

Request for information about Police investigation into complaint against Minister

Legislation	Official Information Act 1982, ss 6(c), 9(2)(a), 9(2)(ba), 9(1)
Agency	New Zealand Police
Ombudsman	David McGee
Case number(s)	291898
Date	12 November 2010

Section 6(c) OIA did not apply—no prejudice to the maintenance of the law in circumstances where the investigation had concluded and no charges had been laid—s 9(2)(a) applied—high privacy interest given the nature of the allegations and the fact that no charges had been laid—s 9(2)(ba)(i) and (ii) applied to witness statements—implied obligation of confidence—release would be likely to prejudice the future supply of information from witnesses—it is in the public interest for Police to continue to receive information that enables them to investigate potential criminal offending—release would be likely to damage the public interest by undermining public trust in the Police, and their ability to enforce the law—public interest in accountability required release of summary

Background

The New Zealand Police received a complaint against a Government Minister. After investigating, the Police determined that there was no basis for proceeding with any criminal charge against the (then former) Minister.

A requester sought information about the Police investigation. The Police refused the request under sections 6(c) and 9(2)(a) of the Official Information Act (OIA). 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. He also consulted the Privacy Commissioner, and provided the former Minister with an opportunity to comment before forming his opinion.

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 Ombudsman noted that the application of section 6(c) after an investigation has concluded *'is generally restricted to information on investigation files that would reveal investigative techniques or the identity of informants'*. As there were no such concerns in the present case, the Ombudsman concluded that section 6(c) did not apply.

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.

There were privacy interests in respect of both the complainant and the suspect in this case. The privacy interests were heightened given the nature of the allegations, and the fact that no charges had been laid.

The Privacy Commissioner commented that there were *'very high privacy interests'* which needed protecting.

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

Confidentiality

Section 9(2)(ba) of the OIA provides good reason for withholding (subject to a public interest test) when releasing information that is *'subject to an obligation of confidence'* would be likely to:

- (i) 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 (9(2)(ba)(i));
or
- (ii) otherwise damage the public interest (9(2)(ba)(ii)).

The Ombudsman noted that, while each official information request must be considered on its merits, successive Ombudsmen have accepted the application of this section to information supplied to the Police by witnesses.¹

¹ See Ombudsman's [Annual Report 2009/2010](#) at 31-32.

Such information is subject to an implied obligation of confidence: *'It is a fundamental principle, recognised by the law, that a high degree of confidentiality attaches to information provided by a person interviewed by the Police'*. As one Judge has said:²

Members of the public who volunteer information to the police are entitled to expect that it will be used only for the purposes of the investigation and subsequent criminal proceedings. Their expectations should be respected.

The Ombudsman considered that release would prejudice the interests protected in both limbs of section 9(2)(ba).

In terms of section 9(2)(ba)(i), many potential witnesses would be deterred from making statements to the Police if they had reason to believe that their statements would be made freely available upon request. Although witnesses will be aware that their comments might come to light if a criminal trial proceeds, that does not mean that they expect their statements to be made available on request, particularly where a defended hearing does not take place. It is clearly in the public interest for Police to continue to receive information that enables them to investigate potential criminal offending.

In terms of section 9(2)(ba)(ii), the Ombudsman commented that *'the strength of [the] obligation [of confidence] is such that breach of it without good reason is likely to damage the public interest, which I take to be the instilling of confidence in the relationship between the Police and the citizenry'*. Release of the statements would be likely to damage the public interest by undermining public trust and confidence in the Police and, consequently, their ability to enforce the law.

The Ombudsman concluded that sections 9(2)(ba)(i) and (ii) applied to the witness statements.

Public interest

Sections 9(2)(a) and 9(2)(ba) are 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 stated that *'the Police hold an important position in society and accordingly there is a high public interest in the Police being accountable for their investigations and decision making'*.

The Ombudsman considered the information that had been published by the Police about the investigation. This was, in essence, that after *'careful and thorough investigation'* Police had concluded that there was no basis for pursuing a criminal charge against the former Minister.

The Ombudsman did not think this was sufficient to address the public interest in *'the public being assured that the Police had properly carried out their investigative duties in the circumstances of this case'*.

² *Taylor v Serious Fraud Office* [1997] 4 All ER 887 at 904, per Millett LJ.

He did not think the public interest required *'disclosure of the detailed information on the investigation file'*, but it did require release of an expanded summary of the Police's decision making in relation to this investigation. Such transparency was critical to maintaining public confidence in the Police.

The Privacy Commissioner agreed that a more comprehensive public summary would be beneficial to the broad public interest in the Police action, and that a further summary statement was *'an appropriate way of meeting the public interest'*.

Outcome

The Ombudsman formed the opinion that although sections 9(2)(a) and 9(2)(ba)(i) and (ii) of the OIA provided good reason to withhold the detailed content of the investigation file, the public interest required disclosure of summary information.

The Ombudsman recommended disclosure of a summary which included a reference to the nature of the allegations, and the Police reasoning in applying the Crown Law Office Prosecution Guidelines. The Police complied with the Ombudsman's recommendation.

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