

Request for tender proposals, evaluation and scoring material relating to appointment of default KiwiSaver providers

Legislation	Official Information Act 1982, ss 9(2)(b)(ii), 9(2)(ba)(ii)
Agency	Ministry of Economic Development
Ombudsman	David McGee
Case number(s)	176546
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Release of detailed organisational information including information about products and fees would be likely unreasonably to prejudice the default providers' commercial positions—section 9(2)(b)(ii) applies to tender proposals—explicit obligation of confidence—release would make it more difficult for MED to monitor compliance of default providers with their instruments of appointment and have a damaging effect on the success of the KiwiSaver scheme itself—section 9(2)(ba)(ii) applies to evaluation and scoring information

A requester sought information about the selection and evaluation of default KiwiSaver providers. The Ministry of Economic Development (MED) released some information, but withheld other information under sections 9(2)(b)(ii) and 9(2)(ba) of the OIA. The requester complained to the Ombudsman.

Some information was released at the Ombudsman's suggestion. The Ombudsman concluded there was good reason to withhold:

- information supplied to MED by the applicants for default provider status;
- evaluation material including scoring and internal comments and discussions on the merits of each application.

Information released

The Ombudsman observed that only brief information about MED's process for evaluating the applicants for default provider status had been released. He identified a public interest in release of information that detailed the extent of the default provider selection process and the expertise that was involved in this task. He asked MED whether there was any concern with releasing some of the documentation underpinning the selection process, such as:

- papers detailing the evaluation methodology and process;
- the standard interview questions that were the basis of interviews with the default providers;
- the due diligence plan; and
- worksheets used in the due diligence visits (without any commentary on the specific provider).

MED agreed to release this information to the requester.

Section 9(2)(b)(ii)—tender proposals

MED's explanation

MED explained that the information it held was obtained through the competitive tender process for selecting the default providers agreed to by the relevant Ministers. The information provided was extensive and included detailed information on the organisations' governance structures, key personnel, organisational capacity, superannuation administration capability, investment capability, and fee and pricing information in the context of providing a default KiwiSaver scheme.

Applicants were expected to provide MED with their proposed designs for a KiwiSaver savings package, including a detailed analysis of their proposed default investment product, as well as details of the range of other investment product options that would be offered. MED's evaluation of this information involved an examination of the investment strategies and the risk management practices for each proposal.

All of the default providers were commercial entities operating in a highly competitive market. Much of the information provided to MED was not in the public domain. If the information was released, this would seriously prejudice the ability of the default providers to compete in the market and thereby unreasonably prejudice their commercial position.

Ombudsman's opinion

The Ombudsman was satisfied that much of the information gathered from the default providers was commercially sensitive, and that its release would be likely to prejudice the commercial position of those default providers.

The commercial information ranged from the specifics of each default provider's proposed range of investment products and the investment strategies applied, through to negotiations about fees and prices. There was also significant detail about the financial and IT resources of each organisation and other details that would be likely to undermine the competitive edge of each provider, were this information to be released into the public domain. In the context of a competitive tender process, in which assurances of confidentiality resulted in the government accessing information that would not normally be made available to it, the likely commercial prejudice consequent upon release would be unreasonable.

The Ombudsman formed the opinion that section 9(2)(b)(ii) applied to the tender proposals supplied by the default providers to MED.

Section 9(2)(ba)—Evaluative and scoring information

MED's explanation

MED noted that the Request for Proposal (RFP) stated that, subject to the OIA, communications and negotiations under the RFP process, and information relating to the evaluation and comparison of proposals, was confidential to the Crown and the applicants.

MED explained that, for the purpose of evaluating the applications for default provider status, it had relied on the default providers to furnish detailed and commercially sensitive information. This information was supplied with the reasonable expectation that it, and any evaluative material generated by the government during the selection process, would remain confidential.

If this information were to be released, it would have a negative effect on the ongoing relationship MED must maintain with the default providers.

MED's role was to monitor the compliance of the default providers with their instruments of appointment. In this role, MED required an open and transparent relationship with the default providers to be confident that it would be alerted at the earliest possible time to any matters that might affect the ability of the default providers to meet the conditions of their appointment.

As part of its monitoring role, MED would at times need to request commercially sensitive information from the default providers. It was concerned that its ability to obtain such information would be compromised if there was an expectation that this type of information would enter into the public domain.

There was also a broader concern expressed by MED that release of any of the evaluative or scoring material could create a misleading perception that there was a difference in quality between default providers. This would have a potential impact on the commercial position of the default providers and would certainly have a negative impact on the relationship between MED and those providers.

Ombudsman's opinion

The Ombudsman was satisfied that the evaluation and scoring material was subject to an explicit obligation of confidence as per the RFP. He considered that, if it were to enter the public domain, it would be likely to have a prejudicial effect on the reputation of some of the default providers that would not be justified. MED's concerns about the effect of public release on its relationship with the default providers were therefore valid. The Ombudsman also said that, in the investment business, where success is inextricably linked with public confidence, release of this information could have a disproportionately damaging effect on the success of the KiwiSaver scheme itself.

The Ombudsman therefore formed the opinion that section 9(2)(ba)(ii) applied to the evaluative and scoring information.

Public interest

The Ombudsman noted that individuals cannot choose a preferred default provider. A person either joins the KiwiSaver scheme that he or she prefers or a default provider is automatically selected. In this context, he could not see how it was in the public interest to know which of the six default providers that were selected performed better or worse than another.

In the Ombudsman's view, the public interest lay in having sufficient information about the rigorousness and independence of the selection process itself and the standards that all default providers are required to meet. To that end, MED had agreed to release the documentation underpinning the selection process.

The Ombudsman concluded that the information already released by MED adequately addressed the public interest considerations at stake. He did not agree that there was a public interest in knowing how each of the six default providers were ranked against each other that outweighed the interests protected by sections 9(2)(b)(ii) and 9(2)(ba)(ii).

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