Valuations Regulations 1998.

These provisions require that the price or value of the properties be supplied to the rating and valuation authorities, who in turn must make them available to the public. The Ombudsman did note that some additions to the standard form had been made, but it appeared that the only '*unique*' feature was the quantum of the sums to be paid to the private owners for disturbance and re-establishment, and for legal costs and other expenses. The Ombudsman noted that such payments form part of the statutory scheme for compensation under the Public Works Act 1981, so there did not seem to be any good reason to withhold the fact that such payments were to be made in this case. However, the Ombudsman was willing to accept that disclosing the actual quantum might raise privacy issues.

The Ombudsman then considered the valuation of the private land. He noted the information contained in the valuation could be divided into three categories, namely:

- general information about the land and valuation;
- information directly referable to the land being transferred back to the Crown; and
- a considerable amount of detailed information about soil classification, land use and stock levels among other things, which related to the financial and commercial position of the private owners.

While the Ombudsman was unable to identify any good reason to withhold the information falling within the first two categories, he accepted that the more detailed information in the valuation was not likely to have been provided had confidentiality not been assumed. As a result, the Ombudsman considered it necessary to consult with the private owners for their views on release of this information.

Finally, the Ombudsman considered the valuation of the NZDF land to be exchanged. He recognised that there was a public interest in knowing the value of the land transferred to the private owners by way of exchange, but considered it necessary to also consult the private owners for any concerns they may have with release of this information given they were soon to be the new owners of the land.

The private owners advised that they entered into negotiations with the NZDF on the clear understanding that the negotiations would be in confidence and that the final terms of the agreement between the parties would remain confidential. They therefore opposed the release of any part of the exchange agreement including the range within which the payment was based. Further, they considered the information contained in the valuations to be commercially sensitive and were of the view that they should remain confidential.

However, simply asserting that the requested information was commercially sensitive is not enough under the OIA to establish a good reason for withholding it. Rather, section 9(2)(i) requires that disclosure would be likely to '*prejudice or disadvantage commercial activities*'. In the circumstances of this case, the Ombudsman had particular difficulty identifying what commercial activity was at issue. It has long been held by the courts that the essence of commercial activity is the buying or selling of property, goods or services for the purposes of profit. However, the only relevant activity that had been carried out in this case was the exchange of land, considered to be of approximately equal value, to facilitate military training. That is not a commercial activity by the NZDF. Therefore, the Ombudsman did not consider section 9(2)(i) to be a relevant withholding ground in this case.

However, the NZDF disagreed. It submitted that providing land for military training was a fundamental part of the business of the NZDF. It said it transacts this business '*in a commercial manner using commercial advice to the profit (advantage or benefit) of the NZDF*'.

The Ombudsman referred to the exchange agreement which was expressed as being made pursuant to the Public Works Act 1981 with Her Majesty the Queen named as the purchaser of the land acquired '*for defence purposes*'. The Ombudsman noted that this is the traditional way in which the Crown's land acquisitions for public works are indicated. It was the Ombudsman's view that '*defence*' is not a commercial enterprise or a commercial activity, although he noted that section 24(4)(b) of the Defence Act 1990 empowers the Secretary of

Defence to *'Purchase...or trade in ...assets...including land...'*. There is also a distinct power in section 24(4)(c) to *'...sell or otherwise dispose of...any land...under the control of the Ministry of Defence'*. However, in this case the purpose of the transaction was to acquire additional land for the NZDF's military training. There was nothing in the way the transaction was conducted which had any resemblance to a commercial transaction or suggested that the Secretary was trading. Rather, it was the Ombudsman's view that, on the basis of all the information available to him, the transaction in this case was simply an exchange of land for defence purposes within the terms of the Public Works Act.

It was the Ombudsman's view that the exchange agreement should be released with the actual sums deleted but with a statement advising that the total compensation fell within a certain \$20,000 range. The NZDF accepted this view and released the information to the complainant.

The Ombudsman was also of the view that the information contained in both private valuations should be released with the exception of certain detailed information about the private owners' land. The Ombudsman was satisfied that this information had been provided subject to an obligation of confidence between the private land owners and the NZDF, and it was necessary to withhold this particular information under section 9(2)(b)(ii) of the OIA, to protect the commercial position of the private owners. Further, the Ombudsman was unable to identify any overriding considerations rendering it desirable, in the public interest, to make that information available.

The NZDF agreed to release the remaining information to the complainant but maintained its position that the transaction was a *'commercial activity'*.

### **Comment**

The Ombudsman was aware that the NZDF had been involved in lengthy negotiations with the private owners. If the request for information had arisen during the course of those negotiations then section 9(2)(j) may have been a relevant withholding ground. Likewise, if the information was about the negotiations which had taken place (including some special feature, technique or methodology which would be likely to be of particular value in later similar negotiations), the Ombudsman noted that some measure of protection from disclosure might have been given to that. However, this case simply involved an attempt to reach an amicable settlement against the backdrop of the powers conferred on the Crown by the Public Works Act 1981, in which the usual techniques of rural land valuation had been employed. The Ombudsman therefore did not consider section 9(2)(j) to be applicable in this case.

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