Ombudsman
Fairness for all

Case note

Request for project and hazard management plans relating to Mount Victoria tunnel refurbishment

Legislation	Official Information Act 1982, s 9(2)(b)(ii)
Agency	New Zealand Transport Agency
Ombudsman	Professor Ron Paterson
Case number(s)	311481
Date	June 2014

Section 9(2)(b)(ii) applies to genuinely innovative methods that competitors could copy or adapt in future tenders, but not to the plans in their entirety—strong public interest in disclosure to promote accountability for adherence to the plans and effective participation in the consultation process

The New Zealand Transport Agency (NZTA) initiated a project in 2010 to refurbish the Terrace and Mount Victoria tunnels in Wellington. A group of companies was selected by NZTA to carry out the work, including Leighton Contractors Pty Ltd (LCPL). Together with NZTA, these companies formed the Wellington Tunnels Alliance (WTA).

The Mount Victoria Residents Association sought the project and hazard management plans. NZTA identified two relevant documents—the Mount Victoria Project Management Plan (PMP) and the Project Construction Environmental Control Plan (PCECP). It allowed the Residents Association to inspect the plans, but refused to provide a copy of them under section 9(2)(b)(ii) (commercial prejudice). The Residents Association complained to the Ombudsman.

Agencies are generally required to provide information in the way preferred by the requester. One exception is where meeting the requester's preference would prejudice the interests protected by section 6 or 9 and, in the case of section 9, there is no countervailing public interest. The Ombudsman considered whether there was good reason, under section 9(2)(b)(ii) of the OIA, to refuse to provide the Residents Association with a copy of the PMP and PCECP.

NZTA explained that under some competitive tendering arrangements, points were awarded during the selection process for tenderers' project management plans. These plans were the

intellectual property of the WTA participants, and release would undermine their competitive advantage when participating in future tender processes. It stated:

> *As a practical example of this, it is possible that a competitor may use the documents to learn of practices that they do not employ, or equally practices that they do employ but were not used on the tunnel refurbishment project (or may have been used in different ways at different stages of the projects). In either case, the competitor would then be able to adjust either their methodology statements, the quality of their own approach, or their price in future tendering exercises where they are bidding against one or more of the tunnel alliance non-owner participants.*

In other words, NZTA's position was that disclosure of the plans would unreasonably prejudice the commercial position of the WTA participants by enabling competitors to utilise the companies' intellectual property when submitting their own tenders for work in the future.

However, the Ombudsman considered the likelihood of the claimed prejudice was overstated. While there was good reason to withhold some of genuinely innovative methods used by the contractors, *'the blanket claim for withholding the document[s] was unsustainable'*.

The Ombudsman could see nothing in the PCECP which would unreasonably prejudice the commercial position of any of the WTA participants. There was some limited information about particular methodologies to be employed, but these seemed straightforward, and information about them had been disclosed at a public stakeholder meeting.

In relation to the PMP, most of it was not tailored to the project at all, but was simply a template generated from within LCPL's project management software, and was standard project management *'good practice'*.

Most of the detailed processes, procedures and policies to be operated by the contractors, which would be more likely to contain commercially sensitive intellectual property, were not contained in the PMP at all, but in the project management software and electronic document repository owned and operated by LCPL.

However, the Ombudsman did accept that section 9(2)(b)(ii) applied to some of the more detailed information contained within the PMP about LCPL's processes, procedures and policies, as it showed how LCPL had innovated in these areas, and would help to distinguish that company from its competitors.

In view of the Ombudsman's opinion that section 9(2)(b)(ii) did not apply to any of the PCECP and only small parts of the PMP, it was not strictly necessary to consider the countervailing public interest in disclosure.

However, the Ombudsman commented that withholding these two documents in their entirety did not meet the public interests reflected in section 4 of the OIA, in promoting accountability and enabling *'effective'* participation in the *'administration of laws and policies'*. He stated:

> *There is a significant public interest in … the community group … being able to hold the NZTA and its WTA contractors accountable for adherence to its own plans and proposals for implementing the project on time and with minimal detrimental*

> *impact on the community living around the work sites. To enable that, as well as effective participation in any consultation process on how the impacts of the work would be mitigated, … the community group needed to have sufficient advance information to know what measures and standards applied in those areas so as to be able to ask appropriate questions during any consultation and make complaints during the work. These interests in turn depend on being able to refer to the [PMP] and the [PCECP].*

The Ombudsman concluded that *'the public interest does not lie in the blanket application of section 9(2)(b)(ii) to withhold the entirety of project management documents such as these'*. The NZTA accepted the Ombudsman's opinion and released most of the PMP and all of the PCECP.

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