

Request for comments on early draft cabinet papers

| | |
|-----------------------|--|
| Legislation | Official Information Act 1982, s 9(2)(g)(i) |
| Agency | Department of the Prime Minister and Cabinet |
| Ombudsman | Sir Brian Elwood |
| Case number(s) | W48162 |
| Date | July 2003 |

Request for documents regarding Kyoto Protocol—information contained initial Treasury comments on draft versions of cabinet paper—part of informal consultation early in policy making process—concern that release would result in officials being less co-operative and formalise the process—withholding necessary to maintain effective conduct of public affairs

A Member of Parliament wrote to Treasury in 2002 requesting copies of documents that it had produced or received in relation to the Kyoto Protocol. He was later advised that part of his request had been transferred to the Department of the Prime Minister and Cabinet (DPMC) for response, namely certain comments from Treasury on particular climate change cabinet papers. The request was subsequently declined under section 9(2)(f)(iv) of the OIA, to maintain the confidentiality of advice tendered by officials. The MP then approached the Chief Ombudsman requesting that he investigate this decision.

In response to the complaint, DPMC confirmed that since the request was first made, the Government had announced its Preferred Policy Package in relation to climate change and released a series of Cabinet papers relating to that package into the public arena. As a result, DPMC said it had reviewed the complainant's original request and no longer considered section 9(2)(f)(iv) an appropriate provision to rely upon for withholding the information. However, it remained of the view that the information should continue to be withheld. DPMC advised the Chief Ombudsman that it considered section 9(2)(g)(i) of the OIA applied.

Before accepting that section 9(2)(g)(i) applies, the Chief Ombudsman must be satisfied that it is necessary to withhold the particular information at issue because:

- disclosure of the information would be likely to inhibit future *'free and frank expression of opinions'*;
- such future free and frank expression of opinion would be necessary to maintain the *'effective conduct of public affairs'*; and
- in the circumstance of the particular case, the interest in withholding is not outweighed by countervailing public interest considerations favouring disclosure.

The focus of the Chief Ombudsman's enquiries therefore turned to the nature, content and source of the information at issue and the context in which it was generated.

First, he considered carefully the content of the information at issue. He noted it comprised an email from a Treasury official commenting on the first two drafts of two proposed Cabinet papers which DPMC explained were *'worked through in the normal process of discussion...as the papers were further developed'* and a draft version of a particular Cabinet paper with Treasury comments (as track-changes) included.

The Chief Ombudsman then considered the context in which the information was generated. DPMC explained that the issues surrounding the ratification of the Kyoto Protocol were complex and had potentially wide reaching implications for many sectors of the economy and society. As a result, the development of policy advice on these issues required collaboration with a number of agencies across government in a relatively short time-frame. DPMC's role in this process included facilitating early sharing and *'sounding'* of ideas between officials within the relevant departments and then bringing together the multiple strands of expertise and knowledge into a single collective piece of advice for Cabinet within a short time-frame.

DPMC explained that it adopted a relatively informal process for departmental consultation and provided departments with very early drafts of material for initial comment and thoughts, so that any major issues could be identified early and solutions quickly developed. Swift and vigorous debate ensued as ideas were floated, challenged and discussed before being refined into coherent pieces of analysis and proposals. DPMC advised the Chief Ombudsman that officials were given very little time to comment on the early drafts, therefore any feedback was largely an initial reaction or *'off the top of the head thoughts'*. The information at issue represented the initial comments that were provided by Treasury officials on these early draft versions of the final Cabinet papers.

In this context, DPMC said it was concerned that if the free and frank opinions were disclosed, the processes adopted in this case for developing policy advice would need to be revisited and the level of formality would necessarily increase, hindering the effective conduct of public affairs.

Before concluding his enquiries, the Chief Ombudsman also considered whether there were any other considerations that rendered it desirable, in the public interest, to make the information available despite the likely harm that had been identified if it were released. The

Chief Ombudsman acknowledged that there was undoubtedly a public interest in the disclosure of information relating to the workings of government to promote accountability and participation. However, in his view the overall public interest in this case would not be served by disclosing information that would undermine the ability of the government to function effectively and in an orderly manner. While the OIA does not specify the extent to which withholding is necessary to protect the effective conduct of public affairs, the Danks Committee, in discussing the interests of effective government and administration, did say:

...that there should be continuing protection as needs be for the free and frank exchange of views between Ministers and their colleagues, between Ministers and officials, or between officers of the government in the course of their duty. Such protection would not always be needed, will certainly often need to be of only a short-term kind, and should not preclude steps to involve public servants in a debate about policy options and national choices before decisions are taken. Nor should it prevent the release of information explaining the bases of decisions and policies after they have been adopted.

Finally, the Chief Ombudsman also considered the information the Government had already made publicly available on this issue.

The Chief Ombudsman accepted that release of the particular information at issue would be likely to inhibit future free and frank expression of opinions by or between officials through a greater level of formality being introduced into the early stages of the policy development process. Where a collaborative approach has been adopted for the development of policy advice, the early sharing of ideas between the agencies involved in the policy development process was essential to the effective conduct of public affairs. The Chief Ombudsman was not persuaded that the public interest considerations favouring release of the information at issue were sufficient to outweigh the interests he had identified in favour of withholding the information. Rather, it was his view that the overall public interest in this case was in ensuring that the effective conduct of public affairs was maintained.

The complainant did not make any further submissions and the Chief Ombudsman concluded his enquiries on this basis.

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.