



Request for investigation report relating to a personal grievance

Legislation	Official Information Act 1982, ss 9(2)(a), 9(2)(ba)(i) and (ii), 9(1)
Agency	Department of Building and Housing
Ombudsman	David McGee
Case number(s)	321631
Date	25 June 2012

Sections 9(2)(a) and 9(2)(ba)(i) and (ii) OIA applied—privacy and confidentiality in employment context—express obligation of confidence to parties and other contributors—release would be likely to prejudice the future supply of information needed to deal with personal grievances appropriately, and otherwise damage the public interest in maintaining good working relationships between the Department and its staff—public interest in transparency and accountability when allegations levelled against very senior staff—no public interest override as SSC investigation already published—good reason to withhold

Background

An employee of the Department of Building and Housing raised a personal grievance about the way the Chief Executive had treated her. The Chief Executive appointed an independent lawyer to investigate the personal grievance. A requester sought a copy of the independent investigator's report. The Department refused the request under section 9(2)(a) of the Official Information Act (OIA), and the requester complained to the Ombudsman.

Investigation

The Ombudsman requested a copy of the information and an explanation of the reasons for withholding. Having reviewed the information at issue, he considered the application of both sections 9(2)(a) (privacy) and 9(2)(ba) (confidentiality) of the OIA.

Privacy and confidentiality

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

Section 9(2)(ba) applies when releasing information that is *'subject to an obligation of confidence'* would be likely to:

- (i) 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 (section 9(2)(ba)(i)); or
- (ii) otherwise damage the public interest (section 9(2)(ba)(ii)).

The report related to a personal grievance and there are strong privacy interests arising from the expectation of confidentiality in employment. The Privacy Commissioner has noted on numerous occasions that *'information about an individual's performance in an employment context is highly personal and would generally be considered to be confidential'*. The Ombudsman concluded that withholding was necessary to protect the privacy of the employee who raised the grievance, and the chief executive.

The Ombudsman also noted that staff had provided information to the investigation in confidence, and that there was a confidentiality agreement between the parties arising from the settlement of the employment dispute. These matters are not conclusive, but were sufficient to establish that there was an *'obligation of confidence'* in respect of the information in the report. The Ombudsman accepted that release would be likely to prejudice the future supply of information needed to deal with personal grievances appropriately, and damage the public interest in maintaining good working relationships between the Department and its staff.

The Ombudsman concluded that sections 9(2)(a) and 9(2)(ba)(i) and (ii) of the OIA applied.

Public interest

Sections 9(2)(a) and 9(2)(ba) 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 noted that the information related to allegations about how a chief executive of a public service department conducted themselves in office. He also noted that the matter had attracted public attention.

Expectations of conduct, behaviour, and professionalism on the part of chief executives are justifiably high. A report on a personal grievance involving a chief executive must be considered in a different light from such reports generally. There is a greater public interest in the transparency of how a personal grievance was dealt with in these circumstances than in the generality of cases.

The Ombudsman had regard to the information that was already in the public domain. He noted that the State Services Commissioner had initiated his own investigation, the results of which were released. He found that this process of third party review satisfied the public interest in knowing more about a personal grievance than would otherwise be the case. The existence and subsequent operation of that process could be seen as obviating any residual public interest in release of a report which, in ordinary circumstances, would remain confidential to the participants.

Outcome

The Ombudsman formed the opinion that sections 9(2)(a) and 9(2)(ba)(i) and (ii) of the OIA provided good reason to withhold the investigation report.

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