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| Request for information about Children’s Commissioner investigation |
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| Legislation Official Information Act 1982, ss 9(2)(a), 9(2)(ba)(i) Agency Children’s Commissioner Ombudsman Beverley A Wakem Case number(s) 174056Date 15 June 2007 |

*Section 9(2)(a) OIA applied to redacted material from draft investigation report—requester no longer authorised to act as advocate for the family—withholding necessary to protect the family’s privacy—requester’s prior knowledge did not affect the family’s privacy interest—the mother had a right to revoke the agency relationship and control who could access her personal information—s 9(2)(ba)(i) applied to records of interviews—implied obligation of confidence—release would be likely to prejudice the future supply of information by interviewees—it is in the public interest for interviewees to be completely candid and cooperative, as this better enables the Children’s Commissioner to discharge their statutory functions—no public interest override—good reason to withhold*

# Background

An advocate made a complaint on behalf of a mother and her children to the Children’s Commissioner. He subsequently ceased to act on their behalf, and the mother asked the Children’s Commissioner not to disclose any personal information about her or the children to him.

The advocate requested information about the Commissioner’s investigation, including the draft investigation report, and records of interviews that had been conducted by the Commissioner’s staff.

The Commissioner provided a redacted version of the draft investigation report and withheld the interview records under section 9(2)(a) of the Official Information Act (OIA), in order to protect the privacy of the mother and her children.

The former advocate complained to the Ombudsman, saying that, as he knew all the basic information, it was no longer private.

# Investigation

The Ombudsman requested a copy of the information at issue and an explanation of the reasons for withholding.

After discussion with the Ombudsman’s investigating staff, the Children’s Commissioner agreed to release:

* a limited amount of personal information about the requester (which was required to be considered under the Privacy Act 1993 rather than the OIA); and
* information that went more to the process of the Commissioner’s investigation than the personal circumstances of the mother and her children.

The Ombudsman went on to consider whether there was good reason to withhold the remaining information.

## Material redacted from draft investigation report—privacy

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

The report related to the personal circumstances and living arrangements of the mother and her children, and the Department of Child, Youth and Family’s (CYF’s) intervention in that family. The Ombudsman consulted the Privacy Commissioner, who commented that *‘these matters are generally personal and delicate’* for any parent.

The Privacy Commissioner also stated that—while prior knowledge may diminish the privacy interest in information—this case was different. An individual’s control over their personal information is an important aspect of privacy. The requester would not have been privy to these personal details but for his role as the mother’s advocate, and the mother had chosen to end that relationship. The Commissioner concluded that the requester’s prior knowledge about the mother and her children did not affect their privacy interest in the information.

The Ombudsman concluded there was a privacy interest in the redacted material, notwithstanding the requester’s prior knowledge of the family’s circumstances. Even if the requester knew some of the basic facts, it would be impossible to ascertain which ones he knew and which he did not. In addition, whilst aware of those facts, he would not be aware of the Commissioner’s interpretation or opinion of them.

Furthermore, the requester’s knowledge of the case was gained while acting on behalf of the mother and with her consent. She had ended that relationship and revoked that consent. As the Privacy Commissioner noted, privacy includes the ability to control your personal information. An individual must be equally free to appoint an agent to act on their behalf, and to revoke that agency and prevent further access to their personal information.

The Ombudsman concluded that section 9(2)(a) applied to the material redacted from the draft investigation report.

## Interview records—confidentiality

The Ombudsman then considered the records of interviews conducted by the Children’s Commissioner’s staff. While section 9(2)(a) was also relevant to these, section 9(2)(ba)(i) had particular relevance.

That section applies when releasing information that is *‘subject to an obligation of confidence’* would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied.

The Ombudsman noted that investigations are conducted by the Children’s Commissioner in private, and participants in an investigation will therefore have an expectation that information they supply will be disclosed by the Commissioner only if, in the Commissioner’s opinion, such information ought to be disclosed for the purposes of giving effect to the Children’s Commissioner Act 2003. This is reflected in the secrecy provisions of that Act. That information may also be disclosed by the Commissioner where this is required by any other Act, does not mean that all information in relation to an investigation is therefore required to be made available on request. Any investigatory body, including an Ombudsman, could not operate effectively if that were the case.

In this context, the Ombudsman was satisfied that raw information (including interview records) supplied by participants in the Commissioner’s investigation was subject to an obligation of confidence. Interviewees could reasonably have expected the records of their interviews to be kept confidential and, if they were to be disclosed, interviewees would likely be much more circumspect and less cooperative in future interview situations. It is in the public interest for interviewees to be completely candid and cooperative, as this more readily enables the Commissioner to properly and effectively discharge their functions under the Children’s Commissioner Act.

The Ombudsman concluded that section 9(2)(ba)(i) of the OIA applied to the interview records.

## Public interest

Sections 9(2)(a) and 9(2)(ba)(i) are 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 Ombudsman acknowledged the public interest in promoting CYF’s accountability for its actions in respect of the family. However, this interest had been met by the information that had already been disclosed.

The Ombudsman also acknowledged that the requester’s complaint triggered the Commissioner’s investigation, but said that this did not mean he was entitled to access all information held in relation to that investigation. She drew an analogy with child abuse notifications. Any person can and should notify CYF of suspected child abuse, but that will not automatically entitle them to all information in relation to CYF’s investigation of their allegations. Such information may, depending on the particular circumstances of a case, be legitimately withheld to protect the privacy of individuals, and other interests protected by the OIA.

Lastly, the Ombudsman acknowledged the complainant’s argument that his knowledge and experience would assist the Commissioner in carrying out his investigation. However, the fact remained that the mother did not want her personal information disclosed to the requester. The Ombudsman was not persuaded that releasing further personal information about the mother or her children would be of such benefit to the Commissioner that any public interest that may be served thereby would outweighthe need to withhold that information in order to protect legitimate privacy interests.

# Outcome

The Ombudsman formed the opinion that:

* section 9(2)(a) provided good reason to withhold the remaining material redacted from the draft investigation report; and
* section 9(2)(ba)(i) provided good reason to withhold the interview records.

*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.*