

Request for advice regarding the effectiveness of benefit reductions

Legislation	Official Information Act 1982, ss 9(2)(f)(iv), 9(1)
Agency	Ministry of Social Development
Ombudsman	Leo Donnelly
Case number(s)	458197
Date	September 2017

Summary

A journalist asked the Ministry of Social Development for copies of any advice or reports it had provided to the Minister for Social Development on the effectiveness of benefit reductions under section 70A of the Social Security Act 1964.

The journalist complained to the Ombudsman after the Ministry refused the request under section 9(2)(f)(iv) of the Official Information Act 1982 (OIA). This section can apply to protect advice given by officials to a Minister, to allow the Minister to consider the advice in private and without fear of premature disclosure.

The Ombudsman formed the opinion that the request should not have been refused. He considered that it was difficult to see how future decision-making processes would be harmed by release of the information, as the Minister appeared to have had time to deliberate on the advice, and had publicly indicated her intended actions following its receipt. The Ombudsman therefore considered that section 9(2)(f)(iv) did not apply to the information.

The Ombudsman also considered that, even if section 9(2)(f)(iv) had applied in this case, it would have been outweighed by public interest considerations favouring disclosure. In this case, the Ombudsman considered the overall public interest required disclosure of the information to promote the accountability of Ministers and officials, and more effective participation by the public in considering the options for legislative change.

Background

1. Under section 70A of the Social Security Act 1964, a reduction can be applied to the benefit of a sole parent who does not identify the other parent of their child or apply for child support.
2. The requester, a journalist, asked the Ministry for all advice provided to the Minister by officials in the previous five years concerning the effectiveness of section 70A benefit reductions.
3. The Ministry refused to disclose four documents covered by the request under section 9(2)(f)(iv) of the OIA. The Ministry gave the reason that the documents were still under active consideration, and that the release of the information would be likely to prejudice the ability of government to consider and deliberate on advice effectively. The journalist complained to the Ombudsman.

Investigation

4. The Ombudsman notified the Ministry of the complaint, and sought the requested information and copies of internal decision-making papers for the request.

Did section 9(2)(f)(iv) apply to the information?

5. The information within the scope of the request consisted of three papers to the Minister on section 70A of the Social Security Act 1964, as well as an A3 information sheet on section 70A that accompanied a report to the Minister dated 5 September 2015. The papers were essentially different iterations of the same document, each one being a more fully formed version of its predecessor. The paper dated 19 October 2015 was the most up to date and detailed.
6. Section 9(2)(f)(iv) of the OIA provides good reason to withhold information *'if, and only if'*:
 - a. it is *'necessary'* to maintain the constitutional conventions that protect the confidentiality of advice tendered by Ministers of the Crown and officials; and
 - b. this protected interest is not outweighed by other considerations that render it desirable, in the public interest, to make the information available (section 9(1)).
7. The purpose of section 9(2)(f)(iv) is to protect the orderly and effective conduct of executive government decision-making processes. This reason for refusal recognises that sometimes government needs private time and space to deliberate and decide on the advice it receives.
8. The general approach of the Ombudsmen has been that section 9(2)(f)(iv) applies to advice:
 - a. that is related to executive government decision-making processes;

- b. that has or will be tendered to Ministers or Cabinet by Ministers or officials;
 - c. whose disclosure would harm the orderly and effective conduct of the relevant decision-making process.
9. However, the need to withhold information under section 9(2)(f)(iv) is often temporary, and is subject to a requirement that the agency must consider whether countervailing public interest considerations favouring disclosure outweigh the need to withhold it.
10. In this case, at relevant times, the Social Security Legislation Rewrite Bill was being considered by Parliament and the Select Committee had received a number of submissions opposing the continuation of the mechanism within section 70A. A Supplementary Order Paper was introduced that included the removal of clauses relating to the issue.¹
11. The papers contained information and advice on the effectiveness of section 70A that was generated by officials to allow the Minister to make a decision on certain options about the issue.
12. The 19 October 2015 paper asked the Minister to note certain information, while presenting three options:
 - a. maintain the status quo and retain the section 70A reduction; or
 - b. repeal section 70A, and seek budget funding once initial work has been completed; or
 - c. instruct the Ministry to undertake research into the matter to inform future policy decisions.
13. The papers set out the Ministry's view on the effectiveness of section 70A, including factual information, commentary on how section 70A functions, and findings from studies on its effectiveness. Much of this information did not appear to be in the form of advice as to future action. There was also a degree of information that had been made publicly available. In these circumstances, the Ombudsman could not see that section 9(2)(f)(iv) justified the withholding of all the information at issue.
14. At the time of the request, the most recent paper was eight months old. The Minister therefore appeared to have had some time to consider its contents. The paper was also at least the third iteration of advice on this issue to the Minister, and there had been further public discussion and comment by the Minister on the issue.

¹ New Zealand Parliament. 'Social Security Legislation Rewrite Bill' retrieved on 22 August 2017 from https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/OODBHOH_BILL68669_1/social-security-legislation-rewrite-bill

15. In response to an oral question in Parliament on 1 June 2017, the Minister advised:²

This government has no intention to change section 70A, but I have asked the Ministry of Social Development (MSD) to do some research to see the effectiveness of that policy.
16. The Minister went on to state that the purpose of this research is ‘to see whether the intent of the policy is actually reaping the rewards that we want to be sure that it is’.³
17. While section 9(2)(f)(iv) is designed to allow Ministers and Cabinet time and space to consider and deliberate on advice, it does not allow a blanket exemption from disclosure before a final decision is made, nor does it give a blanket right to undisturbed consideration of advice that may be the basis of future decisions on the issue.
18. The Ombudsman considered that, while the Minister may have had further decisions to make concerning section 70A, it was apparent from her public statements that the Minister had taken steps regarding the advice that was provided, and had indicated that the Government did not intend to change section 70A. The Minister had instead instructed the Ministry to undertake further research on the issue.
19. The Minister therefore appeared to have had time to deliberate on the advice tendered by officials, and had otherwise publicly indicated her actions and intentions. The Ombudsman therefore found it difficult to see how future decision-making processes would be harmed by release of most, if not all, of this information.
20. The Ombudsman therefore did not consider that withholding this advice was ‘necessary’ to maintain the constitutional convention that protects the interests under section 9(2)(f)(iv).

Public interest test under section 9(1)

21. The Ombudsman noted that while he did not consider that section 9(2)(f)(iv) applied to the information at issue, even if it did apply, it would have been outweighed by strong public interest considerations favouring its disclosure.
22. The operation of section 70A has been the subject of considerable interest and debate through submissions on the Social Security Rewrite Bill, questions in Parliament and media attention.⁴ As stated in the papers themselves:

² New Zealand Parliament. ‘Answers to oral questions – Thursday 1 June 2017 Volume 722’ retrieved on 22 August 2017 from https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansD_20170601_20170601

³ Ibid

⁴ See for example http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11886812, <http://www.radionz.co.nz/news/national/313375/beneficiaries-%27punished%27-for-not-naming-child%27s-father> and <http://www.newshub.co.nz/home/politics/2017/06/anne-tolley-apologises-to-rape-victim-over-benefit-docking.html>

There are 13,616 benefit reductions in place. The clients affected by the reductions are more likely to be women, Māori or [Pasifika], and younger than other sole parent beneficiaries.

23. The reduction inevitably also affects the children of those receiving these reduced benefits.
24. The operation of section 70A involves substantial public funds. Decisions made regarding section 70A would clearly have an impact on how these funds are used, the amount of revenue gained from child support, and which sectors of society are affected as a result.
25. Section 4(a)(i) of the OIA recognises that ‘*more effective participation*’ by the public in ‘*the making and administration of laws and policies*’ enhances respect for the law and promotes good government. In other words, there is a public interest in the availability of information to give the public a reasonable opportunity to influence outcomes in the making and administration of laws and policies. This requires adequate availability of information before final decisions are made and not after.
26. In a free participatory democracy, there is a public interest in adequate transparency to promote contestability of advice and opinions to government not just from officials but also from the public.
27. Given the wide impact that section 70A can have on individual New Zealanders and their dependent children, the Ombudsman considered that there was a strong public interest in allowing people to see the information officials had provided the Minister to inform her decision making.
28. As the Minister had announced the Government’s current intention and had asked the Ministry to undertake further research into the effectiveness of section 70A, release of the information at issue would allow the public to more effectively participate in the subsequent decision-making processes by being able to express their opinions. Disclosure would also allow the public to see the reasoning behind the advice, and the position that the Minister had indicated, promoting transparency and accountability in the manner that section 4(a)(ii) of the OIA clearly envisages.

Outcome

29. The Ombudsman formed the provisional opinion that the Ministry did not have good reason under the OIA to withhold the advice that the Ministry had provided to the Minister on the effectiveness of benefit reductions applied under section 70A.
30. Following consideration of the Ombudsman’s provisional opinion, the Ministry accepted the findings and agreed to release the information to the requester. The Ombudsman confirmed his final opinion and advised the Ministry and the requester accordingly.