



Request for emails between MP and university researchers

Legislation	Official Information Act 1982, s 9(2)(ba)(i)
Agency	University of Auckland
Ombudsman	Leo Donnelly
Case number(s)	431322
Date	19 February 2018

Section 9(2)(ba)(i) OIA did not apply—no obligation of confidence—information voluntarily supplied with no reference to confidentiality—release of ‘benign’ information with the consent of the supplier would not be likely to prejudice the future supply of similar information—recommendation to release

Background

University researchers published a report titled *Reconstruction of marine fisheries catches for New Zealand (1950-2010)*. Fishing industry representatives requested emails between the researchers and politicians or environmentalists about the report.

The University of Auckland withheld a chain of emails between the researchers and Prime Minister Jacinda Ardern (then a Labour Party Member of Parliament), 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 information at issue and an explanation of the reasons for withholding.

The email chain comprised a request by Ms Ardern for the researcher’s views on a draft article she proposed to submit to the Sunday Star Times. The researchers provided brief comments approving the article, and some minor amendments.

The University argued that:

- the emails were mutually understood to be confidential;
- release would prejudice the future supply of this kind of information to the University; and
- it was in the public interest for people writing articles to be able to freely consult with academic staff.

Section 9(2)(ba)(i) 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.

In order to establish that information is subject to an obligation of confidence, there must be a mutual understanding between the supplier of the information and the agency receiving the information that it is subject to an obligation of confidence. In other words, the supplier must regard the information as confidential and there must be knowledge on the part of the agency that the information was imparted in confidence. This mutual understanding may be express or implied from the circumstances of the particular case. An obligation of confidence will not exist simply because an agency unilaterally asserts an obligation of confidence in response to a request under the OIA.

In this case, Ms Ardern contacted the researchers voluntarily. She made no reference to an expectation of confidentiality when initiating that contact. The Ombudsman consulted Ms Ardern, who advised there was no issue with disclosure of the emails from her perspective.

In circumstances where there was no reference to confidentiality, and the supplier of the information did not seek to maintain confidentiality, the Ombudsman could not accept that the emails were subject to an obligation of confidence.

Nor was the Ombudsman persuaded that release of the emails would be likely to prejudice the future supply of similar information. He described the emails as 'benign' and not in any way of a sensitive nature. It was unsurprising that Ms Ardern contacted the researchers because her article cited their report. In circumstances where Ms Ardern consented to disclosure of the emails, it was difficult to see how release would be likely to deter journalists, or politicians writing opinion pieces, from seeking comment from university staff in future.

The Ombudsman accepted that it was a desirable practice for the writers of opinion pieces to 'fact-check' draft articles with academic staff, in the interests of accuracy and fairness in the media. However, he did not accept that all such communications, particularly communications as benign as the email chain at issue, must be conducted on a confidential basis in order for that practice to continue. Each case must be considered on its merits consistent with the presumption of availability under section 5 of the OIA.

As the information was not subject to an obligation of confidence, and release would not be likely to prejudice the future supply of similar information, section 9(2)(ba)(i) of the OIA did not apply.

Outcome

The Ombudsman formed the opinion that the request should not have been refused under section 9(2)(ba)(i) of the OIA and recommended release of the emails. The University complied with the Ombudsman's recommendation.

This case note is published under the authority of the [Ombudsmen Rules 1989](#). 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.