

Request for Crown's projected figures, budgetary consequences and methodology relating to Treaty of Waitangi negotiations

Legislation	Official Information Act 1982, s 9(2)(j)
Agency	Office of Treaty Settlements
Ombudsman	Mel Smith
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Crown's position in negotiations would be prejudiced by release—public interest in OTS's transparency and accountability for negotiating with public money met by information already in public arena and made available to claimants during negotiation process

A journalist wrote to the Office of Treaty Settlements (OTS) requesting any forecasts prepared by OTS over the past year involving treaty claim settlement quantum.

OTS responded, advising that forecasts involving settlement quantum are closely related to the negotiations of individual Treaty claims and need to remain confidential to the process. Accordingly, OTS decided to withhold the information under the OIA.

In responding to the complaint, OTS explained that it did not *'forecast'* amounts for future settlements. Therefore, strictly speaking, the information did not exist as envisaged by the complainant. However, OTS advised that it did hold information in the form of figures and projected financial and budgetary consequences of different settlement quantum. This was contained in documents providing advice to the Minister of Treaty Negotiations. OTS forwarded this information to the Ombudsman on the basis that it could fall within the scope of the request.

The Ombudsman noted that not only did this information discuss different settlement quantum but the documents also detailed the methodology employed to arrive at those figures.

During discussions with OTS, it became clear to the Ombudsman that its primary concern with release of this information was that it considered disclosure would prejudice its ability to carry on its negotiation function with claimants. In this context, it appeared the provisions of section 9(2)(j) of the OIA would be the most relevant.

In assessing whether this section did indeed provide good reason for withholding the information, it was first necessary to identify the particular negotiations at issue. This was clear. OTS is charged with negotiating Deeds of Settlement with claimant groups for the settlement of Treaty of Waitangi claims. A key part of the negotiation process was reaching agreement on the settlement quantum or dollar value of the financial component of the redress. OTS explained that quantum offers are made to claimant groups in negotiation only, after discussions have taken place between the parties and after the scope and nature of the claims have been investigated in detail. It was these discussions or negotiations which OTS considered were at risk by disclosure of the information.

Next, the Ombudsman proceeded to identify the prejudice or disadvantage that would be likely to result from disclosure of the information. OTS was concerned that disclosure would call into question settlement amounts that had already been reached where the consequences of a higher payout had been considered. It would also give future parties a bargaining advantage by falsely creating the impression that a *'top dollar'* figure existed. Further, disclosure of the methodology used in arriving at such figures would also reveal OTS's negotiating approach in current and future discussions, which would impact adversely on the Crown's bargaining position as well as on the ability of OTS to effectively carry out its role in what was already a complex negotiation environment.

The Ombudsman then considered whether there was a particular public interest in making the information available. The complainant submitted that it was in the public interest for claimants and the general public to know, in detail, how the Crown evaluated the financial value of a settlement in order to be assured that the approach adopted was both fair and balanced. The Ombudsman agreed that there was a public interest favouring release of such information, particularly when it was public money that was the subject of the negotiations.

It was therefore necessary for the Ombudsman to assess where the balance lay between the public interest in ensuring that the OTS was able to approach settlement negotiations in a fair and just manner, and the public interest in ensuring that the result secured by the negotiations was one which would benefit all parties.

The Ombudsman also reviewed the information regarding the treaty negotiation process that was already publicly available. He noted that a degree of transparency and accountability already existed by way of the publication *'Healing the Past, Building the Future'*, which described how the Crown arrived at quantum offers by outlining the broad factors that were taken into account by the Crown together with relevant weightings. Further, with respect to each particular claimant group's negotiations, the Ombudsman noted that once they have been entered into, a more detailed explanation is provided to the parties to the proceedings.

It was the Ombudsman's view that release of the information would inevitably prejudice the Crown's bargaining position and inhibit OTS's ability to effectively carry out its role in what was

already a complex negotiation environment. The Ombudsman was also satisfied that the release of any details regarding the methodology employed by the OTS would be highly prejudicial to the negotiation process.

Further, he considered that the public interest in this case had been met by the information already available in the public arena. Beyond that, the Ombudsman was of the view that no public interest considerations favouring release existed which outweighed the need to withhold the information at issue. Accordingly, OTS was entitled to rely upon section 9(2)(j) to withhold the information from the complainant.

While the complainant accepted the Ombudsman's view that section 9(2)(j) applied to some of the information at issue, she disputed his view that it also applied to the details of the methodology used by OTS in reaching settlement with various claimant groups. After considering her further submissions, the Ombudsman remained of the view that release of such details would be prejudicial to the negotiation process. The Ombudsman commented that, in the course of any commercial or financial negotiation, the relevant parties would have one or several negotiation strategies which they would employ with a view to obtaining a favourable outcome. The strategies and figures contained in the information were clearly commercially sensitive as they identified how the Crown, as a party to the negotiations, intended to proceed. Private sector companies and individuals are not required to reveal these strategies, as to do so would jeopardise their commercial position. It was the Ombudsman's view that the Crown was also entitled to guard its sensitive information including, in this instance, its negotiation strategy for arriving at settlement forecasts.

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