

Request for online discussion group messages

Legislation	Official Information Act 1982, s 9(2)(ba)(i)
Agency	Ministry of Health
Ombudsman	David McGee
Case number(s)	300012
Date	20 June 2012

Section 9(2)(ba)(i) OIA applied—express obligation of confidence—release posed a real and substantial risk that the Ministry would be denied ongoing access to the New Zealand Tobacco Control Action Network—ongoing access was in the public interest because it helped the Ministry to develop tobacco-related policy and advice—strong public interest in knowing the provenance of public policy development—however, this was a general request for all messages not one for information obtained and utilised in the development of a particular policy—no public interest override in these circumstances—good reason to withhold

Background

A requester sought all messages sourced from the New Zealand Tobacco Control Action Network (NZTAN) during 2010. The Ministry of Health explained that NZTAN is an online discussion group with restricted membership, and withheld the messages under section 9(2)(ba)(i) of the Official Information Act (OIA). The requester complained to the Ombudsman.

Investigation

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

The Ministry explained that NZTAN is an online discussion group for people interested or involved in tobacco control. It is administered by ASH New Zealand (Action for Smokefree), and hosted by Globalink, an international not-for-profit organisation. ASH is required to adhere to Globalink's rules, which include restricted membership (on application with named referees),

and confidentiality requirements prohibiting members from forwarding posts without the author's explicit permission.

The Ministry was concerned that, if messages were provided to non-members under the OIA, members of NZTAN would be less willing to use the website to share information. They could decide to withdraw their membership, or they might not allow Ministry officials to remain in the network. Either would have a significant impact on its effectiveness and operation.

The Ministry considered that ongoing access to this information was in the public interest because it assists the Ministry to give advice and formulate policy to reduce tobacco use and improve the health of New Zealanders. Some of the information could not be obtained elsewhere. Other information, while obtainable elsewhere, was more readily accessible on NZTAN, often in a more timely manner.

Confidentiality

Section 9(2)(ba)(i) of the OIA 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.

It was clear from the rules around the operation of the online discussion group that the messages were subject to an express obligation of confidence.

The Ombudsman accepted that:

- release of the messages posed a real and substantial risk that the Ministry would be denied ongoing access to the network; and
- ongoing access was in the public interest because it helped the Ministry to develop tobacco-related policy and advice.

The Ombudsman concluded that section 9(2)(ba)(i) applied to the information at issue.

Public interest

Section 9(2)(ba)(i) 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 Ombudsman identified a public interest in the disclosure of information that is utilised in the formulation of government policy—*'I see a high public interest in knowing the provenance of public policy development'*. This public interest in disclosure may, in appropriate circumstances, prevail over any expectation of confidentiality.

However, the request at issue was a general one—not related to information obtained and utilised in the development of any particular policy. In these circumstances, the Ombudsman did not consider that the public interest in release outweighed the need to withhold.

However, in the case of a particularised request, if the Ministry had utilised information in the development of policy or advice, the public interest in release may potentially outweigh the need to withhold under section 9(2)(ba)(i).

Outcome

The Ombudsman formed the opinion that section 9(2)(ba)(i) provided good reason to withhold the messages in this case.

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