

Request for independent test results of product

Legislation	Official information Act 1982, s 9(2)(ba)(i)
Agency	Commerce Commission
Ombudsman	Ron Paterson
Case number(s)	347590
Date	19 May 2015

Section 9(2)(ba)(i) OIA applied—implied obligation of confidence—information could have been compelled under an enactment—release would be likely to prejudice timely supply of information of the quality and standard necessary for the Commerce Commission to carry out its investigative functions—it is in the public interest for the Commission to be able to perform its statutory functions effectively and efficiently—no public interest override as the Commission had provided information about the reasons for its decision to take no further action—good reason to withhold

Background

The Commerce Commission (the Commission) received a complaint that a company had made false or misleading claims about the testing and properties of its product. The Commission requested copies of independent test results from the company. The company provided the requested test results on the basis that they were confidential and commercially sensitive.

The Commission concluded that the company's claims were not misleading, and discontinued its investigation. The person who complained to the Commission asked for a copy of the test results. The Commission withheld them under sections 9(2)(ba)(i) and 9(2)(b)(i) and (ii) of the Official Information Act (OIA), and the requester complained to the Ombudsman.

Investigation

The Ombudsman requested a copy of the information at issue and an explanation of the reasons for withholding.

The Commerce Commission provided comments from the company on the likely commercial prejudice from release. The Commission explained that its concerns related to the confidential nature of the information at issue, and the risk that disclosure would prejudice the voluntary supply of information by businesses under investigation in future.

The Ombudsman decided the confidentiality withholding ground was most relevant in this case.

Confidentiality

Section 9(2)(ba)(i) of the OIA applies when releasing information *‘which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment’* 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 was satisfied that the Commission came to hold the information at issue subject to an obligation of confidence. He was also satisfied that, although it did not do so, the Commission could have compelled the company to provide the information at issue under section 47G of the Fair Trading Act 1986 (FTA). That section enables the Commission to require information by written notice, if that is necessary or desirable for the purpose of carrying out the Commission’s functions.

The Commission asked the company to provide the information at issue for a specified purpose, namely its investigation of a complaint made against the company under the FTA. The company voluntarily provided the information requested, subject to an explicit statement that it desired the information at issue to remain confidential, and an implicit understanding that the information collected would only be used for the specified purpose. It was also implicit in the correspondence that, but for the Commission owing an obligation of confidence towards it, the company would not have provided the information at issue voluntarily and the Commission would have been required to compel its supply under section 47G of the FTA.

The Ombudsman found the information at issue was of a confidential nature. It contained commercially sensitive test results which were not known to the world at large, and not accessible by any other means. There was nothing to indicate that the confidentiality of the information had been eroded by other means such as prior publication.

The Ombudsman accepted that there was a real risk that, if the Commission released the information at issue, parties being investigated for breaches of the FTA in future would be less forthcoming with information they regard as commercially sensitive, or choose not to cooperate fully with the Commission’s investigation for fear of subsequent disclosure.

The Ombudsman acknowledged that the FTA grants the Commission statutory powers to compel the provision of information. Nevertheless, he was satisfied that the timely supply of information of the quality and standard necessary for the Commission to carry out its investigative functions would likely be prejudiced by the disclosure of the information at issue.

In this case, the company provided the Commission with not only the information that it had requested, but also with helpful contextual information. This included an explanation of the nature and meaning of certain technical data, as well as advice on the industry in which the company operated. This sort of frank assistance during the information-gathering stage of an investigation is particularly important for a regulatory and enforcement body like the Commerce Commission. The Commission has such a broad jurisdiction that it cannot realistically be expected to have an in-depth working knowledge of all the products and processes potentially subject to an FTA investigation.

A loss of trust in the Commission's ability to keep information in confidence would in turn inhibit the Commission's ability to perform its statutory functions effectively and efficiently, by discouraging parties who might otherwise provide the Commission with more fulsome information or other means of assistance.

The Ombudsman concluded that section 9(2)(ba)(i) applied to the information at issue.

Public interest

Section 9(2)(ba)(i) is subject to a public interest test. This means the need to withhold must be balanced against the countervailing public interest in release. If the countervailing public interest weighs more heavily, the information must be released. If not, it can be withheld.

The Ombudsman acknowledged a public interest in ensuring the Commerce Commission performs its functions under the FTA satisfactorily, but he did not think that interest outweighed the need to withhold the information at issue. The Commerce Commission had provided information about the reasons for its decision to take no further action, which was sufficient to address the public interest in accountability.

Outcome

The Ombudsman formed the opinion that section 9(2)(ba)(i) of the OIA provided good reason to withhold the information at issue.

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.