

Request for information about severance payment

Legislation	Official Information Act 1982, ss 9(2)(a), 9(2)(ba)(ii), 9(1)
Agency	Ministry for the Environment
Ombudsman	Beverley A Wakem
Case number(s)	176475
Date	25 May 2008

Section 9(2)(a) OIA applied—withholding necessary to protect strong privacy interests—significant impact of further media scrutiny on personal privacy—s 9(2)(ba)(ii) applied—settlement agreement contained express obligation of confidence—release would be likely to damage the public interest by making it more difficult to settle complex employment disputes—no public interest override—good reason to withhold

Background

A third-tier manager resigned from the Ministry for the Environment pursuant to a negotiated settlement that had been reached in respect of a dispute about a potential conflict of interest.

This became a matter of media interest, and a journalist asked the Ministry whether the manager received any sort of pay-out, and sought the amount of the pay-out and conditions attached to it.

The Ministry withheld this information in reliance on sections 9(2)(a) and 9(2)(ba) of the Official Information Act (OIA), and the requester complained to the Ombudsman.

Investigation

The Chief Ombudsman reviewed the information at issue, and consulted both the Privacy Commissioner and the former manager, who objected to release.

Related inquiries

At the same time, two other inquiries were underway into the appointment of the manager, one by the State Services Commissioner, and one by an independent inquirer appointed by the Commissioner, DK Hunn. Both inquiry reports were released.

Mr Hunn's report revealed that the manager did receive a severance payment as part of a confidential settlement agreement. It also disclosed one of the conditions attached to that agreement. Mr Hunn did not disclose the amount of the payment, but made the following observations (emphasis added):

*It is necessary at this point to interpolate a paragraph on the settlement agreement. As I have noted already, the document continues to be subject to a confidentiality clause which [the manager], on legal advice, prefers to maintain. When the CE told the Commissioner there had been 'an agreed settlement', the latter had understood this had been acceptable to both parties which provoked the question 'Has there been any payment?' The CE replied there had been a modest payment in lieu of notice. For my own part, **I would rather describe it as not unreasonable, based on comparisons with other settlements in circumstances of involuntary departure.** The terms went somewhat beyond payment in lieu of notice and constituted what both parties regarded as an equitable interpretation of the employment agreement. The CE considered that the settlement terms should reflect the fact that it was not [the manager] who had created the situation and the Ministry should be fair to her. In agreeing to the confidentiality clause, the Ministry acted on legal advice and would appear to have accorded a higher priority to [the manager's] right to privacy than to the guidance of the Auditor General on this subject, that the public interest generally requires transparency for such settlements.*

Therefore, it had since been publicly disclosed that a severance payment had been made that was, in Mr Hunn's view, '*...not unreasonable, based on comparisons with other settlements in circumstances of involuntary departure*'. This left at issue the actual amount of the severance payment and any other conditions attached to it.

Privacy

Section 9(2)(a) applies where withholding is '*necessary to protect the privacy of natural persons*'.

The Privacy Commissioner described information about a person's financial affairs and employment as '*highly sensitive*', and the manager's privacy interest in the information at issue as '*strong*'. The privacy interest was strengthened given the existence of a confidential settlement agreement, and the manager's objection to disclosure.

The Chief Ombudsman agreed with the Privacy Commissioner that the privacy interest requiring protection in this case was '*strong*'. The manager had been exposed to the glare of media publicity for a significant period of time. Release of the information at issue would re-

expose the manager to further media scrutiny, which would have a significant impact on her personal privacy. The Chief Ombudsman noted that as a third-tier manager, she had a higher expectation of privacy than someone higher up in the organisational hierarchy.

The Chief Ombudsman concluded that section 9(2)(a) of the OIA applied.

Confidentiality

Section 9(2)(ba)(ii) of the OIA applies when releasing information that is ‘*subject to an obligation of confidence*’ would be likely to ‘*damage the public interest*’.

The Ministry submitted that a confidentiality clause contained in the settlement agreement created an obligation of confidence between the parties, and release would be likely to discourage the use of mediation to achieve out of court settlements in such matters. It was also concerned that the Ministry might be liable for breach of confidence.

The Chief Ombudsman noted that the existence of a confidentiality clause does not of itself provide a good reason to withhold information. Otherwise, it would be open to a public sector employer to impose on itself an obligation of confidence whenever it appeared expedient.

This issue was addressed in *Wyatt Co (NZ) Ltd v Queenstown Lakes District Council (Wyatt)*:¹

As that paragraph [of the contract] is phrased it is that it is outside the legal powers of the Chief Ombudsman to fulfil his statutory duties if individuals enter into a contract using language that renders the [Local Government Official Information and Meetings] Act nugatory. The proposition has only to be stated in that way to demonstrate its falseness. There cannot be allowed to develop in this country a kind of commercial Alsatia beyond the reach of a statute. Confidentiality is not an absolute concept admitting of no exceptions.....It is an implied term of any contract between individuals that the promises of their contract will be subject to statutory obligations. At all times the applicant would or should have been aware of the provisions of the Act and in particular s 7, which effectively excludes contracts on confidentiality preventing release of information.

A promise of confidentiality does not oust the OIA. Nor does section 149 of the Employment Relations Act 1990, which governs settlement agreements, have that effect.

In relation to the Ministry’s concern about potential liability for breach of confidence, the Chief Ombudsman noted that section 48 of the OIA provides protection against civil or criminal liability for the release of official information in good faith in response to an OIA request.

The Chief Ombudsman accepted that the confidentiality clause created an obligation of confidence in respect of the information at issue.

In previous cases relating to the settlement of employment relationship problems, Ombudsmen have found that:

¹ [1991] 2 NZLR at 191.

- it is in the public interest for public sector agencies to be able to reach settlement in appropriate cases;
- if agreeing to hold certain information in confidence is necessary to achieve such settlement, there is a public interest in public sector agencies being able to honour any promise of confidentiality given in such circumstances; and
- if disclosure of information would prejudice the ability of public sector agencies to maintain promises of confidentiality and thereby achieve settlement in appropriate cases, disclosure would be likely *'damage the public interest'*.

The Chief Ombudsman agreed that *'there is a public interest in a public sector agency being able to maintain promises of confidentiality in appropriate cases, where a confidentiality agreement is a necessary component of achieving settlement of the dispute'*. She accepted that confidentiality was a necessary component in the settlement of this dispute, and that, had there been no provision for confidentiality, the manager might well have made a different decision, or chosen a different path to resolve the employment relationship problem.

The Chief Ombudsman found that release of the information at issue would be likely to damage the public interest by making it more difficult for public sector agencies like the Ministry to settle complex employment disputes.

Public interest

Sections 9(2)(a) and 9(2)(ba)(ii) 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 Chief Ombudsman identified the following public interest considerations favouring release of information about the severance package:

- To promote accountability and transparency for the expenditure of public funds. As noted in *Wyatt*, *'[i]t is fundamental to the [OIA] that the public are to be given worthwhile information about how the public's money and affairs are being used and conducted, subject only to the statutory restraints and exceptions'*.
- To promote accountability and transparency of the Ministry in relation to the events surrounding the manager's appointment and her subsequent resignation which resulted in a severance payment.

She also listed relevant factors in assessing the strength of the public interest in favour of disclosing information about severance packages:

- the seniority of the employee's position within the organisation;
- whether the payment included an amount beyond the employee's contractual entitlements for payment upon termination of employment;

- whether there is sufficient justification for a payment over and above contractual entitlements;
- the level of expenditure involved, and the proportion of annual salary it represents;
- whether the severance package is higher than the average amount paid in similar circumstances;
- whether a promise of confidentiality was made, and if so, was this for the benefit of the employer or the employee; and
- whether the public interest in accountability and transparency has been substantially met by the public release of other information or through the operation of other accountability processes.

In this case:

- two independent reviews of the Ministry's handling of the events in question had been published;
- the settlement amount was confirmed by one independent reviewer to be '*...not unreasonable, based on comparisons with other settlements in circumstances of involuntary departure*'; and
- the employee was a third-tier manager, which is an important position, but not at the highest levels of the Ministry's organisational hierarchy.

The Chief Ombudsman considered that the need to withhold on privacy grounds was particularly acute in this case, and not outweighed by the public interest in disclosure. The public interest in accountability for the Ministry's handling of the matter was substantially met by the two independent reviews. The public interest in accountability for expenditure of public funds was substantially met by the information disclosed by Mr Hunn, which '*gave sufficient indication to the public that the expenditure of public funds was within acceptable limits on this occasion*'.

The Chief Ombudsman considered whether the public interest could be met by a summary describing the components of the severance payment, but not the amount of that payment. However, she concluded that the detrimental impact on the manager's privacy would be disproportionate to the public interest that would be served by the release of this limited information.

Outcome

The Chief Ombudsman formed the opinion that section 9(2)(a) of the OIA provided good reason to withhold information about the severance payment. The public interest in disclosure of that information did not outweigh the need to withhold in order to protect the manager's privacy. It was not necessary for the Chief Ombudsman to form a view on whether the public interest would have outweighed the need to withhold on confidentiality grounds.

The Ombudsmen addressed the issue of severance payments in their [Annual Report 2008/2009](#):

... confidentiality and privacy are important interests to be considered when requests for [information about severance payments] are received. However, an agency's promise to keep such information confidential and/or private cannot override the provisions of the OIA. The agency must therefore consider whether there is any countervailing public interest in the circumstances of a particular case strong enough to outweigh the reasons for withholding.

In respect of severance payments, disclosure of the fact that a severance payment has been made to a public sector employee is clearly in the public interest. Therefore, this information should, as a general rule, always be made available without undue delay. However, disclosure of the amount of such a payment and any conditions of a settlement agreement upon termination of employment will depend on the circumstances of a case.

When making such a decision in response to a request, agencies should note that there is a strong public interest in transparency around severance payments to ensure accountability for the expenditure of public funds. If the information relates to a senior employee and the severance or exit package is sizeable, it is unrealistic in the current public sector environment to expect that such information should remain private and confidential.

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