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| Request for information about Operation Burnham |
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| Legislation Official Information Act 1982, s 6(c); Inquiries Act 2013, s 15(1)(a)Agency New Zealand Defence Force Ombudsman Peter Boshier Case number(s) 481126Date 27 March 2019 |

*Section 6(c) can potentially apply to prevent prejudice to the conduct of an inquiry under the Inquiries Act—however, blanket refusal was not justified—basic and uncontested factual material could be provided—section 6(c) applied where questions sought to interrogate someone on an issue which may lead to subsequent questions of liability—likelihood of public debate and administrative concerns not reasons for withholding under section 6(c)—investigation discontinued after remaining information at issue made subject to an order under section 15(1)(a) of the Inquiries Act*

# Background

A participant in the *Government Inquiry into Operation Burnham and related matters* asked the New Zealand Defence Force (NZDF) for answers to a number of specific questions. The NZDF refused to answer any of the questions under section 6(c) of the OIA, on the basis that it would be likely to prejudice the conduct of the inquiry. The requester complained to the Ombudsman.

# Investigation

The Chief Ombudsman notified the NZDF of the complaint, and made some initial comments cautioning against a blanket application of the OIA’s grounds for refusal. He referred to Justice Collins’ comments in the High Court, in *Kelsey v Minister of Trade*,[[1]](#footnote-2) that making a decision on an official information request requires that each piece of the requested information be assessed against the criteria for withholding.

In this case, there seemed to have been a blanket application of section 6(c) in order to refuse the requests. There did not appear to have been an analysis of each piece of information against the criteria for withholding. Section 6(c) may have justified the refusal of some questions, but each piece of information had to be considered.

The Chief Ombudsman then provided comments on section 6(c), generally, and in relation to the inquiry.

## Section 6(c) generally

Section 6(c) provides good reason to withhold official information where release would be likely ‘to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial’.

This section usually applies to the investigations of more traditional law enforcement bodies, such as the New Zealand Police. However, successive Ombudsmen have found that it can also protect the ability of regulatory agencies to maintain the law. In this context, its main purpose is to ensure that criminal conduct is properly investigated, dealt with, and brought through the justice system. Naturally, information relating to the investigation of an offence where charges have not yet been laid, the details of an informant, or the details of criminal investigative technique will usually give rise to concerns under section 6(c). It may also apply as matters are going through the courts, to ensure the relevant parties have a right to a fair trial.

Section 6(c) is not generally applicable to administrative investigations, such as those undertaken by the Health and Disability Commissioner or the Commerce Commission. As the Law Commission has stated: [[2]](#footnote-3)

The question is how far beyond the court process the maintenance of the law ground can extend. A number of agencies indicated that they use it to prevent prejudice to an inquiry or investigation which they are undertaking. The Education Review Office have used it in relation to reviews of schools which have been instigated in response to a complaint; the Commerce Commission in relation to investigations into a lenience application[…] We have doubts, which are shared by the Ombudsmen, about whether the ‘maintenance of the law’ ground is appropriate in such cases. Its wording does not readily accommodate this use.

The Chief Ombudsman agreed with the Law Commission that the primary purpose of section 6(c) is to protect the criminal justice system and the integrity of the courts.[[3]](#footnote-4) As it is a conclusive ground, not subject to the public interest test in section 9(1), the scope of section 6(c)’s application should not be expanded without cause.

## Section 6(c) and inquiries

Ombudsmen in the past have accepted that prejudice to an inquiry can fit within section 6(c). This has arisen in the context of the Royal Commission into the Pike River Mine Tragedy (see case [301633](https://www.ombudsman.parliament.nz/resources/request-information-about-pike-river-mine)), and Coronial inquiries or inquests. The use of section 6(c) was considered to be justified in these cases due the nature of the inquiry, the powers of each respective body and the subject matter being considered.

A coronial inquiry provides a useful comparison. The Coroners Act 2006 states that a coroner’s role does not include determining civil, criminal, or disciplinary liability.[[4]](#footnote-5) Ombudsmen have, however, considered that the important statutory role of coronial inquiries is such that prejudice to their processes can be prejudice to *‘the maintenance of the law’*.[[5]](#footnote-6) The views of the Coroner in each case are a primary consideration.

The Inquiries Act also provides that inquiries are not to determine civil, criminal or disciplinary liability. However, an inquiry can (subject to its terms of reference) make a finding of fault or recommendations that further steps be taken to determine liability.[[6]](#footnote-7)

The Chief Ombudsman accepted, as a general principle, that where it is shown that the release of information would be likely to prejudice the processes of an inquiry under the Inquiries Act, or its ability to make its findings, that this may amount to a prejudice to the ‘maintenance of the law’, depending on the nature of the inquiry. This approach recognises the influential role that inquiries hold in New Zealand, and the increased powers which were conveyed by the enactment of the Inquiries Act, empowering an inquiry to regulate its own procedures, hold oral hearings, compel witnesses and take evidence on oath.

There is clearly a high public interest in ensuring that the public can have confidence in the findings of an inquiry. Premature release of certain information which an agency will need to produce to an inquiry, which is central for the inquiry to make its findings, has the potential to undermine the investigation being undertaken.

An inquiry’s role in the maintenance of the law is different from a court in a criminal trial, and this will be shaped by its terms of reference and the procedure that it adopts. An inquiry under the Inquiries Act can take many different forms. The subject matter could be policy-based (such as the *Royal Commission on Auckland Governance*), while others will look into conduct of agencies or people. An inquiry will therefore not always be investigating compliance with legal rules or standards, and witnesses or cross examination may be less central to the process.

It should also be noted that the application of section 6(c) will be temporary, and will usually not be applicable once an inquiry has reported. The use of section 6(c) will therefore not mean that information will never be released. After an inquiry has presented its final report, all documents (except those specified in section 32(2) of the Inquiries Act) become subject to the OIA.

The Chief Ombudsman clarified that this general principle does not empower an agency to use a blanket application of section 6(c) simply because the request relates to information within the terms of reference of an inquiry. There must be a causal link between the release of the specific information at issue and the prejudice to the maintenance of the law. This prejudice must also be likely to occur.

Relevant factors in assessing the likelihood of a prejudice occurring include:

* the views of the inquiry;
* the terms of reference for the inquiry;
* arguments from the agency holding the information as to how release may impact on its ability to participate in the inquiry;
* relevant statutory powers of the inquiry, such as rules around the availability of information, the power to determine release of information and to summon witnesses; and
* the procedures which are adopted by the inquiry, such as whether it is adversarial or inquisitorial, and whether witnesses will be summoned and cross-examined.

## Section 6(c) and the Operation Burnham Inquiry

The Chief Ombudsman noted that the terms of reference for this inquiry were broad and
wide-ranging. Some were focused on administrative aspects, such as steps taken by the NZDF to review the operation, and public statements made in relation to civilian casualties. It was more difficult to see that information relating to these administrative aspects of the inquiry would prejudice the maintenance of the law.

Conversely, a finding of fault by the inquiry in relation to the conduct of NZDF forces, including compliance with the applicable rules of engagement and international humanitarian law could have implications for those who could be held accountable for this finding. The NZDF explained that if there were adverse findings on these points, the matter may need to be considered under the Armed Forces Discipline Act 1971.

Accordingly, prejudice could arise where a request for information was essentially seeking to interrogate someone on something they did, on an issue which may lead to subsequent questions of liability. It could be prejudicial to force that person to give their version of events in the OIA forum, when that very question is being considered by the inquiry. There may be a prejudicial effect on the evidence that is provided.

This was distinct from requests for basic and uncontested factual material, like *‘what was Afghan local time when the Apache fired the rounds that fell short’*. It was difficult to see how answering these requests could be said to prejudice the maintenance of the law.

The Chief Ombudsman considered an argument that release of the information would lead to the issues before the inquiry being argued in the media and in the public, which would prejudice the public’s view of the inquiry. The Chief Ombudsman did not think that increased media debate on the wider issues would of itself prejudice the ability of the members of the inquiry to reach their conclusions free of pressure, or of the NZDF to be able to present its case.

The Chief Ombudsman also considered concerns that responding to OIA requests would unreasonably divert staff with the requisite experience from responding to the inquiry, which would therefore prejudice the conduct of the inquiry. The Chief Ombudsman did not think that section 6(c) could apply for this reason. It could only apply where the release of information would prejudice the maintenance of the law, not where the work in preparing release might tangentially bring about an administrative prejudice.

Compliance with the OIA is a fundamental obligation for agencies subject to it. While the Chief Ombudsman was sympathetic to the workload concerns, the running of the inquiry should not impact on decisions being made in compliance with the OIA. Sections 15(1A) (charging), 15A (extensions) and 18 (administrative refusal grounds) of the OIA provide methods for handling requests which raise administrative concerns.

## Fresh decision

After considering the Chief Ombudsman’s comments, the NZDF made a fresh decision on the request. It provided answers to some of the questions. Some of the questions it continued to refuse under sections 6(a), (b) and (c), and 18(g) of the OIA.

## Provisional opinion

The Chief Ombudsman formed a provisional opinion that some of the answers could be refused.

He found that section 6(c) applied to requests that would require specific NZDF personnel to provide their version of events on questions which the inquiry was seeking to answer. These requests were seeking information central to the questions of conduct being looked at by the inquiry. Requiring NZDF personnel to answer these requests in the OIA forum would result in prejudice to the NZDF’s ability to properly engage with the processes of the inquiry, and therefore prejudice the maintenance of the law.

Section 18(g) (information not held) applied to questions which would have required the NZDF to generate an opinion in order to respond.

The Chief Ombudsman identified other answers where he would need more information before a provisional opinion could be formed.

## Section 15(1)(a) order—investigation discontinued

On 21 December 2018, the Operation Burnham inquiry made an interim *‘non-publication order under section 15 of the Inquiries Act in respect of all classified material provided to the Inquiry’.*

The OIA[[7]](#footnote-8) and the Inquiries Act[[8]](#footnote-9) provide that *‘any matter subject to an order under section 15(1)﻿(a) of the Inquiries Act 2013’* is not *‘official information’*.

The Chief Ombudsman asked the NZDF to review the remaining questions at issue and confirm whether the information was within scope of the inquiry’s non-publication order. After consulting the inquiry, the NZDF advised that it was.

The Chief Ombudsman had regard to the NZDF’s response, the information at issue, and the order itself. He concluded that the information was subject to a security classification, and that it was provided to the inquiry. He therefore concluded that the information was not *‘official information’* for the duration of the order.

# Outcome

The Chief Ombudsman discontinued his investigation, as in these circumstances he could not recommend release, and it would be an offence under the Inquiries Act for the NZDF to release the information.[[9]](#footnote-10)

This case note is published under the authority of the [*Ombudsmen Rules 1989*](http://legislation.govt.nz/regulation/public/1989/0064/latest/DLM129834.html?src=qs). 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.

1. [2015] NZHC 2497, at 108-109. [↑](#footnote-ref-2)
2. Law Commission. [*The Public’s Right to Know: Review of the Official Information Legislation*](https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R125.pdf)*.* (NZLC R125, 2012) at 127. [↑](#footnote-ref-3)
3. See above at 129. [↑](#footnote-ref-4)
4. See s 4(1)(e)(i) Coroners Act 2006. [↑](#footnote-ref-5)
5. See [Annual Report 2011/12](https://www.ombudsman.parliament.nz/resources/annual-report-20112012-full-report) at 45–46. [↑](#footnote-ref-6)
6. See s 11 Inquiries Act. [↑](#footnote-ref-7)
7. Seeparagraph (ha) of the definition of *‘official information’* in s 2 OIA. [↑](#footnote-ref-8)
8. Sees 32(2)(a) Inquiries Act. [↑](#footnote-ref-9)
9. See s 29 Inquiries Act. [↑](#footnote-ref-10)