

Request for a copy of paper presented to Cabinet Strategy Committee

Legislation	Official Information Act 1982, ss 9(2)(g)(i), 9(2)(j)
Agency	Electricity Corporation of New Zealand Ltd
Ombudsman	Nadja Tollemache
Case number(s)	W3649
Date	Published April 1993

Information deleted from position paper on pricing issues presented by ECNZ to Cabinet Strategy Committee—ss 9(2)(g)(i) and 9(2)(j) applied to some of the information—interest in withholding information in certain sections of the paper outweighed by strong public interest in disclosure—s 9(1)—electricity pricing has a direct widespread impact on a large number of New Zealanders

A journalist requested a copy of the paper on pricing issues which the Electricity Corporation of New Zealand Ltd (ECNZ) presented to the Cabinet Strategy Committee on 24 January 1992. ECNZ declined the request and cited sections 9(2)(g)(i), 9(2)(i) and 9(2)(j) in support of its decision. By way of further explanation, it advised that the paper was prepared in response to a request by the Committee that ECNZ discuss the matter of pricing with the Committee, and the paper set out areas for discussion and background information. The paper was designed ‘to facilitate a constructive debate amongst Ministers and members of [ECNZ]’ and it was ‘a comprehensive and open statement of the Corporation’s position, including an analysis of the decisions made by the Commerce and Marketing Select Committee and the potential consequences’. ECNZ therefore considered that the document contained ‘free and frank expressions of opinion’ and that were the document to be released, ECNZ would have to reconsider its future approach to briefings of this nature which would be detrimental to the effective conduct of public affairs. It also considered that in view of the forthcoming negotiations with supply authorities over electricity contracts, disclosure of the information would be detrimental to its commercial activities and to its ability to carry on commercial negotiations.

Having viewed the information at issue, the Ombudsman felt that much of the information did not need to be withheld. She therefore arranged a meeting with officials from ECNZ to discuss the issues. As a result of that discussion ECNZ agreed that not all the information which had been requested needed to be withheld to protect the interests which it considered would be prejudiced by release of the information. The Ombudsman's investigation therefore focused on specific passages in the briefing paper. While she accepted that section 9(2)(j) applied to some of the passages, she was not convinced that all the deletions proposed by ECNZ were necessary. In this regard, the Ombudsman sought comment from the Minister of State Owned Enterprises on any concerns which either he or his Cabinet colleagues might have about the possible disclosure of this particular information.

In the absence of any response from the Minister, the Ombudsman formed a provisional opinion that sections 9(2)(g)(i) and 9(2)(j) applied. In terms of any countervailing public interest in disclosure, the Ombudsman concluded that in part, there was no countervailing public interest favouring disclosure and that the decision to withhold the information was justified. However, in her view that was not the case in respect of the information in the sections of the paper headed '*Moving to a New System*' and '*In the Meantime*' (item (c)).

In applying the requirements of section 9(2)(g)(i) to the information in item (c), the Ombudsman was satisfied that the information at issue comprised essentially free and frank expressions of opinion by ECNZ on electricity pricing issues, its pricing structure, and a possible course of action for Government to follow in resolving what it should do about the Commerce and Marketing Select Committee's recommendations on ECNZ's pricing policy. Those opinions had been generated in the context of meeting a request from the Cabinet Strategy Committee (via the Minister of SOEs) for advice on ECNZ's pricing structure and issues related to the Select Committee's report which Government officials (from either the Treasury or Ministry of Commerce) were unable to provide. It was clear that the conduct of public affairs in question was Cabinet consideration of how the Government should respond to the Select Committee's report and, in the context of electricity pricing issues, the effective conduct of public affairs is dependent on Ministers being as fully informed as possible. The Ombudsman was also satisfied that disclosure of the information would inhibit ECNZ in future should it be asked for free and frank opinions on electricity pricing issues.

However, the Ombudsman was equally satisfied, given the background context in which the information was generated, that the following strong public interest considerations favoured disclosure of the information:

- Electricity pricing directly impacts on a large number of New Zealanders. While electricity does face competition from alternative fuels, the fact remains that modern New Zealand society is reliant on electricity in a wide range of ways; the power supply difficulties being experienced at the time this investigation was undertaken illustrated that fact. Similarly, the widespread public concern expressed at the original proposed electricity price increases, which led to the Select Committee's examination of and report on the proposed electricity price increases evidenced a perception by the New Zealand public that electricity pricing is a matter of public interest.

- Given the recommendations of the Select Committee, it seemed that there was a general public interest in as much transparency as possible in the Government's subsequent consideration of how it should respond. The public interest in transparency was heightened because the Government is unable to rely on advice from officials or independent consultants with respect to in depth information about ECNZ's pricing structure because this is not held by anyone other than ECNZ itself. Where Government relied on ECNZ (whose proposed price increases led to the Select Committee report in the first place) to provide information to assist it in reaching its decision, then there was a strong public interest in as full disclosure as possible of the information thus provided. The information at issue revealed only ECNZ's opinions/advice, not the deliberations of the Cabinet Strategy Committee based on such opinions/advice.
- While there was a public interest in the profitability of the Crown's commercial activities and, to an extent, in maximising the return on taxpayers' funds, the public interest did not end there. In respect of electricity issues, pricing cannot be completely separated from other issues such as conservation of resources and protection of the environment for the purposes of assessing the overall public interest. The public interest cannot be equated only with ECNZ's commercial interests in respect of electricity pricing issues.
- While there is a strong public interest in maintaining the ability of Ministers to be fully informed before making decisions on matters of public significance, in terms of the OIA, that interest has to be weighed in the balance against the overall public interest which might favour disclosure notwithstanding the prejudicial effect of disclosure on the future expression of free and frank opinions.

The Ombudsman put those views to ECNZ and to the Minister of SOEs for comment. ECNZ was of the view that the Ombudsman had not given sufficient weight to the interest in withholding the information in item (c). ECNZ argued that:

- 'the public interest, as measured by the level of public concern at the time of the pricing debate, has reduced substantially now.'
- therefore 'the benefits of the additional information in the public arena now, while of some value, must be greatly reduced', and
- this 'deals with [the Ombudsman's] point that because the public is interested, it is in the public interest'.

However, an Ombudsman has never accepted that simply because the public might be interested in certain information it automatically follows that there is a public interest, for the purposes of section 9(1), in disclosure of that information. The point the Ombudsman had wished to make was that electricity pricing has a direct widespread impact on a large number of New Zealanders. It is the nature of this impact on the New Zealand public which led the Ombudsman to the view that electricity pricing is a matter of public interest. The question of whether the public is interested in the information at issue at any particular point in time is not an overriding factor. Furthermore, the public's interest in information which is sought under

the OIA cannot be assessed with any degree of accuracy because invariably the public does not know the true nature of the information which has been withheld.

In respect of ECNZ's argument that sufficient weight had not been given to the public interest in withholding the information, namely, the continuing need for the free flow of '*free and frank expression of opinions by or between or to Ministers of the Crown ...*' the Ombudsman pointed out that she had indeed accepted that that interest did need to be protected, but that, in this case, notwithstanding the strength of that interest, the countervailing public interest considerations outweighed it. As Jeffries J put it in *Wyatt Co v Queenstown-Lakes District Council* [1991] 2 NZLR 180 at p.191:

That Act requires [the Ombudsman] to exercise his judgment using experience and accumulated knowledge which are his by virtue of the office he holds. Parliament delegated to the [Ombudsman] tasks, which at times are complex and even agonising, with no expectation that the Courts would sit on his shoulder about those judgments which are essentially balancing exercises involving competing interests. The Courts will only intervene when the [Ombudsman] is plainly and demonstrably wrong, and not because he preferred one side against another.

The Ombudsman therefore recommended that ECNZ release the information in item (c). ECNZ accepted this recommendation.

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.