



No confidentiality in Government Ministers' travel expense claims; information 'official', regardless of purpose of travel

Legislation	Official Information Act, ss 9(2)(ba)(i)(confidentiality) and 9(1) (public interest)
Agency	Department of Internal Affairs
Ombudsman	Judge Peter Boshier
Case number	356912
Date	June 2016

Summary

The Department of Internal Affairs (the Department) refused a request for information relating to the surface travel expenses of Government Ministers. The Department's practice prior to this request had been to summarise the information and, in the interests of accountability, make it available on its website, on a quarterly basis.

The Department initially relied on sections 18(f), 6(d) and 9(2)(a) of the Official Information Act 1982 (OIA) to withhold the information but, further to the requester's agreement to refine the request, revised its initial decision, relying instead on section 9(2)(ba)(i) of the OIA, on the grounds that the raw data was subject to an obligation of confidence.

The Chief Ombudsman considered that the information at issue was clearly '*official information*' within the meaning of the OIA and was not persuaded that information relating to the expenditure of public money, regardless of whether the travel was for private or official purposes, could be subject to an overriding obligation of confidence.

Further, the Chief Ombudsman considered that even if an obligation of confidence could have been said to exist, this would have been outweighed in the circumstances of this particular case by the public interest in disclosure.

Consequently, the Chief Ombudsman formed the final opinion that the request should not have been refused and formally recommended release of the information at issue.

Background

1. Mr Hamish Rutherford, a journalist for Fairfax Media, sought an investigation and review by the Ombudsman of the Department's decision to refuse his request for information relating to expenses claimed by Ministers of the Crown for surface travel. The particular information sought was:

... a breakdown of all expense claims, by all Government Ministers, which fall under the category of 'surface travel (Ministers, Spouses and Staff)' category in the quarterly 'Members of the executive expenses disclosure' provided by the Department of Internal Affairs, for all of 2012.

Please break the information down in such a way that allows the reader to determine whether in any cases money was being charged when the Minister was not travelling.

Please be as specific as possible on the location of individual travel (ie Parliament to Island Bay School, etc).

2. The Department refused this request on grounds the information could not be made available without substantial collation or research (see s18(f) OIA).
3. The Department further noted that details of the pick-up point and destination locations of individual journeys would otherwise be withheld as it considered that making this information available would be likely to endanger the safety of the Minister involved (see section 6(d) OIA) and, in addition, that this was necessary to protect the privacy of natural persons (see section 9(2)(a) OIA).

Investigation - revised request and decision

4. After an initial meeting with the Department to explore the nature of its concerns, then Chief Ombudsman Dame Beverley Wakem consulted with Mr Rutherford who agreed to withdraw his request, and his complaint, in favour of a new refined request. The request as refined was for the surface travel claims for the period of 1 January 2014 to 31 March 2015 and explicitly excluded pick up and drop off points and passenger information.
5. In the absence of a response to this revised request, Mr Rutherford wrote to the Chief Ombudsman whose staff met again with officials from the Department. The Department remained concerned with release of the information, now raising issues as the accuracy of the data it held. The Department was concerned that, if this raw data were released, the Department could face repercussions from Ministers if it transpired that the information was incorrect, particularly as the information was to be provided to the media.
6. The Chief Ombudsman acknowledged the Department's concerns but indicated that she considered the public interest in the information to be considerable and not met by quarterly publication of information in summary form.

7. The Department subsequently responded to the revised request providing some further detail but continued to withhold the raw data. The basis for the decision at that time was that the information was subject to an obligation of confidence and release would be likely to prejudice future supply of such information (see section 9(2)(ba)(i)).
8. Mr Rutherford was not satisfied with this response and asked the Chief Ombudsman to resume the investigation.
9. In December 2015, Judge Peter Boshier succeeded Dame Beverley as Chief Ombudsman and assumed responsibility for this matter.

Application of section 9(2)(ba)(i)—obligation of confidence

10. Section 9(2)(ba)(i) provides for withholding information where this is *'necessary to:*
 - (ba) *protect information which is subject to an obligation of confidence ... where the making available of the information—*
 - (i) *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;*
11. Obligations of confidence must be mutually understood and relied upon, not unilaterally imposed. Agencies subject to the official information legislation, such as the Department, can never guarantee blanket confidentiality in all cases, as a request for information will inevitably fall to be considered under that legislation on a case by case basis, and the principle that information must be made available unless there is good reason for withholding it.
12. The entitlement of Ministers to claim expenses for surface travel is set out in the *'Ministers' Travel Services within New Zealand Determination 2014'* (the Determination), Clause 3.2 of which concerns the principle of transparency:
 - (a) *the reasons for, and the circumstances surrounding, the use of public resources by individual ministers should be available; and*
 - (b) *the process by which funds are expended should be publicly known.*
13. While the raw data had not previously been released, the Chief Ombudsman did not consider that this in itself created an obligation of confidence. Conversely, the Chief Ombudsman noted that clause 3.2 of the Determination clearly expresses the intention that information pertaining to the use of public funds should be publicly available.
14. The Chief Ombudsman was also not persuaded that Ministers would cease to supply the information if it were to be released, and was therefore not persuaded that section 9(2)(ba)(i) applied to the information at issue.

15. The Department queried whether, in circumstances where the use of Ministerial transport was for private purposes, rather than official business, the information would still be '*official information*' for the purposes of the OIA and, if so, whether this impacted on the public interest in release.
16. The Chief Ombudsman said that information relating to expenditure for the purpose of Ministerial travel was without doubt '*official information*', whatever the purpose of that travel. The entitlement to Ministerial transport arises because the individual is a Minister, and the expenditure on such travel is publicly funded, irrespective of whether the travel is for a public or private purpose. Information about the expenditure, by or on behalf of specific Ministers, is held by those Ministers in their official capacity as a Minister of the Crown and therefore is covered by the definition of '*official information*' under the OIA.
17. The Chief Ombudsman stated that it could not be a principled approach to withhold details of expenditure on Ministerial transport, paid for by public money, merely because such travel was outside the scope of strict Ministerial duties. On the contrary, it was his opinion that the public interest in disclosure is **enhanced** where transport funded by the public purse is utilised for non-official matters.
18. The Department was also concerned about release of certain information which might be inaccurate. The Chief Ombudsman stated that inaccuracy of official information is not, in itself, a reason for withholding that information and stated:

... if the system of recording of Ministerial travel is sufficiently inaccurate as to cause concern, then there is every reason to draw attention to that, and to suggest that it is remedied. It is patently not in the public interest for me, knowing that an inaccuracy exists, to condone it by supporting its withholding from legitimate public scrutiny for that reason alone.

Outcome

19. For the reasons outlined above, the Chief Ombudsman formed the final opinion that good reason did not exist to withhold the information at issue in reliance upon the OIA and that, in any event, the public interest considerations favouring release were so significant that this would likely have outweighed any reason to refuse the request.
20. The Chief Ombudsman recommended that the information be released to Mr Rutherford.