

Request for information about senior employee's departure and personal expenses

Legislation	Official Information Act 1982, ss 9(2)(a), 9(2)(ba)(ii), 9(1)
Agency	Ministry of Health
Ombudsman	David McGee
Case number(s)	286335
Date	15 December 2010

Section 9(2)(a) OIA applied—privacy and confidentiality in employment context—s 9(2)(ba)(ii) OIA applied—settlement agreement contained express obligation of confidence—release would be likely to damage the public interest by making it more difficult to settle complex employment disputes—public interest in accountability required release of summary

Background

The Ministry of Health investigated concerns about expenses incurred by a senior employee. The Ministry and the employee reached a mediated settlement, and the employee resigned. A journalist requested information about the employee's departure and expenses.

This request was refused under a range of withholding grounds, including sections 9(2)(a) and 9(2)(ba)(i) of the Official Information Act (OIA).

The Ministry did confirm that it had investigated the employee's personal expenses, and that an investigation was underway into their expenditure against budget. The results of the latter investigation would be made public once it was completed.

The Ministry also provided total travel expenses for all staff in comparable or equivalent positions.

The requester complained to the Ombudsman about the Ministry's decision to withhold information about the employee's departure and personal expenses.

Investigation

The Ombudsman requested a copy of the information at issue. This included the Ministry's investigation report, the employee's submissions, and a spreadsheet of the employee's personal expenses.

The Ombudsman consulted the Privacy Commissioner on the need to withhold this information in order to protect the employee's privacy. He also provided the (former) employee with an opportunity to comment before forming his opinion.

Privacy

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

The Privacy Commissioner noted that *'information about an individual's performance in an employment context is highly personal and would generally be considered to be confidential'*.

She took into account the existence of a confidential settlement agreement. This suggested the employee would expect the information to remain confidential, which heightened the privacy interest.

She also took into account the fact that the employee held a senior position at the Ministry. This lowered the privacy interest: *'Individuals in senior positions in the state sector are aware that matters concerning their employment and conduct are a matter of public interest'*.

On the whole, the Privacy Commissioner concluded that there was a *'strong'* privacy interest in the information.

On the matter of the spreadsheet of personal expenses, the Privacy Commissioner stated *'I would generally consider that details of an individual's personal expenditure are likely to attract a strong privacy interest'*.

The Ombudsman agreed with the Privacy Commissioner, and concluded that section 9(2)(a) of the OIA applied.

Confidentiality

Section 9(2)(ba)(ii) of the OIA applies when releasing information that is *'subject to an obligation of confidence'* would be likely to *'damage the public interest'*.

The Ministry's settlement agreement with the employee provided that the negotiations and terms of settlement would remain strictly confidential to the parties. The investigation report and submissions were part of the negotiations to which this confidentiality requirement applied.

The Ombudsman noted that the existence of a confidentiality clause does not itself provide a good reason to withhold information. Otherwise, it would be open to a public sector employer to impose on itself an obligation of confidence whenever it appeared expedient. This issue was

addressed by Jeffries J in *Wyatt Co (NZ) Ltd v Queenstown Lakes District Council* [1991] 2 NZLR at page 191 (commenting on the Local Government Official Information and Meetings Act, which contains similar provisions to the OIA):

As that paragraph [of the contract] is phrased it is that it is outside the legal powers of the Chief Ombudsman to fulfil his statutory duties if individuals enter into a contract using language that renders the [Local Government Official Information and Meetings] Act nugatory. The proposition has only to be stated in that way to demonstrate its falseness. There cannot be allowed to develop in this country a kind of commercial Alsatia beyond the reach of a statute. Confidentiality is not an absolute concept admitting of no exceptions. ... It is an implied term of any contract between individuals that the promises of their contract will be subject to statutory obligations. At all times the applicant would or should have been aware of the provisions of the Act and in particular s 7, which effectively excludes contracts on confidentiality preventing release of information.

The Ombudsman accepted that the confidentiality clause was evidence of an obligation of confidence attaching to the information at issue. However, it was still necessary to consider whether release of that information would be likely to damage the public interest.

In making this assessment, the Ombudsman said, regard must be had to the Auditor General's comments in the report *Severance Payments in the Public Sector* (2002, since superseded by [Severance payments: A guide for the public sector](#)).

A public sector employer should ensure that any confidentiality agreement reached as part of an employment settlement:

- *Is genuinely necessary, and in the interests of both parties;*
- *Is consistent with the employer's obligations as to disclosure of information; and*
- *Does not otherwise prevent the employer from being accountable for its use of public funds.*

The Ombudsman accepted that, if agreeing to hold certain information in confidence was necessary to achieve this settlement, there was a public interest in the Ministry being able to honour that promise of confidentiality, and release would be likely to damage the public interest by hindering the Ministry's (or other public sector agencies') ability to settle complex employment disputes.

Public interest

Sections 9(2)(a) and 9(2)(ba)(ii) 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.

In this case, the Ombudsman identified ‘*a significant and compelling*’ public interest in making information available to promote the accountability of the Ministry as a public sector employer by giving greater transparency to the matter. This approach was in accordance with the findings of former State Services Commissioner Don Hunn’s *Investigation into the public service recruitment and employment of Ms Madeleine Setchell* (emphasis added):

*There is an obligation on good employers to handle their relations with their employees with discretion, but **sometimes employee confidentiality may be overridden by the public interest.***

*It is understandable that employees and managers are generally very sensitive about employment matters. Matters such as constructive criticism, changes of terms and conditions, conflicts and separations, are all generally better conducted in private. **The Chief Executive of a public agency, however, has an obligation to account for their performance and behaviours.** From time to time, it is necessary for a Chief Executive to explain his or her actions and this may mean more revelation of personal affairs than would otherwise be appropriate. The public official always has an ongoing responsibility to avoid any unnecessary reputational damage to the employee, and to avoid feeding prurient interest in irrelevant details. However, the unavoidable public accountability of public officials means that **confidential settlements ought not to be entered into without very good reason and employees ought not to be encouraged to rely on inappropriate undertakings of confidentiality.***

The Ombudsman concluded that there was a public interest in disclosure of summary information about the employee’s departure, that outweighed the valid privacy and confidentiality interests that had been identified.

The summary should include:

- the concerns that had been raised about the employee’s conduct;
- the findings of the Ministry’s investigation; and
- a summary of the employee’s personal expenditure, including the number and type of transactions, and the total amount spent.

The employee was concerned that the proposed summary did not reflect his submissions in response to the Ministry’s findings. The Ombudsman told the Ministry he was happy for it to negotiate the inclusion of additional information with the employee, so long as the core information identified by the Ombudsman was released.

Outcome

The Ombudsman formed the opinion that sections 9(2)(a) and 9(2)(ba)(ii) of the OIA provided good reason to withhold the information at issue, but the public interest required disclosure of summary information. The Ministry released the agreed summary.

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