

Request for legal opinions concerning Russian adoptions

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| Legislation | Official Information Act 1982, s 9(2)(h) |
| Agency | Department of Child, Youth and Family Services |
| Ombudsman | Anand Satyanand |
| Case number(s) | W45490, W45585, W45737, W45872, W45779, W45840 |
| Date | November 2011 |

Request for legal opinions concerning Russian adoptions—withheld to maintain legal professional privilege—s 9(2)(h)—public disclosures of first opinion meant waiver had occurred—s 9 ‘necessity’ test not met—while section 9(2)(h) applies to second opinion need to withhold outweighed by a strong public interest in release of the information (with the exception of three paragraphs)

In October 2000 the Department of Child, Youth and Family Services decided to review its involvement in the adoption of children from Russia by New Zealanders. Legal advice was sought from the Crown Law Office and provided by letter in November that year with respect to the legality, under New Zealand law, of the adoption of Russian children by New Zealanders and whether such adoptions comply with New Zealand’s international obligations. In reliance upon that advice, the Department announced that it had suspended its involvement in Russian adoptions. Without the involvement of the Department in these adoptions, the Russian authorities would not allow them to proceed, effectively halting all such adoptions. At the time of announcing the decision to halt such adoptions, the Department advised the public that the decision was based upon a legal opinion that it had received and summarised the contents of the opinion.

The Department then received a number of requests for that legal opinion which it refused, relying upon section 9(2)(h) of the OIA. The Ombudsman was asked to review this decision by six complainants.

A second legal opinion on the adoption of Russian children was sought from the Crown Law Office after the Ministry of Foreign Affairs and Trade questioned the accuracy of the original advice. After receiving a draft of this second legal opinion, the Department reversed its decision and resumed its involvement in the adoption of Russian children.

The Department also received a request for a copy of the second legal opinion, which it also refused to provide under section 9(2)(h) of the OIA. The Ombudsman was asked to review this decision by one complainant.

It is well established that Ministers and government departments have the right to obtain legal advice on the same confidential basis as any other person or organisation. That is, they are entitled to be protected by the rules relating to legal professional privilege.

After considering the precise nature and content of the first legal opinion, the Ombudsman was satisfied that it fell within the kind of material that attracts solicitor/client privilege.

In respect of the second legal opinion, the Ombudsman noted that it was a draft of an opinion that was being prepared. Regardless of whether it was in draft or final form, the document was presented by the Crown Law Office to the Department and the Department relied on the advice in that document. In these circumstances, the Ombudsman was satisfied that it constituted 'legal advice' and consequently attracted legal professional privilege.

However, section 9(2)(h) does not provide good reason for withholding such information under the Act simply on the grounds that the rules relating to legal professional privilege apply when legal advice is provided within the context of a solicitor/client relationship. Rather, it applies only where withholding the information is '*necessary to maintain legal professional privilege*'.

The Ombudsman then considered whether privilege had been waived by considering what, if any, information contained in the opinions had already been disclosed.

The first opinion had not only been referred to, but the substance of the advice it purported to contain had been publicly disclosed in a media release as well as during a radio interview. Further disclosure was made to parties directly affected by the decision of the Department to suspend its co-operation with inter-country adoptions in Russia. All these disclosures had occurred prior to the Department receiving requests for copies of the first legal opinion.

However, while there was extensive public discussion of the first opinion, the Ombudsman noted that the second opinion had not been publicly referred to at all. The media release advising that the Department was resuming its assistance to New Zealanders wanting to adopt Russian children simply stated that since the original suspension decision had been made, '*the Department had been working through the issues of concern with its legal advisers...*'. It did not purport to disclose what legal advice had been received, nor had any disclosure been made to the requester of the contents of that advice.

In these circumstances, the Ombudsman went on to consider whether there were any factors that would render it '*desirable in the public interest*' to make the second legal opinion available.

The Ombudsman noted that the public interest in the maintenance of legal professional privilege is a particularly strong one, and an important factor to take into account when considering the strength of that public interest is the ‘type’ of legal advice at issue. The Ombudsman noted that in the Danks Committee’s supplementary report ‘Towards Open Government’, the Committee recognised that there can be a greater degree of public interest in legal opinions of a more general and constitutional nature than there might be in opinions that relate to specific contractual issues. The Ombudsman then identified the following public interest considerations favouring release of the second opinion:

- it related to New Zealand’s compliance with its international obligations, of which there is a strong public interest generally;
- release of the second opinion would promote public understanding of the reasons for the Department’s decision to resume its involvement in Russian adoptions; and
- release of the second opinion would enable the making of a more informed judgement by those considering whether to adopt a child from Russia, thereby promoting the best interests of those children.

The Ombudsman was not persuaded that it was ‘*necessary*’ to withhold the first opinion in order to ‘*maintain*’ the privilege as required by section 9(2)(h).

With regard to the second opinion, the Ombudsman was of the view that while section 9(2)(h) applied, there was a strong public interest in release of the information (with the exception of three paragraphs) and that this interest outweighed the need to withhold the opinion in the circumstances of this case.

With regard to the remaining three paragraphs in the second legal opinion, the Ombudsman was of the view that their content did not relate directly to the public interest considerations identified. As a result, he considered the Department was entitled to withhold this particular information pursuant to section 9(2)(h) of the OIA.

The Department agreed to review its original decision and subsequently released both legal opinions to the relevant complainants with the exception of the three paragraphs in the second opinion.

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