

Request for legal advice

Legislation	Official Information Act 1982, ss 9(2)(h)
Agency	Department of Conservation
Ombudsman	Sir Brian Elwood
Case number(s)	W39453
Date	March 1998

Request for legal advice—information covered by legal professional privilege—public interest in Member of Parliament having information to discharge responsibilities to electors—balance between availability and protection of official information—protection of legal professional privilege not outweighed

A complaint under the OIA was received from a Member of Parliament who sought copies of legal advice provided to the Department of Conservation regarding Fort Takapuna.

It was clear that the information at issue was covered by legal professional privilege, and that it was necessary to withhold the information in order to ‘*maintain legal professional privilege*’ within the meaning of section 9(2)(h) of the OIA.

However, the Member submitted that, by reason of the interest of the public in the topics discussed by the legal advice, and his responsibilities towards the electors who had asked him to pursue their concerns, the reason to withhold the information at issue was outweighed by countervailing public interest considerations.

The Member of Parliament went on to submit that the legal advisers may have had access to background facts which it would be difficult for the public to access, and thus judge the matter for themselves.

As a general principle, the fact that an issue may be of interest to the public at large will not normally be a consideration of sufficient weight which, by itself, will outweigh the interest in withholding the information for the purpose of maintaining legal professional privilege. The section is concerned to maintain legal professional privilege, as distinct from protecting the particular content of any legal advice. Thus, the content or significance of the legal advice at issue is not necessarily of relevance to the ultimate view which must be formed under the OIA.

The issue of disclosure of facts on which legal advice is based involves a separate question. If any person wishes to obtain details of background facts to a particular matter, then it is open under the OIA for that individual to make the appropriate request for the information. The disclosure of a legal opinion itself is not necessary in order to ascertain such facts.

The purposes of the OIA, as set out in section 4, provide for a balance to be struck between the availability of official information and its protection. In the case of section 9(2)(h), the fundamental issue of whether public interest considerations exist which outweigh the reason to withhold the information is rarely affected by the position or occupation of the requester. This is because release of official information is generally seen as a release to the public at large. Information released under the OIA is rarely restricted in the use to which it may be put. In this case, therefore, it did not seem that the requester's occupation as a Member of Parliament amounted to a countervailing public interest which outweighed the reason to withhold.

In the circumstances, the final view formed was that the information at issue was properly withheld in reliance upon section 9(2)(h). However, the Member was invited to consider whether, in this particular case, the procedures of the House, Parliamentary questions or the activities of Select Committees might provide an avenue for obtaining the particular factual information of interest to him.

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