

Request for information about ERO review

Legislation	Official Information Act 1982, ss 9(2)(ba)(i), 9(2)(g)(i)
Agency	Education Review Office
Ombudsman	Peter Boshier
Case number(s)	473785
Date	8 August 2018

Section 9(2)(ba)(i) OIA applied to information obtained from participants in review—express obligation of confidence—release would be likely to prejudice the future supply of information by participants—it is in the public interest for ERO to receive confidential information from participants in order to inform the statutory review process—s 9(2)(g)(i) applied to information obtained from participants and generated by ERO review officers—release would inhibit the receipt and generation of free and frank opinions on the operation of a school, which is necessary for the effective conduct of the review process—no public interest override—good reason to withhold

Background

A requester sought all information about the review of a school. The Education Review Office (ERO) transferred part of the request (for documents generated by the school) to the board of trustees for consideration. It refused to supply the remaining information at issue under sections 9(2)(a) (privacy), 9(2)(ba)(i) (confidentiality) and 9(2)(g)(i) (free and frank opinions) of the Official Information Act (OIA). 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 information fell into two categories:

1. information obtained from participants in the review; and

2. information generated by ERO review officers in undertaking the review.

The Chief Ombudsman considered the application of the confidentiality and free and frank withholding grounds. While the privacy withholding ground may have been relevant to some of the information at issue, its detailed consideration was not necessary in this case.

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.

Agencies must consider whether:

- the information is subject to an obligation of confidence;
- release would be likely to prejudice the supply of similar information, or information from the same source, in the future; and
- the continued supply of such information is in the public interest.

ERO advised that review officers carry out reviews of schools in line with a set of standard procedures and Code of Conduct, so that *'schools will experience evaluations based on a consistent and explicit methodology'*.

The ERO's [Expectations of review officers](#) include that:

- Review officers receive information on the basis that it will be used without prejudice only for the purpose of review.
- Review officers respect the confidentiality of information acquired in the course of their duties.

The ERO explained that, as part of the review process, review officers obtain information from a variety of sources, and that all information obtained is treated as having been received in confidence.

The Chief Ombudsman was satisfied that information was obtained from participants in the review on the express understanding that it would be held in confidence. The ERO relies on disclosures from various participants including board members, school staff and other relevant parties to ensure that review officers obtain a comprehensive understanding of the school, including areas for improvement.

If information provided by participants on a confidential basis was made available, it is likely that future engagement with the review process may be detrimentally affected, both by decreased engagement from participants, and by a potential reduction in the quality of information that can be obtained. While review officers can compel schools to provide information under the relevant provisions of the Education Act 1989, it is preferable that the information required to conduct a review is provided on a voluntary, free and frank basis.

As such, if the information provided to ERO were to be disclosed, participants would likely be deterred from engaging fully in the review process, which would prejudice the future supply of information from schools and other participants.

It is essential, and in the public interest, that ERO continues to receive confidential information from participants voluntarily engaging in the review process. In the absence of receiving such information, the review could result in a distorted or incomplete perspective of how a particular school is performing, and may mean that areas for improvement cannot be identified. This would not be of assistance to the school, or to current or prospective parents of children who attend, or may attend the school.

The Chief Ombudsman concluded that section 9(2)(ba)(i) of the OIA applied.

Free and frank opinions

Section 9(2)(g)(i) of the OIA applies when withholding is necessary to maintain the effective conduct of public affairs through the free and frank expression of opinions.

Agencies must consider whether:

- release of the information would inhibit free and frank opinions in the future; and
- whether this inhibition will prejudice the effect conduct of public affairs.

As noted above, review officers obtain information in confidence from a variety of sources. Participants are encouraged to identify and discuss areas for improvement at the school in a free and frank manner, and receiving such information allows review officers to gain a better understanding of how the school is functioning.

The information received in the course of the review process is then evaluated by review officers in a free and frank manner, which includes ongoing, free and frank discussions with participants, before an unconfirmed report is drafted and provided to the school for review and response. The school's comments are then incorporated into the final report, which is published on ERO's website.

If preliminary comments made during the review process were made available, review officers would likely be discouraged from making free and frank assessments of information provided by schools, which may detrimentally affect the quality or completeness of the final report. Further, the ability of review officers to effectively carry out their statutory function would likely be prejudiced if school staff and other parties were discouraged from providing ERO with relevant and honest opinions about issues that may impact the effective operation of the school.

The Chief Ombudsman concluded that section 9(2)(g)(i) of the OIA applied.

Public interest

Sections 9(2)(ba)(i) and 9(2)(g)(i) 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.

There is a public interest in the disclosure of information related to the performance of schools subject to ERO review. There is also a public interest in ensuring that ERO's statutory review functions are carried out in a fair and accountable manner, and that concerned parties have an opportunity to participate in the review.

However, the ERO makes the final report for every review available on its website. The final report in this case had been published a few months after it was conducted.

The Chief Ombudsman considered that the public interest in disclosure of information related to the performance of the school was met by disclosure of the final, confirmed report, particularly given the relatively short timeframe between the conclusion of the review process and publication of the final report.

There was nothing in this case to suggest that the review officers carried out their functions in an inappropriate or unfair manner.

Concerned parties were also able to exercise their ability to provide feedback about any concerns during the review process, which appeared to satisfy the public interest considerations in this regard.

The Chief Ombudsman concluded that the public interest considerations favouring disclosure of the information at issue in this case did not outweigh the need to protect the other interests noted above.

Outcome

The Chief Ombudsman formed the opinion that sections 9(2)(ba)(i) and 9(2)(g)(i) of the OIA provided good reason to withhold information about its review.

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.