

Request for copy of reviewers' training manual

Legislation	Official Information Act 1982, ss 9(2)(b)(i), 9(2)(i)
Agency	Fairway Resolution Ltd
Ombudsman	Professor Ron Paterson
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Information was not a trade secret—although FairWay was engaged in commercial activities, it was not clear how disclosure would prejudice or disadvantage those activities—the manual was largely in the public domain, and there was little prospect of competition—ss 9(2)(b)(i), 9(2)(i) do not apply

A requester asked FairWay Resolution Ltd for a copy of its reviewers' training manual. At the time, Fairway was a Crown-owned company,¹ providing resolution services, including review of ACC claims decisions. FairWay refused the request under sections 9(2)(b)(i) (trade secrets) and 9(2)(i) of the OIA (prejudice or disadvantage to commercial activities). The requester complained to the Ombudsman.

Trade secrets

Fairway argued the manual had intellectual property value. It had spent considerable time and effort developing it, and it was only available on its internal shared drive.

The Ombudsman noted that the term '*trade secret*' within the context of the OIA is concerned with highly secret information capable of indefinite protection. This is separate from provisions

¹ It is now an employee-owned company, and no longer subject to the OIA.

accommodating ‘*confidential information*’ (section 9(2)(ba)), and information that would prejudice a commercial position (section 9(2)(b)(ii)), or commercial activities (section 9(2)(i)).

The Ombudsman considered the following criteria for identifying a trade secret:²

1. the extent to which the information is known outside the owner’s business;
2. the extent to which it is known by persons engaged in the owner’s business;
3. measures taken by the owner to guard the secrecy of the information;
4. the value of the information to the owner and their competitors;
5. the effort and money spent by the owner in developing the information; and
6. the ease or difficulty with which others might acquire or duplicate the secret.

The Ombudsman noted that the manual derived its content from relevant provisions of the Accident Compensation Act 2001, case law, and the requirements of natural justice and fair process. It outlined the process for the hearing of a review in accordance with those principles. It was not technical information. It was quite accessible and could not be described as the product of creation or ingenuity.

It was not the case, nor should it be, that FairWay required absolute secrecy about the manner in which it conducted reviews. The content of the manual could be inferred from the manner in which reviews were conducted. In addition, an earlier revision of the manual was available online, and there was little difference between that version and the one at issue.

The manual did not contain evidence of unique or special procedure developed by FairWay. While it might be time consuming to do so, there would not be any great difficulty in duplicating similar information. Indeed, aspects the review process were outlined in other publicly available documents.

Beyond the fact that the manual was not published online, or made available to the public, there was little in the way of protocol for maintaining secrecy of the document. It was stored on a shared document drive. There were no restrictions on the staff members who could access it. The document was not labelled or identified as confidential. In the Ombudsman’s opinion, there was not the required degree of secrecy for the manual to qualify as a trade secret.

It was also not clear what advantage or value the manual would have for those outside of the organisation. The material did not disclose specialised process or proprietary information, nor did it appear to disclose information that would be beneficial to any entity seeking to compete (eg, pricing structures, time management practices, performance indicators, or terms arising from the contract for services).

² See *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* (1967) VR 37 at 50 (VSCA), citing the American *Restatement of the law of Torts* (1939, Volume 4, paragraph 757); *Re Organon (Australia) Pty Ltd and Department of Community Services and Health* (1987) 13 ALD 588 (AAT); and *Searle Australia v Public Interest Advocacy Centre (Searle)* (1992) 108 ALR 163 at 174 (FC).

The Ombudsman concluded the information in the manual did not amount to a trade secret. Although some effort had gone into its preparation, the information did not attract the necessary degree of secrecy or value to competitors. Prior disclosure and dissemination of the manual online undermined any claim to secrecy, and diminished the extent to which it could be considered necessary to withhold the information under section 9(2)(b)(i).

Prejudice or disadvantage to commercial activities

Fairway also argued the manual would provide an unfair advantage to its competitors, by giving them a precedent or template.

The Ombudsman noted that Fairway was an independent Crown-owned company providing a range of conflict management services, one aspect of which related to reviews under the Accident Compensation Act 2001. It was the only provider of review services to ACC, and operated under a contract for services.

The Ombudsman accepted that FairWay operated for the purpose of making a profit, particularly in regard to its alternative dispute resolution services. The Minister's Annual Letter of Expectations for 2014/15 clearly identified that FairWay was to operate '*profitably*', and to seek a broader customer base and new business opportunities. FairWay confirmed that it provided ACC review services for the purpose of making a profit, which might be contrasted with a requirement to merely maintain an operational surplus, or exercise prudent financial management.

However, it was not clear what prejudice or disadvantage would arise from disclosure of the manual, or what benefit could be derived by FairWay's purported competitors. The manual was largely a restatement of information from relevant sources. Its commercial value appeared to be only the limited benefit a competitor might derive from the fact of compilation of that material. An old, but comprehensively similar version of the manual was online, yet the Ombudsman had seen no evidence that this had led to any disadvantage.

Even if the Ombudsman was to be persuaded that disclosure of the manual could cause some prejudice to Fairway's commercial activities, the content of the manual did not suggest that it was necessary to withhold the information in order to protect that interest. The manual was derived from public sources and set out fairly elementary procedural requirements.

The likelihood of any prejudice arising was also unclear. FairWay had not identified prospective competitors, and was the only organisation to provide ACC with review services. Given that the manual was substantially similar to the earlier version available online, withholding was not necessary in order to avoid prejudice or disadvantage to FairWay's commercial activities. The information had largely been made available, although not by the agency itself.

The Ombudsman concluded that section 9(2)(i) did not apply.

Public interest

Given the Ombudsman's conclusion that sections 9(2)(b)(i) and 9(2)(i) of the OIA did not apply, it was not necessary to consider the countervailing public interest in disclosure. However, the Ombudsman noted the public interest in claimants having access to information about the way Fairway conducts reviews. This was supported by section 22 of the OIA, which provides a right of access to internal rules and guidelines used to make decisions that affect people personally.

The Ombudsman concluded there was no good reason to withhold the manual. Fairway accepted the Ombudsman's opinion and released the manual.

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