Ombudsman
Fairness for all

Case note

Request for information disclosed during confidential Ministerial briefing to sector group

Legislation	Official Information Act 1982, s 9(2)(g)(i)
Agency	Minister of Finance
Ombudsman	John Robertson
Case number(s)	W1732
Date	Published April 1993

Request by Opposition for information disclosed during confidential Ministerial briefing to sector group—s 9(2)(g)(i)—effective conduct of public affairs—public interest balancing—accountability—need for transparency in Minister's dealings with financial sector

In early 1989 the Minister of Finance met with a number of bankers and financiers to brief them on Government fiscal policy. After the meeting the Minister was reported as saying:

> *The purpose of the discussion was in order to demonstrate that the Government is capable of reaching our fiscal targets ... in the expenditure area there were some details [of Government's fiscal intentions] that I was able to brief them on in confidence...*

The requester, a senior member of the opposition, then made a request seeking details of the information disclosed at the meeting. The Minister refused the request and the requester asked the Chief Ombudsman to investigate and review that decision.

In the course of this review, it emerged that the Minister's concern in protecting the information was to ensure that the practice of holding confidential sector group briefings did not suffer as a result of disclosure in this case. The Minister told the Chief Ombudsman that he regarded such briefings as essential to the effective business of government and the economy. If the information were disclosed in this case, a public expectation of disclosure in future cases would arise and, in his opinion, this would undermine the interest that he sought to protect by refusing the request, namely, the ability of a Minister to hold confidential briefings.

This concern seemed best addressed in the context of section 9(2)(g)(i) of the OIA. It was reasonably clear that sector group briefings of the type at issue here were necessary for *'the effective conduct of public affairs'*, and that for such meetings to be successful there needed to be a general expectation by the sector group that at least some of the opinions and views exchanged, if not all, should remain confidential. As a general rule, therefore, it seemed that section 9(2)(g)(i) should protect free and frank exchanges of opinions in the course of meetings. Whether that rule would apply in a particular case depended on the nature of the information itself and the circumstances existing at the time of the request. Any countervailing public interest would also need to be considered.

The Chief Ombudsman put this to the requester who agreed with the need for discussion and confidential exchanges of views with sector groups in circumstances where the Minister wished to listen and to discuss proposals for new policies or even to *'fly a kite'* on a policy proposal to get reactions. However, she saw this case as different in principle because of the nature of the matters which had (according to the Minister's reported comments) been discussed at the meeting, and the selective numbers of those who had been present. She made the point that in a deregulated financial market anything that a Minister may say or disclose in relation to policy, intended policy or new courses the Government might take would be weighed, evaluated and acted upon by the market. The Minister therefore had to be careful, she said, to provide a *'level playing field'* and to be seen to do so. Talking to a group of bankers which did not include all the players in the financial market either deliberately or inadvertently gave those present an edge on others, which would be discriminatory. Accordingly, she believed the *'effective conduct of public affairs'*, where the financial markets were concerned, required disclosure rather than the withholding of information so as to achieve the necessary level of transparency.

The Minister, in response to these remarks, did not disagree with the need for transparency whenever the Government wishes to convey signals to the financial markets. However, he disagreed that the meeting in question had been of this nature. Whether a particular matter was one for *'transparency'* (full disclosure) or properly for a Minister to raise in confidence on the basis that the deregulated financial market was not affected or disadvantaged was, in his view, a matter of judgment for the Minister to make as it related to the integrity of the consultation process.

Having obtained these views the Chief Ombudsman was able to assess what role the OIA should have in this area. Recognising that the purposes of the Act are both to promote availability of information (specifically in the interests of participation and accountability) and to protect it where the public interest requires, he concluded as follows:

- that the effective conduct of public affairs at the Ministerial level depends on the ability of a Minister to undertake consultations in confidence with sector groups, provided that the consultation is undertaken as part of the Minister's role to develop policy and co-operation;
- in such cases s 9(2)(g)(i) will usually enable the opinions and matters discussed to be protected at the time, but not necessarily for all time;

- it will be for the individual Minister to act with propriety and judgment to ensure that those present at such meetings are not placed in a privileged position in relation to others who may have had an interest in the subject-matter discussed; and
- the Minister's performance in this respect can be brought under scrutiny by the OIA and in particular on review by an Ombudsman who is assessing the countervailing public interest test under section 9(1) of the OIA.

The Chief Ombudsman believed that such a conclusion was consistent with the case by case approach required by the Act, as well as giving sufficient certainty to ensure the effectiveness of the consultation process which depends on a certain amount of confidentiality being maintained.

In the present case the Minister's performance had been placed under scrutiny as mentioned above. After careful consideration the Chief Ombudsman concluded that the test in s 9(2)(g)(i) was met. As far as the countervailing public interest was concerned, he was satisfied that the nature of the matters discussed at the meeting was not such that other players in the deregulated financial market would have been disadvantaged, or that the bankers who were present were given any advantage to the extent that financial gain was possible. Accordingly, it was not in the overall public interest that the information be 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.