

Request for report on DHB governance issues

Legislation	Official Information Act 1982, s 9(2)(g)(i)
Agency	Ministry of Health
Ombudsman	David McGee
Case number(s)	177320
Date	April 2009

Disclosure of report at time of request would have inhibited expression of free and frank opinions by officials—but passage of time and change in circumstances had diminished the likelihood of such prejudice—senior public servants would not be inhibited from expressing free and frank opinions in future

In early February 2008, a complaint was made about the Ministry of Health's September 2007 decision to withhold parts of a 2006 report on governance issues at the Hawkes Bay District Health Board under section 9(2)(g)(i). In late February 2008, concerns about the governance of the DHB prompted the Minister of Health to remove the board and appoint a Commissioner to run its affairs.

The Ombudsman formed the opinion that section 9(2)(g)(i) provided good reason to withhold the report at the time that decision was taken in September 2007. He noted the sensitivity of the governance issues discussed in the report, and that the report was produced in the early stages of collecting information about those issues. The report contained the kind of free and frank, but measured, advice the Minister of Health could expect to receive in these circumstances. The Ombudsman commented:

I am willing to accept, given the context in which the September 2007 decision was made (5 months before the Minister removed the board) that it would be likely that disclosure then would have had an inhibiting effect in future on the willingness of officials, even at the level of seniority of the Deputy Director-General of Health as

was the case here, to give such advice. Such inhibition would be prejudicial to the effective conduct of public affairs.

The public interest in disclosure of the report did not outweigh the need to withhold it at that time:

While there is undoubtedly a public interest in disclosure of information relating to the governance of a Crown entity such as a district health board, the overall public interest would not have been served by disclosing, on 6 September 2007, information of a contextually sensitive nature that would have likely had the effect of inhibiting Ministry officials in future from providing the Minister of Health with timely advice in the free and frank manner that they considered necessary.

However, the Ombudsman also noted—for the Ministry’s consideration only—that circumstances had changed since the decision was made on the request.¹ The report was now nearly two years old, and the board had been removed. He observed that should a fresh request be made, section 9(2)(g)(i) may no longer apply. Even if it did, there was a strong public interest in disclosure of the report. It was important to ‘*make more transparent the circumstances that appear to have led to the removal of the board and the accountability of the Minister for that removal and of the officials who advised him*’.

The Ministry queried the Ombudsman’s position that the need to withhold under section 9(2)(g)(i) might diminish over time and with the change of circumstances. It maintained that section 9(2)(g)(i) protects information because it is of a certain nature.

The Ombudsman explained that section 9(2)(g)(i) does not protect the nature of the information itself, but the maintenance of the effective conduct of public affairs. The question to be considered is the consequence of disclosure on that interest, and that can alter with the passage of time and change of circumstances.

The Ombudsman commented ‘*I would be loathe to accept that there is any information for which it is necessary to maintain confidentiality in perpetuity*’. As an extreme example, he referenced the New Zealand Security Intelligence Service’s disclosure of information about the waterfront strike 60 years later, the point being that even classified security records lose their sensitivity over time.

The Ombudsman accepted that it will sometimes be necessary to protect information even when the relevant circumstances no longer apply in order to encourage others in a similar position in future to express themselves freely and frankly. However, not all information needs that ongoing protection.

In this case, the advice given to the then Minister in May 2006 consisted of a considered briefing on governance issues at the DHB. Responsibility for giving it was assumed at a senior level in the Ministry (a Deputy Director-General). It was entirely

¹ Note, the Ombudsman’s role is to form an opinion on whether the request ‘*should have been refused*’ (s 30(1)(a) OIA). The Ombudsman therefore focuses on the decision at the time it was made. Subsequent events that affect either the need to withhold the information, or the countervailing public interest in its release, are technically irrelevant to any opinion that must be formed.

appropriate (as it itself stated) that it remain confidential at the time to allow the Minister to consider the issues it raised and to formulate a response to them.

But it is not so clear to me why, once action has been taken to address the issues it raised, it is still necessary to withhold it. In my view, officials, particularly senior officials, can be expected to generate advice for Ministers in such circumstances in the future that is of similar quality and frankness to this, knowing that the OIA will protect the confidentiality of that advice while the identified issue is being addressed but not necessarily indefinitely afterwards.

Whether it is possible to release such advice without contravening the interest protected by section 9(2)(g)(i) will, of course, always be a matter of judgment and different opinions can be held about it. I am inclined to the view in this case that the interval of confidentiality to allow the effective conduct of public affairs can be relatively short without damaging that interest given the nature of the advice and the changed circumstances.

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