

Request for CAA investigation report on Minister's airport security breach

Legislation	Official Information Act 1982, ss 9(2)(a), 9(2)(ba)(i), 9(2)(g)(i), 9(2)(h), 6(c)
Agency	Civil Aviation Authority
Ombudsman	Leo Donnelly
Case number(s)	395835, 396111, 397211
Date	29 September 2016

Section 9(2)(a) OIA applied to information that would identify Minister's staff—s 9(2)(a) did not apply to non-sensitive information about actions that occurred in a public place, or to the name of the Investigator—s 6(c) did not apply to information supplied by suspects and witnesses after the investigation had concluded—section 9(2)(ba)(i) applied to that information—implied obligation of confidence—release would be likely to prejudice the future supply of information from suspects and witnesses—it is in the public interest for CAA to continue to receive information that enables it to investigate potential breaches of civil aviation law—s 9(2)(g)(i) did not apply—release of analysis and opinion that CAA is duty bound to provide would not inhibit the future free and frank expression of opinions—section 9(2)(h) OIA did not apply—analysis not subject to legal professional privilege just because it was peer reviewed by General Counsel

Background

The Civil Aviation Authority (CAA) investigated a breach of security at Christchurch Airport by the then Minister of Transport and his staff. The Minister was fined and issued with an infringement notice for breaching civil aviation rules. His staff received warning letters.

The CAA received several requests for a copy of its investigation report. It released the report with redactions under sections 6(c), 9(2)(a), 9(2)(g)(i) and 9(2)(h) of the Official Information Act (OIA). The requesters complained to the Ombudsman.

Investigation

The Ombudsman requested a copy of the information at issue and an explanation of the reasons for withholding. He reviewed the information at issue and the CAA's reasons for withholding, and consulted with the Privacy Commissioner before forming an opinion. The Minister and his staff also had the opportunity to comment.

Privacy

Section 9(2)(a) of the OIA provides good reason for withholding (subject to a public test) when it is necessary to protect the privacy of natural persons.

The Ombudsman accepted that section 9(2)(a) applied to information that would identify the Minister's staff. The need to withhold the information to protect their privacy was not outweighed by the public interest in release, given their limited culpability for the security breach.

However, he did not accept that it applied to information describing the actions of the suspects immediately after the breach. While section 9(2)(a) may, in certain circumstances, protect information about actions which occur in a public place, there was nothing inherently sensitive about the actions described in the information at issue.

The Ombudsman also did not accept that section 9(2)(a) applied to the name of the CAA Investigator. He referred to the [PHARMAC case](#), which set out the Ombudsman's general position that, in the absence of special circumstances, it is not usually necessary to withhold the names of public sector employees to protect their privacy. He noted that the investigating officer's name, title and contact details were all publicly available on the CAA website. The only fact not publicly known was that this Investigator was responsible for this particular investigation. The Ombudsman could not see how disclosure of that information would interfere with their privacy.

Maintenance of the law

Section 6(c) of the OIA provides good reason for withholding when release would be likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial.

The CAA relied on section 6(c) to withhold information supplied by the suspects and witnesses. However, the Ombudsman did not consider that section 6(c) applied. As noted in *Freedom of Information in New Zealand*:¹

A crime cannot be investigated if the investigator's every move is visible to those whose actions are being inquired into, and nothing should be disclosed which is likely to hamper the investigation while it is actually in progress. The point is

¹ Eagles, I, Taggart, M, and Liddell, G. *Freedom of Information in New Zealand*. Oxford: Oxford University Press, 1992 at 180.

*obvious and has been made in public interest immunity cases. Those cases also recognize two very important qualifications to this principle: the information withheld must be germane to the investigation and **the protection conferred should last only as long as the investigation can be harmed by disclosure of the information** (emphasis added).*

The protections offered by section 6(c) typically cease once the investigation is complete (excepting information identifying an informant or police investigative techniques or practices). This is because the *'exemption for investigatory material is usually unnecessary before the investigation gets underway and redundant once it is concluded'*.² There was nothing suggesting this case was exceptional and that section 6(c) should continue to apply after the investigation had ended.

Confidentiality

Although section 6(c) of the OIA did not apply, section 9(2)(ba)(i) of the OIA was relevant to the information supplied by the suspects and witnesses.

Section 9(2)(ba)(i) provides good reason for withholding (subject to a public test) 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.

The Ombudsman found that section 9(2)(ba)(i) applied to information revealing:

- the content of the suspects' statements to the CAA;
- the identity of the witnesses and the information they provided to the CAA.

The suspects consented to a formal interview under caution. In the circumstances, it was clear that the CAA would hold their statements confidentially, subject only to the possibility that they would be disclosed should the suspects be prosecuted in an open court. The witnesses would similarly have expected the information they supplied to be held in confidence, unless disclosure was necessary for the purposes of prosecution.

Disclosure would create a 'real risk' that future parties, whether suspects or witnesses, would be inhibited from sharing information about possible breaches of civil aviation law out of fear that their statements would not remain confidential. This would in turn inhibit the ability of the CAA to detect, investigate and prosecute civil aviation offences. Maintaining the supply of confidential statements from suspects and witnesses was necessary in the public interest.

Section 9(2)(ba)(i) did not apply to some information that was, in effect, already publicly available through partial release of the report, and public statements by the CAA and the Minister.

In respect of the information to which section 9(2)(ba)(i) was applicable, the Ombudsman acknowledged the countervailing public interest in release to promote transparency and

² See above at 181.

accountability. However, he considered that these interests had been satisfied through the disclosure of the remainder of the report.

Free and frank opinions

Section 9(2)(g)(i) of the OIA provides good reason for withholding (subject to a public test) when it is necessary to maintain the effective conduct of public affairs through the free and frank expression of opinions.

The Ombudsman rejected the application of this section to excerpts or summaries of relevant civil aviation law. Release of such information should not inhibit the future expression of free and frank opinions.

The CAA also relied on this section to withhold the Investigator's analysis of the facts and the law, and recommendations on appropriate enforcement action. However, the Ombudsman noted that the Director of the CAA has a statutory responsibility to investigate breaches of civil aviation law. The CAA is therefore obliged to determine whether the facts of a case demonstrate that the law has been breached and, if so, to take any appropriate enforcement action. The CAA only has a finite number of enforcement options. This means that an Investigator has less scope to engage in the kind of 'blue sky' thinking which section 9(2)(g)(i) might ordinarily protect. The Ombudsman did not accept that the CAA would cease providing free and frank advice on potential breaches of civil aviation law out of fear that the opinions of its Investigators would subsequently be disclosed under the OIA.

Legal professional privilege

Section 9(2)(h) of the OIA provides good reason for withholding (subject to a public test) when it is necessary to maintain legal professional privilege.

There are two aspects to the law relating to legal professional privilege—solicitor/client privilege and litigation privilege. As there was no realistic prospect of litigation in this case, the reference to section 9(2)(h) was limited to solicitor/client privilege.

Solicitor/client privilege applies to confidential communications between legal advisor and client, where the legal advisor is acting in that professional capacity, and the communication is for the purpose of obtaining or giving legal advice. As was said in *Re Merit Finance and Investment Group*:³

The essential question in any consideration of whether or not a document is privileged is, was it brought in to existence for the purpose of 'getting or giving confidential legal advice or assistance'?

The CAA relied on section 9(2)(h)—in the alternative to section 9(2)(g)(i)—to withhold the Investigating Officer's analysis of the law and facts, and recommendations on appropriate enforcement action.

³ *Re Merit Finance and Investment Group* [1993] 1 NZLR 152, 158.

However, the report was not generated for the purpose of **giving** legal advice to the Director of the CAA. Investigating Officers are not legally qualified and are therefore prohibited from dispensing legal advice. Nor was it generated for the purpose of **getting** legal advice. The intended recipient of the report was the Director of the CAA, not a lawyer. The dominant purpose of the report was to provide analysis and advice to the Director of the CAA.

The Ombudsman was not persuaded by the CAA's argument that the Investigator's analysis attracted solicitor/client privilege because the General Counsel was required to endorse that analysis before it was submitted to the Director. The fact that the General Counsel reviewed the report before it was submitted to the Director, did not mean it was generated for this purpose.

The function the General Counsel performs in peer reviewing the investigator's report was essentially an administrative one, albeit one where legal expertise was highly desirable. The Ombudsman cited the Court of Appeal's judgment in *Simunovich Fisheries Ltd*,⁴ which endorsed Dawson J's reasoning in *Baker v Campbell* in the High Court of Australia:⁵

...privilege cannot operate to put beyond the reach of the law documentary or other material which has an existence apart from the process of giving or receiving advice or the conduct of litigation.

The report clearly had an existence apart from the process of giving or receiving legal advice. Consequently, section 9(2)(h) of the OIA did not apply, and the CAA was not entitled to withhold the information under that ground.

Outcome

The Ombudsman formed the opinion that some of the redactions to the investigation report were justified under sections 9(2)(a) and 9(2)(ba)(i) of the OIA. However, other redactions were not justified. The Ombudsman recommended the release of this additional information to the requesters.

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.

⁴ *Simunovich Fisheries Ltd v TVNZ Ltd* (CA447/07, 8 September 2008).

⁵ *Baker v Campbell* (1983) 153 CLR 52 (HCA), at 122.