

Request for charitable trust's funding application

Legislation	Official Information Act 1982, s 9(2)(b)(ii)
Agency	Ministry of Education
Ombudsman	David McGee
Case number(s)	176175
Date	July 2009

Trust does not have a commercial position—even if it did, release of the information would not be likely unreasonably to prejudice it—the trust has no competitors, and is very different to other organisations in terms of its size, nature of operations and services—s 9(2)(b)(ii) does not apply

A requester sought the Wellington Marine Conservation Trust's application under the Learning Experience Outside the Classroom (LEOTC) fund, which is administered by the Ministry of Education. The Ministry refused the request under section 9(2)(b)(ii) (unreasonable commercial prejudice) and the requester complained to the Ombudsman.

The Ministry advised the Ombudsman that, while the total value of the contract should not be withheld, the financial breakdown of how the Trust distributed funds in order to deliver the contracted service was commercially sensitive information.

The process by which the Trust, and other Ministry contractors for these services, obtained this funding was contestable. All potential contractors submitted proposals to the Ministry during a tender process and outlined how they could deliver services, including a detailed budget breakdown.

Releasing this information could have prejudiced the present and future commercial position of the Trust in two ways. Firstly, by advantaging any third party that might wish to operate in competition to the Trust. Secondly, by undermining any commercial advantage that the Trust might have developed in terms of tendering for future Ministry contracts for similar services.

The Ombudsman wrote to both the Ministry and the Trust explaining why he did not think there was good reason to withhold the information under section 9(2)(b)(ii).

First, the Ombudsman was not persuaded that the Trust had a commercial position. He acknowledged that the status of an organisation does not, of itself, necessarily determine whether it has a commercial position. A charitable organisation may undertake commercial activities in order to make a profit, even though those profits are then applied for charitable purposes.

It is generally readily apparent that certain organisations, such as business enterprises, are engaged in activities for the purpose of making profit and therefore have a commercial position. However, with other organisations, such as charitable organisations, it may not be readily apparent that the organisations are engaged in activities with a view to making a profit. In such cases, further evidence may be necessary before an Ombudsman is satisfied that the organisation has a commercial position.

In this case, the Ombudsman was not persuaded that the Trust engaged in the provision of LEOTC services for the predominant purpose of making a surplus or profit which it could then apply to its other charitable purposes. The Trust was a not-for-profit charitable Trust. Although it competed in a contestable selection process for the provision of LEOTC services, the Trust did not appear to have engaged in that process with the intention of making a surplus or profit from any monies provided by the Ministry.

Even if the Ombudsman was persuaded that the Trust had a commercial position, he did not see how disclosure of the particular information at issue would be likely unreasonably to prejudice that position. There were no organisations that operated in competition to the Trust in the area of marine education in the Wellington region. Even if someone decided to set one up, it was difficult to see how they could gain an advantage from release of the information.

The information related to the operation of a particular organisation which was differentiated from other organisations by its size, the nature of its operations, and the services it provided. It was unclear to the Ombudsman how the disclosure of financial information about the operation of the Trust would provide a commercial advantage to other service providers seeking LEOTC funding.

The Ministry agreed to release the information after considering the Ombudsman's comments, and the complaint was resolved.

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