

Request for information about volunteer rural constabulary programme

Legislation	Official Information Act 1982, ss 9(2)(f)(iv), 9(2)(g)(i)
Agency	Minister of Police
Ombudsman	Peter Boshier
Case number(s)	496605
Date	16 October 2020

Section 9(2)(f)(iv) OIA applied to briefing from New Zealand Police to Minister—negotiations between coalition partners were still required, and disclosure would have prejudiced the orderly and effective conduct of the Government’s decision making process—s 9(2)(g)(i) applied to associated political consultation emails—release would prejudice the future free and frank expression of opinions necessary for the effective conduct of the political consultation process and coalition relationships

Background

A requester sought information about a ‘*volunteer rural constabulary programme*’. The Minister of Police refused the request under section 9(2)(f)(iv) of the Official Information Act 1982 (OIA), and the requester complained to the Ombudsman.

Investigation

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

The information at issue was a briefing for the Minister prepared by the New Zealand Police, entitled ‘*Exploring the Use of Volunteers to Support Rural Policing*’, and a series of emails discussing a potential meeting on the briefing.

The purpose of the briefing was to provide advice to the Minister on an issue in the Coalition Agreement between the New Zealand Labour Party and New Zealand First to ‘*investigate a volunteer rural constabulary programme*’.

In the course of the investigation, the Minister acknowledged that the sensitivity of the information had diminished over time, and agreed to release most of the briefing. The Chief Ombudsman proceeded to form an opinion on whether the Minister was entitled to withhold the briefing in the first place.

Confidential advice to government

Section 9(2)(f) of the OIA is directed at the need to withhold information to *'maintain constitutional conventions'*. Although the OIA does not specify what these particular conventions are, it lists certain interests and relationships that the conventions are intended to protect. One of these—found in section 9(2)(f)(iv)—is *'the confidentiality of advice tendered by Ministers of the Crown and officials'*.

The purpose of section 9(2)(f)(iv) is to enable the orderly and effective conduct of government decision making processes. If the release of advice that is still under consideration would prejudice the orderly and effective conduct of executive government decision making processes, then its withholding will be necessary in order to *'maintain'* the constitutional convention.

The Chief Ombudsman considered that Police staff can be *'officials'* for the purpose of section 9(2)(f)(iv). Officials is a broad term that includes members of public service and those who have a relationship with their Ministers that are akin to that. The key issue in a particular case is whether the relevant Police staff are operating to provide advice in relation to executive government decision making. In this context, although the Police are required to act independently of Ministers in respect of law enforcement activities, section 16(1) of the Policing Act 2008 recognises that the Commissioner of Police is also responsible to the Minister for *'tendering advice'*.

In this case, the Police tendered advice to inform the Minister's consideration of a proposal contained in the Coalition Agreement. It set out the Police position and provided three options for further research that the Police could undertake once discussions had taken place with New Zealand First. The Minister required time to review the paper, and conduct discussions with New Zealand First before going back to Police with directions on which option to develop further. The Minister was still involved in cross party discussions at the time the refusal decision was made.

The Chief Ombudsman accepted that premature disclosure of the briefing would have prejudiced the orderly and effective conduct of the Government's decision making process, by revealing matters that were still under negotiation between the coalition partners.

He concluded that section 9(2)(f)(iv) applied to the briefing.

Free and frank opinions

The Chief Ombudsman then considered the application of section 9(2)(g)(i) of the OIA to emails connected with the briefing. That section applies when withholding is necessary to ‘*maintain the effective conduct of public affairs*’ through the free and frank expression of opinions.

The emails comprised discussions between staff within the Minister’s office, explaining details of the political consultation process applicable to this decision making process.

The Chief Ombudsman recognised a strong interest in maintaining the Government’s ability to undertake effective and efficient political consultation with political parties, and to receive free and frank opinions during consultation.

The relevant Cabinet Circular recognised that:¹

Timely consultation between portfolio Ministers and between parties is essential to the successful operation of the Cabinet decision-making system and the coalition and confidence and supply agreements.

The Chief Ombudsman considered that releasing this type of information would undermine the effective conduct of the political consultation process, along with the working relationships between political parties. This would make it more difficult for views to be shared and issues to be properly debated.

He concluded that section 9(2)(g)(i) applied to the emails.

Public interest

Sections 9(2)(f)(iv) and 9(2)(g)(i) 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 requester argued that the public should be able to participate in the debate with full knowledge of the information before a decision was set in stone, and that the public should be aware of how seriously the senior coalition partner was taking the proposition.

The Chief Ombudsman agreed that there was a public interest in people being able to participate in the development of policies on law and order, but considered that the discussions between coalition partners needed to have occurred first. The advice at issue was of a preliminary nature and at an early stage of the policy development process. The Government’s policy decision was a long way from being ‘*set in stone*’.

The Chief Ombudsman was not persuaded that there was a public interest in people being able to participate in the policy debate or negotiation between coalition partners while that debate

¹ CO (17) 10: Labour-New Zealand First Coalition, with Confidence and Supply from the Green Party: Consultation and Operating Arrangements, available at: <https://dpmc.govt.nz/publications/co-17-10-labour-new-zealand-first-coalition-confidence-and-supply-green-party>.

or negotiation was underway. As far as being able to understand the dynamics of the coalition relationship on a policy issue, the Chief Ombudsman concluded that would be met by later publication of the policy material as happened in this case.

The Chief Ombudsman concluded that the public interest in release of the briefing and emails did not outweigh the need to withhold them.

Outcome

The Chief Ombudsman formed the opinion that the Minister was entitled to withhold the briefing under section 9(2)(f)(iv) of the OIA, and the associated emails under section 9(2)(g)(i) of that Act.

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.