

Request for consultant's advice on financial impact of electricity lines regulation

Legislation	Official Information Act 1982, ss 9(2)(ba)(ii), 9(1)
Agency	Commerce Commission
Ombudsman	Beverley A Wakem
Case number(s)	167454
Date	29 June 2007

Section 9(2)(ba)(ii) OIA applied—obligation of confidence attached to consultant's advice to Commerce Commission while under consideration—release would be likely to damage the public interest in the orderly and effective conduct of the Commission's statutory decision making process—no public interest override—good reason to withhold

Background

In late 2001, the Commerce Commission (the Commission) began the process for setting thresholds for the declaration of control in respect of large electricity lines businesses (ELBs), under Part 4A of the Commerce Act 1986 (since repealed).

To inform its deliberations, it commissioned a consultant's report on the financial impact of varying forms of regulation on five sample ELBs.

An ELB that would be subject to the proposed thresholds requested a copy of the consultant's report. The Commission refused this request under section 9(2)(g)(i) of the Official Information Act (OIA), and the requester complained to the Ombudsman.

Investigation

The Ombudsman requested a copy of the consultant's report and an explanation of the reasons for withholding.

The Commission originally relied on section 9(2)(g)(i) of the OIA, which applies where withholding is necessary to maintain the effective conduct of public affairs through the free

and frank expression of opinions. However, the Ombudsman found it *‘difficult to accept that a consultant, paid to provide advice that may in any event be made public at some stage, would in future be inhibited from providing the best advice simply because that advice may be made available in response to a request under the [OIA]’*.

The Commission then sought to rely on section 9(2)(ba)(ii) of the OIA, which applies when releasing information that is *‘subject to an obligation of confidence’* would be likely to *‘damage the public interest’*. It argued that premature release of the report would interfere with its deliberative process, and damage the public interest in effective public administration.

The Ombudsman considered:

- whether the report was subject to an obligation of confidence; and
- whether release would be likely to damage the public interest.

Was the report subject to an obligation of confidence?

The most common circumstance in which an obligation of confidence arises is where information is supplied by one party to another, subject to the recipient of the information keeping it confidential.

However, the Ombudsman noted, that is not the sole basis upon which information can attract confidentiality. As stated in *Laws of New Zealand* (emphasis added):¹

*Public Office and government secrets are subject to the same general right to protection as any type of confidential information. However, some such secrets may require different considerations because there is **no confidor or confidant**. ... Secrecy may arise by virtue of the office or position of the possessor of the secret, and **there may be no confidential relationship**. Where government secrets are concerned, disclosure may be restrained if it would involve a **breach of an implicit confidence, akin to the convention of cabinet secrecy, and if the public interest requires such restraint**. Further, the law recognises that **policy making in government requires secrecy in deliberations and communications**. Information arising out of such deliberations and communications will be protected if it is **necessary for the proper function of the public service**. ... In discovery applications, ... discovery will be refused if to allow it ... **would unduly prejudice the proper business of government**.*

Although there was an express confidentiality clause in the contract with the consultant, confidentiality was not something that the Commission could be said to owe the consultant.

Instead, the Ombudsman accepted that an obligation of confidence was implicit from the context in which the report arose, namely as part of the Commission’s exercise of its statutory function of setting thresholds *‘for the declaration of control in relation to large electricity lines businesses*. In forming this view, the Ombudsman considered:

¹ Intellectual Property: Confidential Information, paragraph 28.

1. the statutory duty of the Commission;
2. the complexity and sensitivity of the issues involved;
3. the timing of the request and the stage the Commission's process had reached at the time of the decision;
4. the relevance of the information contained in the report to the exercise of the Commission's statutory duty; and
5. the impact disclosure would have had on the Commission in performing its duty.

First, the Ombudsman noted that the Commission was charged with the statutory function under Part 4A of the Commerce Act to implement a targeted control regime for large ELBs. Section 57DA of the Commerce Act made it clear that *'the Commerce Commission...is the body that exercises jurisdiction under this Part in respect of large electricity lines businesses'*. It alone was charged with the power to set the thresholds at issue under section 57G, and subsection (1)(b) of that provision required it to do so *'as soon as practicable'*.

Secondly, there was agreement amongst all the parties in this case that the issues the Commission was required to consider when deciding on the thresholds to set were complex and, given the impact that the setting of the thresholds would have on the large ELBs involved, highly sensitive.

Thirdly, in order to properly carry out this statutory function and set the thresholds *'as soon as practicable'*, the Commission needed to obtain advice from a variety of sources including its own staff, industry participants, expert external advisers (such as the consultants) and the general public. Once received, the Commission would then be required to carefully consider and balance, within a tight timeframe, this advice and make appropriate decisions on it. Depending on the outcome of its deliberations in this regard, the Commission could then choose either to seek further submissions or advice on an issue, or to make a final decision on the matter.

It was also material that, at the time it refused the request, the Commission had only just received the consultant's report. As a result, it had yet to consider, let alone make any substantive decisions on, the value and persuasiveness of the advice it contained. The Commission was due to commence deliberations on all of the advice received (including the consultant's report), within the following six weeks.

In these circumstances, the Commission maintained that its consideration of the consultant's advice could only be successfully carried out in an atmosphere of complete confidentiality. This was because the Commission believed that, due to the sensitivity of the issues involved, the contents of the report would be the subject of scrutiny and comment to such a degree that the Commission would be forced to respond. In doing so, it would be required to take a position on the advice before it had the opportunity to properly assess the relevance of that advice to its decision. The Commission argued that this would only serve to confuse and undermine its consideration of this particular stream of advice.

The Ombudsman noted that the process at issue, and concerns about release, were akin to those relied on by the Government when it is concerned about the effect release of official information may have on certain decisions required during the course of a particular policy making process. Successive Ombudsmen have accepted that for good government to be achieved there may be times where the advice tendered needs to remain confidential in order to allow it to be considered in an effective and orderly manner.²

The Ombudsman accepted that this situation was analogous, and concluded that the report was subject to an obligation of confidence, at least until the Commission had the opportunity to consider its contents and make the necessary decisions. This had not occurred at the time of the Commission's original decision to withhold.

Would release be likely to damage the public interest?

The Ombudsman noted that the Commission had sole responsibility for implementing a targeted control regime for large ELBs, and that it was required to set the thresholds for declaration of control *'as soon as practicable'*. This was a complex task, with high stakes for industry participants.

In the Ombudsman's view, there was *'a clear public interest in the Commission being able to fulfil this statutory function in an effective, orderly and timely fashion'*. To do so, it needed to receive and consider advice from industry participants, its own staff and external advisers. The consultant's report provided a separate stream of advice on the financial impact of potential forms of regulation on five sample ELB, to inform the Commission's decision.

The Ombudsman was satisfied that release of the report would have resulted in publicity and comment from the industry participants that the Commission would need to respond to, and that, to respond appropriately, the Commission would have been required to make premature assessments on the value and relevance of the advice. This would have undermined both the Commission's consideration of this particular stream of advice, and its ability to decide what course of action it wished to take.

The Ombudsman concluded that premature release of the report would be likely to damage the public interest in the orderly and effective conduct of the Commission's statutory decision making process and, therefore, section 9(2)(ba)(ii) of the OIA applied.

Public interest

Section 9(2)(ba)(ii) is subject to a public interest test. This means the need to withhold must be balanced against the countervailing public interest in release. If the countervailing public interest weighs more heavily, the information must be released. If not, it can be withheld.

The complainant argued that release would encourage effective public participation *'in the making and administration of laws and policies'*, and promote accountability for the Commission's decision making.

² For more information see our guide [Confidential advice to government](#).

The Ombudsman noted that this case brought into sharp focus the competing policy objectives of the OIA. On the one hand, consistent with the underlying principle of availability, the OIA seeks to enhance respect for the law and to promote good government through the release of official information (sections 4(a) and 5). On the other hand, the OIA recognises that there are occasions on which there is a public interest in protecting certain information (section 4(c)). Assessing the weight of the competing public interest considerations involved is a matter of judgement. Whether the overall public interest requires withholding or disclosure of the information can only be assessed on a case by case basis.

Participation

The Ombudsman noted that there was a statutory requirement for the Commission to consult with industry participants when setting the thresholds (see section 57G(1)(a) of the Commerce Act).

She agreed that there was *‘a strong public interest in ensuring that the parties involved are provided with sufficient information to enable the particular purpose of the consultation to be fulfilled’*. However this did not necessarily equate to those parties being entitled to all the information that existed in respect of the decision making process, irrespective of other interests properly protected under the OIA.

The Ombudsman carefully considered the process that had been followed by the Commission up to the date of the refusal at issue, as well as the process it intended to follow thereafter. She noted that there had already been many full rounds of consultation, and that a conference was soon scheduled to take place, at which there would be a further opportunity to present submissions. There was *‘no doubt in [her] mind that the Commission had already received and was continuing to seek significant contestable advice from the industry participants on the setting of thresholds’*. While participants had not been asked to comment on the specifics of the advice contained in the consultant’s report, the Commission consulted *‘widely and rigorously’* with the industry participants on the issues involved.

The Ombudsman referred to *Electra Limited v the Commerce Commission* (2005) 2 NZCCLR 378, where the High Court reviewed the Commission’s earlier threshold-setting process. Justice Ellen France concluded the Commission’s process was adequate to meet the statutory requirement to consult, without the need to consult on the other streams of advice the Commission had received.

One of the pleadings in that case was that the Commission had breached the obligations of consultation and fairness by failing to provide industry participants with a copy of a consultant’s report before reaching the final decision (these consultants had been similarly engaged by the Commission to provide advice on comparative approaches to how the business should be allocated). Justice France stated:

The consultation process was open and wide ranging. It was not the sort of process in which ... those being consulted could expect to be given some sort of “checklist” of issues. The opportunity to comment was there...

At some point, and I believe that point had been reached, the Commission has to be able to say, 'enough', and move on and make a decision.

The Ombudsman was ultimately not persuaded that the public interest in promoting public participation outweighed the need to withhold the report.

Accountability

The Ombudsman also agreed that there is a public interest in releasing official information that explains the reasons why certain decisions were taken.

However, the Commission had not made final decisions at the time it refused the request, and the report at issue contained hypothetical scenarios that may not have accurately reflected the final shape of those decisions.

The Ombudsman was, again, not persuaded that the public interest in promoting accountability for the Commission's decision outweighed the need to withhold the report.

Outcome

The Ombudsman formed the opinion that section 9(2)(ba)(ii) of the OIA provided good reason to withhold the consultant's report at the time that decision was taken. The Commission later released the report, after its decision making process had concluded.

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