

Request for information contained in tender documents for upgrade of New Zealand's Orion aircraft

Legislation	Official Information Act 1982, s 6(a)
Agency	Ministry of Defence
Ombudsman	Mel Smith
Case number(s)	W50683
Date	May 2004

Requester sought information contained in the tender documents for the upgrade of New Zealand's Orion aircraft—information contained details of the proposed functional upgrade of the aircraft—release would allow an informed reader to be aware of their resultant capabilities

The requester originally wrote to the New Zealand Defence Force for information regarding the tender documents for the upgrade of New Zealand's Orion aircraft. This request was transferred to the Ministry of Defence for response in accordance with section 14 of the OIA. Certain information was then released to the requester. At this time, the tender documents were still being developed. The Ministry advised that until the tender had been closed and the evaluation was completed, the requested information would only be released to companies that had been selected to respond.

A few months later, the requester made another request for the tender documents. In response, the Ministry advised that the Request for Tender document had been released to the selected companies, and confirmed its previous advice that it intended to continue to withhold this documentation until the Government had considered the Ministry's tender evaluation recommendation and given its approval to award the contract for the Orion upgrade.

During the course of the Ombudsman's investigation and review, the complainant subsequently advised the Ombudsman that he had decided to refine his complaint and now sought only one particular extract from the tender document, namely Part 5 entitled

‘Statement of Requirement’. The Ombudsman agreed to focus his enquiries on this particular information and advised the Ministry accordingly.

Upon receipt of the information from the Ministry, the Ombudsman noted that certain paragraphs contained in Part 5 were considered classified. The Ministry advised that it was relying on section 6(a) of the OIA for providing good reason to withhold this particular information. It said it had consulted the Director of the Government Communications Security Bureau (GCSB) when making this decision.

Given the Ministry’s previous advice to the complainant, the Ombudsman also asked the Ministry to confirm whether it intended to release Part 5 of the Request for Tender document once the Government had made a decision on the tender. The Ministry said that while it remained its intention to release the unclassified sections of Part 5 once the tender decision had been made, the classified paragraphs would continue to be withheld unless GCSB gave approval for their release.

Having been advised of an interested third party in this case, the Ombudsman then wrote to the Director of GCSB for his views on the potential release of the information contained in these paragraphs, with particular reference to any security issues.

A subsequent report from the Director and a meeting with GCSB officials clarified the concerns GCSB had with release. In particular, the Ombudsman was advised that releasing the information contained in Part 5 would disclose details of the capabilities of the Orion aircraft. By making such information publicly available, an informed reader would be able to identify countermeasures that could be taken which would compromise their operational effectiveness.

The Ombudsman also met with the Chair of the Officials Committee for Domestic and External Security and officials from the Ministry of Defence and the New Zealand Defence Force to further discuss the security issues that might result if the information were released. They were also of the view that New Zealand’s security, defence and/or international relations would be prejudiced if information about the capability of the Orions was released.

The Ombudsman agreed that a knowledgeable person, foreign government or other group could gain an understanding as to what the Orion aircraft could and could not do in the functional areas discussed in Part 5 of the requested tender document. As a result, it was the Ombudsman’s view that making the information available would be likely to cause the prejudice envisaged by section 6(a) and the Ministry was therefore entitled to refuse the request on these grounds.

Comment:

The complainant considered that the information he requested was already substantially available in the public domain as *‘other nations (e.g. the US and Australia) publicise the specifications of their Orion equipment’*. However, during the course of his investigation, the Ombudsman ascertained that, although Orion aircraft were operated by numerous nations, the capabilities of the aircraft were quite divergent and the variation in possible upgrades to the aircraft made them even more so. Given that the concern expressed by the Ministry of

Defence was about the disclosure of the particular specifications for the proposed upgrade of the Orion aircraft operated by the New Zealand Defence Force, any information that may be publicly available in relation to the specifications of other nations' Orion aircraft was not pivotal to the Ombudsman's consideration in this case.

The complainant also expressed dissatisfaction regarding the Ministry's reliance on section 6(a) during the Ombudsman's investigation when the Ministry had not cited it as a ground when it originally refused the request. However, the Ombudsman's role in an investigation and review under the OIA is to form his or her own independent opinion as to whether any likely prejudice to interests protected under the Act would result if the requested information is released. The central issue for the Ombudsman is whether the request should have been refused. An Ombudsman is not restricted to an assessment of whether the specific reasons for refusal initially cited by the agency concerned are made out. In this context, the Court of Appeal comments in *Commissioner of Police v Ombudsman* are relevant¹:

...in conducting a review of the decision, the Ombudsmen are not engaged in an adversarial exercise. The provisions of the Ombudsmen Act apply (s.29 of the Official Information Act), and under ss.18 and 19 they are given wide powers and are not confined to the material put before them by those immediately involved. In the nature of things he who alleges that good reason exists for withholding information would be expected to bring forward material to support that proposition. But the review is to be conducted and the decision and recommendations made without any presumptions other than those specified in the Act.

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.

¹ [1988] 1 NZLR 385, 411