

Decision to release tender information in response to Official Information Act request

Legislation	Ombudsmen Act 1975, ss 13, 22; Official Information Act 1982, ss 9(2)(a), 9(2)(ba)(i), 9(2)(b)(ii)
Agency	Ministry of Business, Innovation and Employment
Ombudsman	Peter Boshier
Case number(s)	490995
Date	25 March 2020

Complaint about a decision to release information under the Official Information Act—Ministry consulted adequately with affected party—Ministry took into account affected party’s submissions, all relevant considerations, principle of availability, legislative requirements, and Ombudsman’s guidance—decision to release was reasonably open to the Ministry

Background

A requester asked the Ministry of Business, Innovation and Employment (the Ministry) for information provided by a contractor as part of a tender process. The request was made under the Official Information Act 1982 (OIA). The Ministry granted the request, and released the information with some redactions.

During the decision making process, the Ministry consulted with the contractor about the information it proposed to release and withhold. The contractor asked the Ministry to make further redactions under sections 9(2)(a), 9(2)(ba)(i) and 9(2)(b)(ii) of the OIA. The Ministry did not make the redactions requested by the contractor.

The contractor complained to the Ombudsman about:

- the adequacy of the Ministry’s consultation; and
- the Ministry’s decision to release some of the information despite its opposition, on the grounds that the Ministry’s analysis of the level of prejudice to the contractor and the public interest was flawed.

Investigation

The OIA provides no role for an Ombudsman to investigate and review a decision to release information. Complaints about decisions to release information under the OIA are investigated under the Ombudsmen Act 1975 (OA).

The Chief Ombudsmen's investigative role under the OA is different to an investigation and review under the OIA. The OA permits an Ombudsman to investigate a complaint about a decision to release, and to form an opinion on whether that decision was taken in an administratively sound manner and was reasonably open to the agency in the circumstances of the case. However, an Ombudsman is not an appeal body under the OA, and would not normally substitute their judgment for that of the statutory decision maker, particularly in this context, where section 48 of the OIA affords a wide immunity to agencies when releasing information in response to an OIA request in good faith.

The issue for the Chief Ombudsman to determine was whether the Ministry followed a robust process for assessing and then releasing the information, including allowing for consultations as appropriate.

Consultation process

The Ombudsman has published guidance material on consulting third parties before making a decision on an OIA request.¹ The Guide notes that third party consultation needs to be handled '*fairly and efficiently*'. However, the process of consultation does not give the third party an ability to veto the release of information. It is for the agency to reach its own decision on the proper application of the withholding grounds, and (where relevant) the countervailing public interest in release.

The Chief Ombudsman considered whether the consultation undertaken demonstrated a genuine and meaningful attempt by the Ministry to elicit the kind of information that is necessary to make a decision on the OIA request.

The Chief Ombudsman stated that the Ministry provided adequate information in its consultation email for the contractor to make an informed decision. The Ministry had clearly marked the sections it proposed to release and to redact from the documents at issue. The Ministry also provided a brief explanation of its obligations under the OIA and noted that, '*[while] any comments you make will be taken into account, they may not necessarily be applied to the released material*'.

The Ministry gave the contractor four and a half days to provide comments. During the investigation, the Ministry acknowledged that more time would have been preferable, but also explained that '*a significant portion of the material had already been consulted on with [the contractor] when responding to previous requests*'.

¹ See [Consulting third parties](#).

The Chief Ombudsman noted that the contractor did not request an extension and provided a comprehensive response a full day before the deadline. In light of this, and given that the contractor had been previously consulted on similar material, the Chief Ombudsman found that its ability to respond was not adversely affected by the timeframe.

Upon receipt of the contractor's comments, the Ministry team responsible for preparing the OIA response convened a meeting to discuss the specific information raised against the relevant OIA withholding grounds. However, the Ministry decided that it was not necessary under the OIA to withhold the information identified by the contractor. Two senior Ministry staff then peer reviewed the proposed response.

Following this review, the Ministry informed the contractor of its intention to release the information without the redactions proposed by the contractor. While this email was brief and did not contain detailed reasons for the decision, the Ministry responded to a further query by the contractor, setting out the reasons for its decision and the process followed.

The Chief Ombudsman found that, in the circumstances, the Ministry's decision making process was not administratively unreasonable.

The Ministry's decision to release the information at issue

The second issue for the Chief Ombudsman to determine was whether the decision to release the information was reasonably open to the Ministry to make. This was based on how the Ministry approached its assessment as to whether there was good reason under the OIA to withhold the particular information. The Chief Ombudsman emphasised that this did not entail a review or reconsideration of the Ministry's decision.

On investigation, the Ministry advised that it took into account the following considerations when making its decision:

- the purposes of the OIA as set out in section 4, particularly to promote accountability in respect of the decision to approve the contractor's tender;
- the principle of availability in section 5 of the OIA; and
- guidance published by the Ombudsman on the respective withholding grounds and the weighing of the public interest.

The Ministry came to the conclusion that the relevant withholding grounds in section 9 of the OIA did not apply to the additional information the contractor sought to withhold. The Ministry further considered that even if the section 9 grounds did apply, this would have been outweighed by other considerations which rendered it desirable, in the public interest, to make the information available (section 9(1) of the OIA).

The Chief Ombudsman looked at the specific withholding grounds raised by the contractor, against the factors the Ministry took into account before it came to the conclusion that they did not apply.

Section 9(2)(a) applies where withholding is necessary to *'protect the privacy of natural persons'*. The contractor raised this provision in relation to the name of one of its directors and the backgrounds of some of its staff. The Ministry explained that it considered the fact that the director's name was already in the public domain, and noted how it had taken steps to preserve the anonymity of the contractor's staff by withholding their personal information.

Section 9(2)(ba)(i) applies where withholding is necessary to *'protect information which is subject to an obligation of confidence ... where the making available of the information ... 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'*. The contractor stated that it had provided information to the Ministry with the expectation that it would not be made public, as part of its tender application.

The Ministry observed that the tender documentation included a statement on its obligations under the OIA and considered this an effective signal that confidentiality could not be assured. It also considered that the making available of the information at issue would not prejudice the future supply of similar information, as tenderers will understand that compliance with the OIA is a condition of doing business with the Government.

Section 9(2)(b)(ii) applies where withholding is necessary to *'protect information where the making available of the information ... would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information'*. The contractor stated that the release of proprietary information (such as its methodology) would prejudice its commercial position as it would be used by competitors to undermine its business. The contractor also opposed the release of information such as client names and information.

The Ministry considered that release of the information at issue would be unlikely to prejudice the contractor's commercial position. It took into account the fact that the contractor did not specify any part of its tender as commercially sensitive at the time it was submitted. It concluded that this indicated that the information did not reveal commercial practices or strategies that were specific to the contractor compared to its competitors. While the contractor subsequently stated that the information was commercially sensitive during the OIA consultation process, the Ministry took the view that this was a direct result of public scrutiny at the time and did not think this context would be sufficient to increase the perceived harm. The Ministry advised that it had consulted all third parties named in the documents and only one had concerns about release.

Finally, if any of the section 9(2) provisions applied, section 9(1) required the Ministry to consider whether there were any countervailing public interest considerations which favoured the release of the information. The Ministry identified a strong public interest in accountability and transparency. The OIA request came at a time when allegations were being levelled against the public sector about its engagement of the contractor. The Ministry considered that the public interest in being *'open and transparent about the Ministry's engagement with [the contractor] and, in doing so, to demonstrate that the Ministry had applied a robust process and acted prudently in appointing [the contractor]'* was sufficient to outweigh the need, if any, to withhold the relevant information.

The Chief Ombudsman found that the Ministry had factored the contractor's views into its decision making, identified all relevant considerations, and considered these matters against the principle of availability, legislative requirements and Ombudsman guidance on best practice. He concluded that the decision to release the information was reasonably open to the Ministry to make.

Outcome

The Chief Ombudsman formed the opinion that the Ministry had not acted unreasonably by deciding to release the information at issue under the OIA. He also noted, for completeness, that there was no evidence to suggest that the Ministry's decision was not made in good faith.

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.