

Request for advice on bulk funding of schools

Legislation	Official Information Act 1982, ss 9(2)(f)(iv), 4(a)(i)
Agency	Minister of Education
Ombudsman	Sir Brian Elwood
Case number(s)	W39361
Date	April 1998

Request to Minister of Education for advice on bulk funding of schools—information withheld on grounds of confidentiality of advice, free and frank opinions, and prejudice to negotiations—release of information likely to create uncertainty and affect adversely subsequent public debate on options

In this case a request was made of the Minister of Education for copies of advice provided to him on bulk funding of schools. The requester had made it clear that he was not interested in drafts of internal Ministry documents, but only final versions. The Minister refused the request in reliance upon sections 9(2)(f)(iv), 9(2)(g)(i) and 9(2)(j) of the OIA.

It transpired that the only relevant information consisted of papers headed ‘draft’. Although it appeared that these documents might be outside the scope of the request, it was established that the Minister had decided to take the matter no further for the time being, and that these ‘drafts’ accordingly represented the ‘final’ advice for present purposes. Nevertheless, the Minister also made clear that related policy work was underway, and that the issues discussed in the papers were not closed.

Upon examining the documents at issue, it was evident that they represented preliminary policy work by officials, and parts of the documents had been left blank for completion at a later stage. In particular, it was clear that input from the Minister would be required before the ‘drafts’ could be finalised.

The Minister explained that he had made no decision as to the range of options which might eventually be pursued, and that some of the options canvassed in the draft papers were unlikely to be progressed. He also explained that there had not yet been any public consultation or sector group consultation on the full range of possible options.

The Minister stated that he considered the policy issue in question to be sensitive, and that he was anxious to ensure that any future debate should proceed in an effective and informed manner. Accordingly, he submitted that in order for this to be achieved, it was necessary for him to be able to consider the advice of officials in confidence at that stage.

Section 9(2)(f)(iv) provides for the withholding of official information where it is necessary to:

- (f) *maintain the constitutional conventions for the time being which protect—...*
- (iv) *the confidentiality of advice tendered by Ministers of the Crown and officials;*

It has generally been accepted that, once government policy decisions have been made and announced, the advice tendered in the policy making process does not require ongoing protection except in exceptional circumstances. However, it does not automatically follow that all advice must be protected until final policy decisions have been made. Such an approach would be inconsistent with one of the purposes of the OIA, namely *‘to increase progressively the availability of official information to the people of New Zealand in order to enable their more effective participation in the making and administration of laws and policies’* (section 4(a)(i)).

The view successive Ombudsmen have consistently adopted where reliance has been placed on section 9(2)(f)(iv) is that informed debate enhances the process of policy development. However, it is necessary for each case to be assessed upon its own merits in the light of the provisions of the OIA.

Having considered all of the circumstances in the light of the particular content of the documents at issue, the view was formed that disclosure of the information at that stage could well inhibit the ability of the Minister to proceed with policy formulation, and that accordingly section 9(2)(f)(iv) did apply to the information at issue.

Having reached that view, section 9(1) of the OIA required consideration to be given to whether, in the circumstances of the particular case, the reason to withhold that information was outweighed by other considerations which rendered it desirable in the public interest to make that information available.

Any public interest considerations which militated in favour of making the information at issue available, rested on the ability of the public to contribute effectively to any debate on the policy issue in question. However, for the reasons discussed above, it seemed that in this particular case the release of the information at issue at that time would not advance that interest. It was therefore concluded that there were no public interest considerations which outweighed the interest in withholding as set out in section 9(2)(f)(iv).

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