

# Request for information concerning United Nations Working Group on Indigenous Populations

<b>Legislation</b>	Official Information Act 1982, ss 6(a), 9(2)(g)(i)
<b>Agency</b>	Minister of Foreign Affairs
<b>Ombudsman</b>	John Robertson
<b>Case number(s)</b>	W1802
<b>Date</b>	Published April 1993

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*International relations—comments by officials in relation to United Nations Working Group—‘would be likely to prejudice’ test applied—free and frank exchanges of opinions by officials at overseas post recorded in cable form—whether disclosure would inhibit expression of opinions in future*

In April 1989 the Chief Ombudsman was asked to investigate and review a decision by the Minister of Foreign Affairs declining, in part, a request for access to information concerning the United Nations Working Group on Indigenous Populations.

The Working Group is a small UN body, responsible to the Commission on Human Rights, whose main task is the drafting of a declaration on the rights of indigenous peoples. The work of the Group was recognised as being of ongoing interest and importance to New Zealand, and the Group had also been a focus of attention directed by certain Iwi and other Maori interests in relation to grievances arising under the Treaty of Waitangi.

The documents under request concerned a 1988 visit to New Zealand by the Chairperson of the Working Group to deliver a report on Maori grievances and also a subsequent session of the Group in Geneva attended not only by New Zealand Government officials but also by a number of Maori and other non- governmental organisations from New Zealand.

The Minister made most of the documents available but with deletions. The Minister also withheld a number of documents in full. Most of the documents at issue were diplomatic cables received by the Ministry of External Relations and Trade from its post in Geneva (where the Working Group is based). Others had come into existence within the Ministry itself. The

Minister relied on either section 6(a) or section 9(2)(g)(i) of the OIA to withhold or delete the information in question.

## Section 6(a)

The information withheld under section 6(a) mostly comprised comments by New Zealand officials about the Working Group, its New Zealand visit and its Geneva session, and the draft declaration on the rights of indigenous peoples. The Minister's concern about these items arose from the nature of the comments themselves in each instance, disclosure of which would, in his view, have been likely to prejudice New Zealand's relationships with the Group and, in some instances, with other countries which had connections with it.

The test under section 6(a) was whether release of the particular items of information 'would be likely' to prejudice the international relations of the Government of New Zealand. In applying this test the Chief Ombudsman took account of the following words of the Court of Appeal (per Cooke P) in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, 391:

*To cast on the department or organisation an onus of showing that on the balance of probability a protected interest would be prejudiced would not accord with protecting official information to the extent consistent with the public interest, which is one of the purposes stated in the Long Title of the Act. At first sight it might seem otherwise, but what has just been said becomes obvious in my view when one considers the range of protected interests in s.6, including as they do, for instance, the security or defence of New Zealand, the New Zealand economy and the safety of persons. To require a threat to be established as more likely to eventuate than not would be unreal. It must be enough if there is a serious or real and substantial risk to a protected interest, a risk that might well eventuate. ... Whether such a risk exists must be largely a matter of judgment.*

The Chief Ombudsman understood the word 'prejudice' in the context of section 6 to mean actual harm or damage. Accordingly, his function in reviewing the Minister's decision was to assess the particular information under request and to form a judgment as to whether its disclosure would raise a serious or real and substantial risk of damage to the relevant interest.

Having done so the Chief Ombudsman accepted that the deletions in question had been properly made.

## Section 9(2)(g)(i)

A number of comments by New Zealand officials in Geneva in cables to the Ministry in Wellington were also withheld under section 9(2)(g)(i). Although he did not consider them prejudicial in terms of section 6(a), the Minister was nevertheless concerned to avoid disclosure of what he regarded as free and frank expressions of opinion.

The opinions in question did not relate to any ongoing process of policy formulation or decision making taking place within the Government. Rather they were in the nature of observations on current events and their implications. Accordingly, the question was whether the opinions were of such a nature, or had been expressed in such a context, that withholding them was necessary to maintain the effective conduct of public affairs. In justifying the need to withhold the opinions on this basis, the Minister said:

*These comments would not have been made by the officer in Geneva if it had been thought that they might become public. And yet comments of this sort, and others in the various cables under discussion, are indispensable to the Ministry in giving us the particular post's perspective, and ensuring that we have the fullest range of information from all sources including from contacts within the UN and other diplomatic delegations. It is important here to bear in mind the particular operational constraints on the Ministry of External Relations and Trade. Officials in other departments are able to chat informally in person or by telephone as they share opinions and develop a position which will ultimately be put in writing. This is just not possible in the case of this Ministry with its many overseas posts. The formulative exchanges of views between officers working on the same issues of necessity have to be cabled in writing. Yet officers in posts abroad will be reluctant in future to express their opinions if they are to become the basis for public debate. This is particularly true given that most of our posts abroad are small with usually only one officer dealing with the particular subject matter. Accordingly, an officer expressing views from a post is identifying him or herself with them in a way other public servants in other government departments—particularly at this quite junior level—are not. In this regard, it is important to bear in mind that officers at overseas posts often feel isolated from developments in New Zealand. They are only too well aware of the fact that their opinions will usually reflect a 'foreign' perspective: one which would not readily be shared or perhaps understood by a domestic New Zealand audience. This factor, combined with the ready identification of the author just referred to, will act as a further disincentive to the free and frank exchanges of views should such material be released.*

The Chief Ombudsman told the Minister that he did not accept that, because of the particular circumstances in which such opinions were expressed, all exchanges of opinions from diplomatic posts could be protected. Those employed overseas are and remain officials of the New Zealand Government and hence are subject to the OIA like anyone else. The context in which particular opinions were expressed was, however, a relevant consideration in determining whether they should be protected on an ongoing basis.

The Chief Ombudsman accepted that a number of the opinions could be withheld (subject to the public interest) in that they were especially free and frank in nature and would only have been given under a complete assurance of confidentiality. In respect of other opinions, however, the Minister accepted the Chief Ombudsman's view that withholding was not necessary on an ongoing basis and he agreed to make these available.

## Comment

This case is an interesting example of the case-by-case approach adopted by the OIA. Both in the Minister's initial decision on the request (as a result of which substantial disclosure was made) and in the Chief Ombudsman's subsequent review of the information which was not made available, it was fully accepted that the form in which the information was held, namely, diplomatic cables, was not in itself a reason to withhold it. Rather it was the information itself which needed to be considered having regard to its content and all other relevant circumstances. As required by the Act, the tests were applied with reference to the harm which would be expected to ensue either to international relations or to the conduct of public affairs if the information were made available.

*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.*