



Request for staff names and initials in Commerce Commission memorandum

Legislation	Official Information Act 1982, ss 9(2)(a), 9(2)(g)(i), 9(2)(g)(ii)
Agency	Commerce Commission
Ombudsman	Peter Boshier
Case number(s)	476423
Date	8 July 2019

Section 9(2)(a) OIA did not apply—not necessary to withhold staff names to protect their privacy—section 9(2)(g)(ii) did not apply—no information to suggest release would lead to improper pressure or harassment—section 9(2)(g)(i) did not apply—no reason to believe release of names would inhibit the future exchange of free and frank opinions

Background

The Commerce Commission received a request for an internal memorandum prepared in relation to a complaint made by the requester about infant formula. The Commission made redactions to the memorandum, which included three staff names and one set of staff initials, under section 9(2)(a) of the OIA. The requester complained to the Ombudsman.

After receiving the complaint, the Commerce Commission agreed to release the name of the Competition Manager, but continued to withhold the other names and initials, relying on sections 9(2)(g)(i) and (ii) of the OIA, in addition to section 9(2)(a). It noted the requester had been a recurrent complainant to the Commission on an emotive issue, and referred to its duty, under the Health and Safety at Work Act 2015, to take all reasonably practicable steps to minimise or eliminate risks to the health and safety of its staff from harassment.

Investigation

The Ombudsman explained the general position that withholding staff names, when all that would be revealed is what they did in their official capacity, is not generally necessary. As per the [PHARMAC case](#):

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 what they are doing in that role. Anonymity may be justified if a real likelihood of harm can be identified but it is normally reserved for special circumstances such as where safety concerns arise.

In particular, it will not usually be necessary to withhold staff names in order to protect their privacy. A name is personal information about an individual, but, on its own, that information is not inherently private. Nor is the fact that a person works for an agency, or what they happen to do in that role, inherently private. A public sector employee should reasonably expect a degree of transparency around what they have done in their official capacity.

The sensitivity of this information will depend entirely on the context—whether it would, in combination with other information, reveal something private or personal about the individual, or in some other way intrude on their privacy.

It is a common misconception that names of 'junior' or 'administrative' staff do not need to be disclosed because there is no public interest in disclosure of that information. However, a harm needs to be established before the public interest in release is considered. If there is no harm, the information must be released, regardless of whether there is a public interest in doing so.

The Ombudsman noted that the Health and Safety at Work Act 2015 is not directly relevant to the question of whether information should be released under the OIA. Releasing staff names in response to an OIA request would not be 'contrary to' the HSWA (per section 18(c)(i) of the OIA) or 'derogate from' it (per section 52(3)(b) of the OIA). Whether staff names can be withheld depends solely on the statutory tests in the OIA. The Ombudsman went on to consider those statutory tests.

Privacy

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

The Ombudsman consulted with the Privacy Commissioner, who agreed that withholding the names and initials was not necessary to protect the privacy of the staff.

The information at issue, when seen in context, revealed:

- the initials of an enquiries officer who conducted an initial assessment of the complaint;
- the name of an assistant investigator who searched for an assessment report; and
- the name of a senior investigator who received a copy of the memorandum.

This was not private or personal information about the staff, nor would release intrude on their privacy in some other way.

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 should be a reasonable expectation that:

- disclosing the name(s) would lead to improper pressure or harassment;
- this would have an adverse impact on the relevant staff (for example, by causing stress or anxiety), and therefore the agency's ability to do its job.

While there is no onus of proof on an agency to produce evidence in support of a predicted harm, *'[any person] who alleges that good reason exists for withholding information would be expected to bring forward material to support that proposition'* (see *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 at 411).

Other than the fact that the requester was a recurrent complainant, the Commission had provided no material to support the proposition that there was a reasonable expectation that disclosing the names and initials would lead to improper pressure or harassment.

Free and frank opinions

The Ombudsman also considered section 9(2)(g)(i) of the OIA, for the sake of completeness. That section applies if, and only if, it is necessary to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers and officials.

The Ombudsman noted that the person who completed the initial assessment of the complaint was only identified by their initials. The other individuals did not express any opinions. He was not convinced, therefore, that release of the names/initials would inhibit the future exchange of free and frank opinions and that inhibition would prejudice the effective conduct of public affairs.

Outcome

The Commerce Commission advised that after consideration of the guidance provided by the Ombudsman and the circumstances of the particular case, it would release the names to the complainant, and this aspect of the complaint was resolved.

This case note is published under the authority of the [Ombudsmen Rules 1989](#). It sets out an Ombudsman's view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.