

Request for audit report of approved organisation under Animal Welfare Act

Legislation	Official Information Act 1982, ss 9(2)(b)(ii), 18(h)
Agency	Ministry of Agriculture and Forestry
Ombudsman	David McGee
Case number(s)	279056
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Acrimonious history and prolonged legal dispute were relevant to decision whether or not request was vexatious—while future similar requests might be vexatious this one was not—the requester’s legitimate concern about effectiveness of Ministry’s oversight of approved organisations was the catalyst for the audit report, and she was initially promised a copy of it—requester was genuinely interested in and entitled to know the findings—request not frivolous or vexatious—Trust does not have a commercial position—s 9(2)(b)(ii) does not apply

A requester sought a copy of an audit report completed by the Ministry of Agriculture and Forestry (MAF) into an organisation called the Animal Welfare Institute of New Zealand (AWINZ). The request was refused on numerous grounds, including that it was vexatious. AWINZ also argued that release would unreasonably prejudice its commercial position.

Vexatious

AWINZ was an organisation approved under the Animal Welfare Act 1999 to carry out certain animal welfare functions. As an ‘approved organisation’, it had some quite significant law enforcement powers.

The requester had made a number of allegations of fraud against AWINZ and its trustees, and published these on the internet and in writing to a range of agencies. One of these agencies was MAF, to which she made frequent complaints that it was not adequately monitoring the performance of approved organisations including AWINZ. One of the trustees had successfully

sued her for defamation, with the court describing her actions as *‘a relentless and vindictive campaign’*.

In response to the requester’s allegations, MAF decided to conduct an audit of AWINZ. MAF initially indicated that it would make the audit report available to the requester, but it later declined to do so out of concern about her intentions.

MAF noted that the requester had quoted selectively from previous responses to OIA requests to support her allegations. She had published this information to multiple recipients and on the internet. She had also breached an earlier undertaking to present the released information in full or with the appropriate context. MAF considered it highly likely the requester would use the information to fuel her ongoing dispute with the trustees, and that while the trustees might have avenues of legal redress open to them if that were the case, the damage would already be done.

The Ombudsman consulted the AWINZ trustees, who were understandably concerned that release of the report would lead to further defamatory conduct by the requester. The Ombudsman acknowledged the acrimonious history between the requester and the AWINZ trustees, and the prolonged legal dispute that had ensued. He agreed that this background was relevant to determining whether or not the request could be considered vexatious.

However, the request was quite reasonable when seen in the context of the requester’s frequent complaints that MAF had not been adequately monitoring the performance of approved organisations, including AWINZ. While the requester’s initial interest in the issue stemmed from her conviction that AWINZ and its trustees were doing something fraudulent, the fact remained that she had raised a legitimate question about how effective MAF oversight of such organisations had been.

As the catalyst for the audit MAF carried out into AWINZ, and having been informed initially that she would receive a copy of the final audit report, it seemed to the Ombudsman that her request for the audit report was a reasonable one. She was genuinely interested in the findings and, of course, wanted to know whether these findings would in any way vindicate her position. In these circumstances, the Ombudsman could not accept that this particular request was vexatious. However, he expressly left open the possibility that future requests for information about AWINZ might be, particularly given that AWINZ had since relinquished its status as an approved organisation.

Unreasonable commercial prejudice

AWINZ argued that parts of the report should be withheld under section 9(2)(b)(ii) of the OIA (unreasonable commercial prejudice). In a letter to AWINZ, the Ombudsman set out his detailed reasons for rejecting that argument.

Although AWINZ was a charitable trust, it claimed to have a commercial position in respect of its services to the film industry, which related to the monitoring of animal welfare issues. It

argued that release of the parts of the report relating to its film monitoring activities would unreasonably prejudice its commercial position.

The Ombudsman acknowledged that the charitable status of an organisation does not preclude the possibility that the organisation might be engaged in activities for the purpose of making a profit and then apply those profits for charitable purposes.

However, the Ombudsman was not persuaded that AWINZ had a commercial position, or that the other requirements of section 9(2)(b)(ii) were met. He also considered that any need to withhold the information would have been outweighed by the strong public interest in disclosure of audit reports.

The Ombudsman's starting point was the requirement of a profit motive. He commented:

If the entity in question is a business or company then it will generally be apparent that such an organisation will be engaged in activities predominantly for the purpose of making a profit and will therefore have a commercial position. However with charitable organisations, the assumption is that the predominant purpose of the organisation will not be to make a profit. In such cases, further evidence about the organisation's profit-making activities will be necessary before an Ombudsman will be satisfied that a charity has a commercial position.

The Ombudsman did not have sufficient information to be satisfied that AWINZ engaged in film monitoring work with the predominant purpose of making a surplus or profit, which it then applied to its other charitable purposes. As AWINZ had refused to provide the auditors with any information about this aspect of its work, it was not possible to gauge much about its activity at all.

On the one hand, AWINZ referred to this work as a 'source of income', which would suggest that profit was made and presumably channelled back into the Trust. On the other hand, the audit report referred to AWINZ 'recovering the costs' of payments and disbursements made to contractors carrying out the monitoring work. A possible interpretation might be that AWINZ provided a service to the film industry (in the interests of ensuring the welfare of animals on film sets), and recovered the cost of that service without generating a profit from the work.

Even if AWINZ had a commercial position, the Ombudsman was not satisfied that release of the information 'would be likely' to prejudice it. A simple assertion to that effect was insufficient.

None of the information was might be described as 'commercially sensitive', such as pricing structures, detailed breakdowns of particular tenders, contracts or business plans, the release of which might provide competitors in the same market with an advantage. As referred to above, AWINZ had refused to provide the auditors with any detailed information.

There were some negative comments in the report regarding conflicts of interest and a lack of accurate record-keeping. However, they did not relate specifically to AWINZ's film monitoring work. At most, it could be suggested that release of the report could damage the reputation of AWINZ, which may then have consequences for a number of its activities, including the film

monitoring work. However, there did not appear to be a serious or substantial risk of this occurring.

The Ombudsman was also not satisfied that any prejudice, if it occurred, would be unreasonable. AWINZ argued that its film monitoring activities should not have been included in MAF's audit. The auditors included them because AWINZ's status as an approved organisation was relevant to film companies' decision to use that organisation for monitoring activities. The Ombudsman agreed that, if an '*approved organisation*' offers a commercial service and is able to rely on its '*approved*' status to enhance its credibility in this regard, then it is reasonable any assessment of its performance as an '*approved organisation*' be made available.

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