

Request for communications between Chief of Defence Force and Prime Minister

Legislation	Official Information Act 1982, s 9(2)(g)(i)
Agency	Prime Minister
Ombudsman	Sir Brian Elwood
Case number(s)	W46771
Date	December 2002

MP requested information on the restructuring of the NZDF—two letters from the Chief of Defence Force to the Prime Minister regarding draft reports withheld under s 9(2)(g)(i)—distinction between substantive comment about draft reports and minor editorial suggestions—substantive comments were recordings of Chief of Defence Force’s free and frank discussions with Prime Minister—part of Chief of Defence Force role is to advise Prime Minister but he would not have reduced comments to writing if he had thought they would be made public—free and frank comments needed to maintain constructive working relationship with Prime Minister—s 9(2)(g)(i) applied to substantive comments but not to remaining information

A Member of Parliament wrote to the Prime Minister in 2001 requesting information on ‘*the proposed or actual reorganisation, re-equipment and/or restructuring of the Defence Force*’.

The requester was advised that there were two letters written by the Chief of the Defence Force (CDF) to the Prime Minister and that both these documents contained free and frank advice that was provided to the Prime Minister in confidence in the course of preparing final reports on the future of the New Zealand Defence Force (NZDF). The requester was advised that the letters were withheld on several grounds, including section 9(2)(g)(i) of the OIA.

On review, the Chief Ombudsman noted that the letters contained:

- minor editorial corrections to the reports; and
- substantive comments regarding the data relied upon and assumptions made in the draft reports.

The process of identifying and correcting incidental errors and ambiguities was part of the normal editorial process of preparing reports for publication. As such, the Ombudsman did not consider these minor editorial suggestions could accurately be described as *'free and frank expression of opinions'* nor was it likely that the release of this particular information would inhibit the future *'free and frank expression of opinions'* required for section 9(2)(g)(i) to apply.

However, with respect to the remaining substantive comments made in the letter, the Department of the Prime Minister and Cabinet (DPMC) maintained that they should be withheld under section 9(2)(g)(i) of the OIA. DPMC explained that the letters were written in the context of a review of the defence policy framework conducted by the Government in 1999/2000. The letters discussed certain draft reports relating to the review process that the Government intended to make publicly available. DPMC advised that the CDF had met with the Prime Minister to discuss certain issues relating to the accuracy of those draft reports and the CDF had been asked to follow up, in writing, the comments made during that meeting. DPMC stated that the discussion and the resulting letters were based on the assumption that these communications were to remain confidential, particularly as the recorded comments were free and frank. Further, DPMC said that the CDF had indicated that, while the advice in the letters was such that it was important to give, he believed it was also advice that needed to be given in confidence. If there was a likelihood that his free and frank comments would end up in the public domain, DPMC said that the CDF had made it clear he would be constrained from giving similar advice in the future.

In light of this advice, the Chief Ombudsman considered it appropriate to seek the views of the author of the letters directly. He therefore wrote to the CDF for his comments.

The CDF acknowledged that it was part of his role to provide the Minister of Defence with advice on military and command issues and, as such, he must be *'utterly frank in that advice to the minister...and free in the sense that [he] must be at liberty to express [himself] in a blunt and compelling manner'*. However, he told the Chief Ombudsman that he could not do this if his commentary was then to be publicised. The CDF also clarified the circumstances surrounding the generation of the letters. He said he had discussed a number of issues with the Prime Minister during their meeting and he had been asked to record those issues in writing so they could be worked through methodically. He explained that he would not have agreed to commit his comments to paper if he had any expectation that they would later be publicised, as he considered them particularly free and frank in nature. In his view, doing so would have been too destructive to the working relationship between the CDF and Ministers.

Finally, the Chief Ombudsman considered whether there were considerations rendering it desirable in the public interest to make the information available. He considered there was a public interest in the accountability of Ministers and officials for the processes which were followed in preparing these reports for publication.

The Chief Ombudsman formed the view that there was no good reason under the OIA to withhold the minor editorial comments made in the two letters. However, he considered that the Prime Minister was entitled to withhold the remaining substantive comments about the data relied upon and assumptions made in the reports from both letters under section 9(2)(g)(i) of the OIA. The Chief Ombudsman was not persuaded that the public interest he had

identified as favouring release of these comments outweighed the reasons in support of withholding the information.

DPMC advised that it accepted the Chief Ombudsman's view and released both letters to the complainant with the substantive comments deleted.

The Chief Ombudsman reviewed the letters as released and advised DPMC that, in his view, three further pieces of information could be released without prejudice to the provisions of the OIA. DPMC reviewed its decision and duly released this further information.

The Chief Ombudsman formed the final view that section 9(2)(g)(i) provided good reason to withhold the deleted information and he concluded his investigation and review on this basis.

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