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| Request for notes of mediation meeting |
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| Legislation Official Information Act 1982, s 9(2)(ba)(ii) Agency New Zealand Historic Places TrustOmbudsman John BelgraveCase number(s) 174888Date 27 February 2007 |

*Section 9(2)(ba)(ii) OIA applied—confidentiality of communications in connection with a mediation—release would be likely to damage the public interest in encouraging parties to settle their disputes without resorting to litigation—no public interest override—good reason to withhold*

# Background

A requester sought information about the East Hills subdivision at Bayview Napier, including the minutes of a mediation meeting between the New Zealand Historic Places Trust (the Trust) and East Hills (2001) Ltd in 2006.

The Trust released most of the information at issue, but refused the request for minutes on the basis that the mediation was confidential. The requester complained to the Ombudsman.

# Investigation

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

The withheld information comprised handwritten notes taken by the Trust’s legal advisor. There were no formal minutes of the mediation meeting.

The Trust sought to withhold the handwritten notes under section 9(2)(ba)(ii) (confidentiality) and 9(2)(h) (legal professional privilege) of the Official Information Act (OIA).

The Chief Ombudsman considered the application of section 9(2)(ba)(ii) of the OIA, which provides good reason for withholding (subject to a public interest test) when releasing information that is *‘subject to an obligation of confidence’* would be likely to *‘damage the public interest’*.

## Were the notes subject to an obligation of confidence?

The notes had been generated by the Trust’s legal advisor at a mediation meeting initiated by the Environmental Court within the framework of the Resource Management Act 1991.

Essentially, mediation is a process to resolve disputes where the parties concerned get together with the assistance of an independent mediator to isolate issues, develop options, consider alternatives and endeavour to reach an agreement which all parties to the mediation can live with, rather than having a settlement imposed on them by a formal body such as a court.

Generally, all discussions that take place in mediation and anything recorded by the parties themselves during the mediation must be completely confidential, and in Environment Court mediations no formal record is kept, except an agreed decision (consent order), that is approved by the court and forms part of the public record.

In this context, the Chief Ombudsman was satisfied that the notes were subject to an obligation of confidence.

## Would release be likely to damage the public interest?

The Chief Ombudsman accepted that what goes on in such mediation proceedings must remain confidential so that if the mediation fails to produce an agreed solution to the issues involved, the parties can then proceed as if the mediation had never taken place.

If what has been recorded by one of the parties during a mediation were subsequently released to someone who was not a party to the mediation, this would be likely to put the good faith principle of mediation at risk, by affecting how parties may otherwise conduct themselves at such mediations, and thereby prejudice their successful outcomes.

Issues raised by parties or concessions given at mediation could become known outside of the mediation, thus affecting the public interest as mediation becomes less popular as a way to reduce and even avoid unnecessary litigation.

The Chief Ombudsman was satisfied that release of the notes would be likely to damage the public interest in encouraging parties to settle their disputes without resorting to litigation.

## 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 Chief Ombudsman could not identify any countervailing public interest in disclosure strong enough to outweigh the public interest in withholding the information at issue in this case.

# Outcome

The Chief Ombudsman formed the opinion that section 9(2)(ba)(ii) of the OIA provided good reason to withhold the notes of the mediation meeting.

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