

## Requests for tape and transcript of pilot communications to air traffic control

<b>Legislation</b>	Official Information Act 1982, s 9(2)(ba)
<b>Agency</b>	Airways Corporation of New Zealand
<b>Ombudsman</b>	Mel Smith
<b>Case number(s)</b>	W50570, W50585
<b>Date</b>	June 2004

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*Media requests for tape and transcript of pilot communications to Christchurch Air Traffic Control prior to crash—class exemption sought—also withheld to protect obligation of confidence—s 9(2)(ba)—release would not breach Chicago convention or any contracts with air traffic controllers—recommendation that information be released*

In 2003 an aircraft crashed near Christchurch Airport, killing the pilot and seven of its passengers who were senior Crop and Food research staff. A national television station and a leading newspaper requested that Airways Corporation of New Zealand (Airways) release an audio tape or transcript of the communications between the pilot and the Christchurch International Airport control tower just before it crashed.

Airways, which has statutory responsibilities for air traffic control, refused the requests under sections 9(2)(ba)(i) and 9(2)(ba)(ii) of the OIA, among other reasons. The requesters wrote to the Ombudsman requesting an investigation and review of this decision.

The Ombudsman asked Airways for a copy of the information at issue and a report setting out the concerns it had with release. The Ombudsman considered it desirable to listen to the actual tape containing the information as well as to view a transcript of it.

The information consisted of a series of very brief communications between the pilot and the Christchurch control tower. The Ombudsman noted that they appeared to be simply standard communications informing the pilot of matters necessary for the plane's approach to the airport and the pilot's acknowledgements of them, other than the two final calls to which there

was no acknowledgement. He also noted that they appeared to conform to the requirements of the Civil Aviation Regulations.

As to the concerns with release, Airways advised the Ombudsman that it did not release such audio tapes for purposes other than accident or incident investigation by the appropriate authorities. It said this practice arises out of a well-recognised industry concern amongst pilots and traffic controllers that, if such information as that requested is made publicly available, they may be reluctant to provide similar information in the future for fear it would expose them to potential civil or criminal action. Airways said it was in the public interest that such information continue to be supplied, as receiving this information was vital to the operation of effective safety management systems.

The Ombudsman considered this submission and noted that Airways was seeking a 'class' exemption for all information passing between the pilot and air traffic controllers, however innocuous the actual information might be. These arguments were virtually identical to those pressed by Airways and the New Zealand Airline Pilots' Association on the Parliamentary Select Committee in making submissions on what became the Transport Accident Investigation Commission Amendment Act 1999. At the time, the Committee had specifically rejected this argument. The Ombudsman also rejected the submission on the basis that the OIA does not provide for classes of documents to be withheld. To accede to this submission would effectively be to amend the law by creating a class of information exempt from the provisions of the OIA.

However, the Ombudsman then considered the application of section 9(2)(ba), being the provision most relevant to the concerns expressed by Airways.

For section 9(2)(ba) to apply, the Ombudsman first needed to establish whether the information was subject to an obligation of confidence. Airways argued that an obligation of confidence arose from the Convention on International Civil Aviation (the Chicago Convention), to which New Zealand is a party. In particular, the Ombudsman was referred to paragraph 5.12 of Annex 13. However, the Convention forms part of New Zealand domestic law only to the extent that legislation has been enacted to give effect to it. The Ombudsman noted that Justice Keith in the Court of Appeal decision in *New Zealand Airline Pilots' Association v Attorney General* [1997] 3 NZLR 269, provided a detailed review of the position of the Convention under New Zealand law and formally declared that it was not part of New Zealand's domestic law. Rather, New Zealand, like other countries which are signatories to the Convention, has recognised its international obligations by legislating to give effect to parts of the Convention. The Ombudsman also noted that, when amending the Transport Accident Investigation Commission Act in 1999, Parliament expressly declined to restrict the effect of the OIA to the extent contended by Airways. As a result, the Ombudsman was of the view that no obligation of confidence for the purposes of section 9(2)(ba) was created by the Convention which was relevant to the information at issue.

Airways also argued that an obligation of confidence arose from the air traffic controllers' collective agreement, which states that information such as that requested is to be held for the purposes of accident or incident investigation and will not otherwise be released. However, this agreement acknowledged that such information might be released where the law

otherwise required. A formal recommendation by an Ombudsman for the information to be released would amount to such a requirement. Consequently, release pursuant to such a recommendation would not breach the terms of the agreement.

The Ombudsman formed the final view that section 9(2)(ba) did not apply to the information at issue as no obligation of confidence could be established.

The Ombudsman made a formal recommendation that Airways release the information and this was ultimately complied with.

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