

Request for names of senior and principal historian involved in writing treaty settlements memo

Legislation	Official Information Act 1982, ss 9(2)(a), 9(2)(g)(ii)
Agency	Ministry of Justice (Office of Treaty Settlements)
Ombudsman	Dame Beverley A Wakem
Case number(s)	306757
Date	10 April 2014

Sections 9(2)(a) and 9(2)(g)(ii) OIA did not apply—information publicly available—seniority—degree of responsibility—no material supporting likelihood of pressure or harassment

Background

A requester who was a member of an iwi in negotiations with the Office of Treaty Settlements (OTS, part of the Ministry of Justice), asked for the name of the senior historian who wrote the memo *'Right of first refusal of property allocation in Mahurangi and Kaipara Areas,'* and the name of the principal historian who peer reviewed it. OTS refused the request under sections 9(2)(a) and 9(2)(g)(ii) of the OIA.

The requester complained to the Ombudsman, arguing that the people directly affected by the memo should have the opportunity to scrutinise the credentials of its authors. He also noted that Crown historians have regularly appeared in the Waitangi Tribunal for cross-examination. And he took exception to the suggestion that members of the iwi would subject Crown officials to improper pressure or harassment.

OTS explained that the Ministry of Justice did not, as a matter of principle, release the names of employees below managerial level. It thought there was a risk that the historians would be the target of *'intemperate and personalised criticism'* if the negotiations did not go the requester's way. It noted the pool of qualified historians in New Zealand was small, and suggested that release might deter them from working for OTS in the future, which would diminish the quality of advice available to OTS during the negotiation process. It acknowledged

that there was no information to suggest the requester had engaged in improper pressure or harassment before.

Privacy

Section 9(2)(a) of the OIA applies if withholding is *'necessary to protect the privacy of natural persons'*.

The Chief Ombudsman's starting point was that the names of officials should, in principle, be made available when requested. All such information normally discloses is the fact of an individual's employment, and the work they are doing in that role. New Zealand does not have a convention of an anonymous public service.

In addition, given that there was one principal historian working for OTS at the time, it was likely that person was already readily identifiable.

Further, the two historians were relatively senior officials within OTS. Their opinion, and the advice they provided, was of fundamental assistance to OTS during Treaty negotiations. The historians contributed to what are often complex and contentious arguments about rights to land, and did so in their professional capacity, as experienced employees of OTS.

These factors significantly reduced the strength of any privacy interest in their identities.

The Chief Ombudsman consulted the Privacy Commissioner, who agreed that the names should be released.

The Privacy Commissioner noted that the two historians were quite high in the hierarchy of OTS, and had relatively high profiles among parties involved in Treaty negotiations. They were both identified on the website for their areas of expertise. Because of *'the level of expertise required by the report writer and the reviewer and their relatively senior roles in OTS'* the privacy interest in their names was low.

The Privacy Commissioner also considered that there was a high public interest in the experience and values that a report writer brings to such an opinion. She commented that *'the opinions of government agencies that support or contradict rights in land, ought to be scrutinised in an open and transparent manner.'*

The Chief Ombudsman concluded that section 9(2)(a) did not apply to the names of the senior and principal historians.

Improper pressure or harassment

Section 9(2)(g)(ii) applies if withholding is *'necessary to ... maintain the effective conduct of public affairs through ... the protection of [Ministers, members, officers or employees of agencies] from improper pressure or harassment'*.

For this section to apply, there must not only be a reasonable likelihood of improper pressure

of harassment, but a link must be made between the anticipated behaviour, the impact upon the person to whom it is directed, and the effective conduct of public affairs.

While being of the opinion that the requester could subject the historians to '*intemperate and personalised criticism*,' OTS was not able to provide any material to support the proposition that he would. The Ombudsman was not satisfied that there was a reasonable likelihood of improper pressure or harassment that would impact detrimentally on the staff concerned.

Outcome

After considering the Ombudsman's opinion, the Ministry agreed to release the information and the complaint was resolved.

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