

Request by shareholder of a company to the Securities Commission for a copy of a report of an investigation carried out on the company

Legislation	Official Information Act 1982, ss 6(c) and 9(2)(ba)(i)
Agency	Securities Commission
Ombudsman	Sir Brian Elwood
Case number(s)	W41711
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Request by a shareholder of a company to the Securities Commission for copy of a report of an investigation carried out on the company—information withheld to protect the maintenance of the law and obligations of confidence—test for withholding under s 6(c) not met—s 9(2)(ba)(i) provided good reason to withhold some information

Section 6(c)

The Commission refused to release the report under section 6(c) of the OIA on the grounds that while no prosecution or follow-up action was contemplated, it was possible that new evidence could emerge which would lead to a reconsideration of the matter. The Commission said that disclosure of any part of the report could hamper and prejudice any further investigation that it may initiate in the future and could also prejudice any affected person's right to a fair trial if the material should become the subject of later proceedings.

For section 6(c) to apply it was necessary to establish that there was a serious or real and substantial risk to the maintenance of the law which would arise if the report were released. It was apparent that if at some future time the Commission received additional information which caused it to consider reopening the matter, any such action would be dependent on the additional information the Commission may receive. This would appear to have little to do with the issue of whether it was 'necessary' to withhold the information contained in the requested report to avoid prejudice to the maintenance of the law or the right to a fair trial.

The view was formed that the test for withholding the report under section 6(c) was not met. The class approach to information advanced by the Commission was also rejected as it has no application to the availability of official information under the OIA. In *Television New Zealand Ltd v Ombudsman* [1992] 1 NZLR 106 at 120, in which a similar argument was raised, the High Court rejected it, saying ‘*in measuring the consequences alleged, some very convincing evidence would need to be presented and in the context of the actual case*’.

Section 9(2)(ba)(i)

For section 9(2)(ba)(i) of the OIA to apply, it is first necessary that the information either be subject to an obligation of confidence or its supply be able to be compelled under an enactment. In this case persons could be compelled to provide information under section 67 of the Securities Act 1978. The next step was to assess whether disclosure of the information would be likely to prejudice the supply of similar information or information from the same source and whether it is in the public interest that such information should continue to be supplied.

Whilst recognising its powers to compel the provision of information, the Commission commented that the quality of information received is most important to the conduct of a commercial inquiry. The Commission said its ability to obtain frank, accurate and complete information from a company, or from persons associated with it, would be significantly prejudiced were such persons to have reason to believe information they have provided might be released. This would in turn prejudice the Commission’s ability to satisfactorily discharge its statutory functions. The Commission said that it was in the public interest that good quality information should continue to be supplied and the existence of an open and orderly market for securities in New Zealand requires an unfettered ability on the part of the Commission and the Registrar of Companies to investigate and inquire into suspected market irregularities. The continued flow of good quality information to the Commission for this purpose is clearly in the public interest.

An analysis of the information provided revealed that some of the information in the report was already publicly available from the Companies Office. The submission that all the information in the report was protected by section 9(2)(ba)(i) was therefore not accepted.

With regard to the remainder of the information, the view was that the Commission required an informal and timely supply of quality information to enable it to perform its statutory functions. Where information was accepted with an obligation of confidence that it would not be released and the providers of that information had subsequently advised that they did not want it released, it was likely that the future supply of similar information, or information from the same source, would be prejudiced if the information were then to be disclosed to third parties. Further, there is clearly a public interest in terms of section 9(2)(ba)(i) in the continued supply of such information to the greatest extent possible for the purpose of enabling an organisation such as the Commission to fully and effectively carry out its statutory investigative functions.

No public interest considerations in the release of the information in terms of section 9(1) of the OIA were identified as being sufficient to outweigh the reasons for withholding the

information. The Commission accordingly released all information in the report which was not capable of being withheld under section 9(2)(ba)(i).

Comment

During the course of the investigation, the Commission expressed concern at the costs of dealing with the request under the OIA. However, it is part of the Commission's functions to deal with requests for information and this will have budgetary effects, as for all organisations subject to the OIA. In the Report of the State-Owned Enterprises (Ombudsmen and Official Information Acts) Committee in 1990 on the review of those Acts on the operations of State Enterprises, the Committee noted with approval the comments of the Controller and Auditor-General who in his submission had stated that to his knowledge:

... being subject to the two Acts has not caused any of the State Enterprises demonstrable problems or significant expense. On the contrary, we have the impression that in some cases as much effort is applied in delaying compliance, or attempting to justify withholding information, as would be required to respond in the spirit of the Acts.

The Commission also asked whether any purpose would be served by the making available of information pursuant to the OIA in view of its statutory mandate to publish information where that appears to be in the public interest. The Commission was referred to *Television New Zealand Ltd v Ombudsman* [1992] 1 NZLR 106 where the Court made the following observations:

As pointed out requests for information do not have to be accompanied by reasons why the information is required. That is fundamental to the spirit and purpose of this Act. If it was trammelled by requirements to justify a request for information, much of the spirit of the Act would be lost. Dominating the Official Information Act is its purposes and principles as set out in sections 4 and 5 [the Purposes and Principle of Availability provisions].

There is no question of establishing a need for the information. Information by its very nature needs to be available if the purposes of the Act are to be achieved. That the onus is cast on the holder of information to show good reason why it should be withheld, runs contrary to any question as to its ultimate relevance or utility, as Jeffries J said at pp 190-191 in Wyatt which makes the above point more effectively.

It was considered during the investigation whether a summary of part of the report would satisfy the request. However, such a summary did not appear to meet the legal entitlements of a requester under the Act. As the requester sought a copy of the report, then subject to sections 16 and 17 of the OIA and the reasons for withholding information, the requester should be provided with a copy of it. Section 16 requires information to be provided in the manner preferred by a requester unless to do so would impair efficient administration, be contrary to a legal duty, or would prejudice one of the withholding grounds. Section 16 is itself subject to section 17 which permits deletions and alterations to be made to a copy of a document to protect information which may properly be withheld. Accordingly, a summary would not meet a requester's right to be provided with a (suitably amended) copy of a

document containing the requested information if that was what was preferred, unless this cannot reasonably be done.

In the present case there appeared to be no difficulty in copying the report and deleting those portions of it containing information which was properly withholdable under section 9(2)(ba)(i). An edited copy of the report was released.

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