

Request for Treasury costings of interest-free student loans policy

Legislation	Official Information Act, ss 9(2)(f)(iv), 9(2)(g)(i), 9(1)
Requester	Office of the Leader of the Opposition
Agency	Minister of Finance
Ombudsman	John Belgrave
Case number(s)	173160 (W54720)
Date	October 2005

Summary

The Office of the Leader of the Opposition requested information about the Labour Party's interest-free student loans policy in the run up to the 2005 general election. The Minister of Finance withheld some information, including Treasury costings of the proposed policy under section 9(2)(f)(iv) of the Official Information Act (OIA).

The Chief Ombudsman formed the opinion that there was no good reason under sections 9(f)(iv) or (g)(i) of the OIA to withhold the Treasury costings. He was not persuaded that disclosure would prejudice the decision making process or inhibit the Minister from seeking early '*order of magnitude*' figures from Treasury in the future.

There was a strong public interest in disclosure of the information. Work done by Treasury to cost policy proposals should be in the public arena in a way that enables voters to form their own opinions during a general election. The Chief Ombudsman recommended that the information be released.

Background

The Minister of Finance asked Treasury, as part of ongoing work on tertiary education expenditure, to estimate the costs of a range of interest-free student loan scenarios. Treasury prepared a paper for the Minister, dated 22 June 2005, that analysed the costs of an interest-free student loan scheme based on the assumption that 95 per cent of full-time students would draw down their full student loan entitlement by 2008–2009. The Minister did not agree with Treasury's assumptions about the rate of draw-down and requested further scenarios

based on an assumption of 70 per cent draw-down for full-time students by 2008–2009. Treasury provided these alternative figures to the Minister in a paper dated 27 June 2005.

On 26 July 2005, as part of the general election campaign, the Labour Party announced a policy commitment to abolish interest on student loans.

The general election was scheduled for 17 September 2005. On 6 September 2005, the Chief Ombudsman received a complaint from the Office of the Leader of the Opposition about a decision made by the Minister of Finance to withhold information relating to the student loans policy commitment.

The Minister had disclosed some information about the proposal. In particular, he released the costs estimated by Treasury up to 2008–2009 using the two different draw-down assumptions (the higher scenario reaching \$390 million and the lower scenario reaching \$302 million in total). He explained that he had not agreed with the draw-down assumptions in the first scenario and had requested a second scenario with different draw-down assumptions. He also provided background information on the cost of the policy and the assumptions behind it. However, he explained that he was withholding all other information about the policy, including the 22 and 27 June papers, under section 9(2)(f)(iv) of the OIA.

The requester asked that the Chief Ombudsman investigate urgently the Minister's decision to withhold the information '*...in order to ensure that the public has access to any relevant official information prior to the general election*'. The requester also observed that:

Labour's student loan policy has become a key issue in the election campaign. More specifically, the projected costs and effect of this policy have become an issue of widespread public interest and debate....

Given the bearing this issue may well have on voting decisions and the make up of the future Parliament, I believe it is imperative that all information produced by public agencies in relation to this policy be made available for public scrutiny....

Investigation

The Chief Ombudsman wrote to the Minister of Finance to notify him of the complaint and to ask for the information at issue. He explained that the requester had asked him to investigate the matter urgently. He said that he was prepared to accept that there were good reasons to treat the complaint as urgent and that he had undertaken to take all reasonable steps to complete his investigation before 17 September 2005.

The Minister provided the Chief Ombudsman with a number of documents. For the purposes of the urgent investigation and review, the two key documents were the 22 and 27 June papers.

The Chief Ombudsman wrote to the Minister on 9 September 2005 to explain it was his provisional opinion that section 9(2)(f)(iv) did not provide good reason to withhold the information at issue.

Section 9(2)(f)(iv) applies *'if, and only if, the withholding of information is necessary to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials'*.

It was clear that the proposal to abolish interest on student loans was part of ongoing policy development with decisions to be made later in the year. However, the Chief Ombudsman noted that a clear decision had been made on the advice that had enabled the Labour Party to make a public announcement on the policy proposal as part of the election campaign. In addition, the Minister had already released financial information on the estimated cost of the proposal.

In these circumstances, it was not clear to the Chief Ombudsman how section 9(2)(f)(iv) applied to the information. The Chief Ombudsman noted that section 9(2)(f)(iv) was concerned with the risk of prejudice to decision making processes. In cases where a decision has already been made it is usually no longer necessary to keep protecting information. The Ombudsman explained that section 9(2)(f)(iv) does not provide a general right to undisturbed consideration of advice nor for advice to be withheld until a decision has been made.

Given the nature of the information that had already been disclosed by the Minister, the Chief Ombudsman was not persuaded that release of the two papers at issue would result in prejudice to the interests protected by section 9(2)(f)(iv).

The Chief Ombudsman also formed the view that, even if he were wrong about the application of section 9(2)(f)(iv), there was a high public interest in disclosure of the information.

The Chief Ombudsman observed that a general election was the central event in a constitutional democracy. At such time, the principles and purposes of the OIA assume even greater relevance. He referred to section 4(a) of the OIA, which says that one of its purposes is to enable more effective participation in the making and administration of laws and policies. He noted that the proposed policy involved considerable cost and the Minister had made no secret of his differences with officials about the assumptions used to estimate the potential costs of the proposal.

The Chief Ombudsman acknowledged that the decision to release some of the information at issue had gone some way to satisfy the public interest. However, he went on to say the fact the Minister had withheld the remainder of the information, particularly in light of his acknowledgement of a disagreement with officials over the draw-down assumptions, had the effect of heightening public interest in disclosure of that advice. This was because the decision to withhold some of the Treasury advice had created understandable public doubt about the integrity of the data which the Minister had released. The Chief Ombudsman observed that:

These doubts are unfair because they stem, not from the data..., but from suspicion about the reasons why contestable data ... [has] been withheld. Disclosure in my view would replace the suspicion with the opportunity for a fairer evaluation ... of the information currently before the public.

The Chief Ombudsman advised it was his provisional opinion that the 22 and 27 June papers should be released and asked the Minister to respond.

The Chief Ombudsman received submissions on behalf of the Minister and by the Secretary to the Treasury in response. These submissions raised a number of concerns about disclosure of the information at issue, including:

- The Treasury work was preliminary and the Government had not made any decisions about the issues the Treasury work addressed. The costings had not been through the normal Treasury quality assurance processes and assumption checking.
- Disclosure of the information would be misleading, given its preliminary nature. Even if the information was released with a number of caveats, focus would fall on the projected figures rather than the assumptions behind these projections. The Treasury assumptions were based on a particular set of factors. However, any thinking about tertiary sector funding had to have regard to a number of inter-related variables, such as student funding and student debt as well as other policy proposals. Because the government had not made any decisions about the other variables involved in the wider review of tertiary education expenditure, the assumptions on which the costings were based could be subject to significant change.
- Release of the information would be likely to inhibit the Minister of Finance from seeking early ‘*order of magnitude*’ costings from Treasury in the future. This would be detrimental to the quality of public policy decision making. There was a public interest in any Minister of Finance being able to seek an initial indication from Treasury about the potential costs of a policy in order to help inform the Minister and his or her colleagues whether the Government could responsibly adopt that policy. The public interest was best served by ensuring a free flow of preliminary costings, with all their limitations, at an early, rather than later, stage in the policy process.

Having considered the submissions, the Chief Ombudsman wrote again to the Minister of Finance and advised it was his final opinion that neither sections 9(2)(f)(iv) or 9(2)(g)(i) provided good reason to withhold the information at issue.

Section 9(2)(f)(iv)

The Chief Ombudsman acknowledged that the proposal to abolish interest on student loans was a commitment made by the Labour Party not a decision made by the Government. He also accepted that Treasury did not give advice on that proposal.

However, having accepted that the Treasury costings were not advice to the Minister of Finance in respect of a government policy or decision, the Chief Ombudsman could not see how section 9(2)(f)(iv) could apply:

The constitutional convention protecting the confidentiality of advice tendered by Ministers of the Crown or officials contemplates the interest in protecting the ability of government to consider and reflect on advice in an orderly and effective manner before making decisions. Since the Government policy process on this proposal has yet to begin, it is difficult to see how disclosure of the costings would prejudice that process in any way.

Section 9(2)(g)(i)

The arguments raised in favour of withholding the information led the Chief Ombudsman to also consider whether section 9(2)(g)(i) was relevant. Section 9(2)(g)(i) applies *‘if, and only if, the withholding of the information is necessary to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown ... in the course of their duty’*.

The Chief Ombudsman carefully considered the concerns raised on behalf of the Minister of Finance and by the Secretary to the Treasury. However, he was not persuaded that disclosure of the information at issue would cause Ministers of Finance to avoid asking Treasury for early *‘order of magnitude’* costings of policy proposals in the future.

In terms of the concern that the information would be misleading if it were disclosed, the Chief Ombudsman explained that the principle of availability in section 5 of the OIA requires that official information be disclosed unless there is good reason to withhold it. Just because information is false, inaccurate or misleading does not, in itself, provide good reason to withhold. Whenever the accuracy or status of information is at issue, the release can be accompanied by caveats or a contextual statement.

The Chief Ombudsman was therefore of the view that issuing the information with the appropriate caveats and contextual information would ensure that it was reported accurately.

Section 9(1)

Regardless of his view that sections 9(2)(f)(iv) and (g)(i) did not apply, the Chief Ombudsman went on to consider whether there were any considerations favouring disclosure of the information in the public interest.

He began by elaborating on his earlier statements regarding the public interest considerations favouring disclosure of the information. In his view, work done by Treasury to put a cost on government policy proposals, or proposals advocated by political parties contesting an election, should be in the public arena in a way that enables voters to form their own opinions.

He considered that the public interest in disclosure of the information had also been heightened by the unequivocal nature of the public announcement by the Labour Party on the issue of student loans. He noted that an announcement in such blunt terms inevitably raised questions about the basis on which the policy proposal had been costed.

The Chief Ombudsman also noted that there was a long lag before the annual costs of the proposal would reach equilibrium and the considerable annual impact by 2020 on the operating balance under either scenario (the higher being \$924 million and the lower being \$527 million).

In these circumstances, the Chief Ombudsman considered it was difficult to argue that there was a low public interest in the release of information which extended the data that had already been released from a four to a fifteen year horizon. In his view, the public interest could only be met adequately by release of the documents at issue in full.

Outcome

The Chief Ombudsman's final opinion was that there was no good reason to withhold the 22 and 27 June reports.

On 14 September 2005, he therefore recommended, under section 30(1)(d) of the OIA, that the Minister make the information available to the requester.

The legal effect of his recommendation was to impose on the Minister of Finance a public duty to observe the recommendation within 21 working days unless, before then, the Governor-General, by Order in Council, otherwise directed.¹

However, in light of the imminent election, the Chief Ombudsman went further. Section 30(1)(d) authorises an Ombudsman to make any recommendation that he or she thinks fit. The Chief Ombudsman therefore indicated that he would expect the Minister to make the information available as soon as possible and, in any event, no later than 5pm that day. He observed that, to the extent that it was open to him to make a recommendation along these lines, he so recommended.

The Minister released the information before 5pm along with a copy of a submission from the Secretary to the Treasury to the Chief Ombudsman which set out the caveats and other contextual information relevant to the information at issue.

¹ See s 32(2) OIA.