

Request for review report prepared for tertiary institution

| | |
|-----------------------|--|
| Legislation | Official Information Act 1982, ss 9(2)(a), 9(2)(ba)(i), 9(2)(g)(i) |
| Agency | University of Otago |
| Ombudsman | Sir Brian Elwood |
| Case number(s) | C5050 |
| Date | April 1999 |

Request for review report prepared for tertiary institution—information refused in order to protect privacy, obligation of confidence, and free and frank expression of opinion—consideration of University’s enforcement of an obligation of confidentiality upon itself—reasoned and well informed comment does not constitute free and frank expression of opinion—Act does not provide for class approach to documents—individual privacy not at issue

A journalist and counsel for a trade union sought copies of a report prepared by a panel who had undertaken a review of a department at Otago University. The University declined the request on the grounds that disclosure of the information would breach the privacy of the individuals who worked within the department, that the information had been supplied subject to an obligation of confidence and that the report comprised free and frank expression of opinions.

The major reason advanced by the University for withholding the information at issue was that the information had been provided subject to an obligation of confidence. Some of the members of the panel were of the view that their advice had been supplied subject to an obligation of confidence. More generally, concern was also expressed that disclosure of the information would prejudice the ability of the Vice Chancellor to establish review panels and receive their reports in confidence.

There was, in fact, no evidence to show that any express or implicit undertaking regarding confidentiality had been made at the time the information had been supplied. Rather, it appeared that any understanding of confidentiality had been imposed after the report had been received by the University and was based on the nature of the information, namely, that it included comment on the performance of personnel within the department under review. Even if it could have been shown that the information had been supplied subject to an

obligation of confidence, before section 9(2)(ba)(i) of the OIA could be said to apply to the information at issue, it still had to be established both that disclosure would be likely to prejudice the supply of similar information or information from the same source and that it was in the public interest that such information should continue to be supplied. Given the particular circumstances of this case, whilst members of similar panels established in the future might feel constrained, it was concluded that it was unlikely that disclosure of the information would in fact create the predicted prejudice. As a consequence, section 9(2)(ba)(i) did not appear to apply to the information at issue.

In regard to section 9(2)(g)(i) of the OIA, the University argued that the information could be withheld because it was free and frank expression of opinions and release of the information would inhibit the candid expression of opinions in the future. The report comprised reasoned and well-informed comment and advice. To that extent it could be said to contain *'free and frank expression of opinions'*. However, given the nature of the report; that its contents were the work of a team of people; and that the views expressed were not attributed, it did not seem likely that disclosure of the report would inhibit the generation of similar reports in future. As a consequence, section 9(2)(g)(i) could not be said to apply to the information at issue.

So far as section 9(2)(a) of the OIA was concerned, the University had said that making available the information would breach the privacy of the individuals who worked within the department under review. It was accepted, however, that in disclosing the information no individuals were readily identifiable as being subject to the criticism and that any criticism contained within the report was levelled at the department as a whole, not at the performance of any specific individual.

On a general level the University argued that it was essential for the University to seek and obtain confidential advice and expressed concern that if the particular report were released, all future reports following similar reviews undertaken by the University would automatically become available.

This assertion overlooked the fact that the OIA applies to information not documents. Each request for official information must be considered on its particular facts, having regard to the principle of availability in section 5 of the OIA and purposes set out in section 4. There is no provision for adopting a class approach when considering a request for information simply because it is contained in a report of a particular type. Official information may only be withheld if it can be established in each case that one of the withholding grounds specified in the OIA applies to the information at issue.

Following the investigation and review, the University agreed to release the report, subject to some deletions which it believed were justifiable in terms of sections 9(2)(a), 9(2)(ba)(i) and 9(2)(g)(i). The requesters were satisfied with the information released and further consideration of the remaining deletions was not necessary.

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.