

Request for the contract regarding sale of Railway houses

Legislation	Official Information Act 1982, ss 9(2)(b)(ii), 9(2)(i)
Agency	New Zealand Railways Corporation
Ombudsman	John Robertson
Case number(s)	W1728
Date	February 1994

Request for copy of contract between NZRC and Stone Key Investments Ltd regarding sale of railway houses—refused as ‘commercially confidential’—contract document itself was not simply a standard form Agreement for Sale and Purchase with price and special conditions added, but was a specially drafted document which reflected the negotiating positions adopted by both parties—release would unreasonably prejudice the commercial position of Stone Key Investments—s 9(2)(b)(ii)—release was so likely to ‘prejudice or disadvantage’ the Corporation in future sales of surplus land that it was necessary to withhold the information at issue—s 9(2)(i)—sale agreement retained two key factors of the Corporation’s previous sales policy relating to its obligations as a ‘good employer’—public interest in disclosure of the manner in which those undertakings had been incorporated into the contract—public interest in disclosure of information enabling an assessment to be made of whether the Corporation had acted responsibly and obtained a ‘fair market price’—written summary released

In February 1989 solicitors on behalf of a housing trust complained that their request for a copy of the contract between New Zealand Railways Corporation and Stone Key Investments Ltd had been refused because ‘*the contract was commercially confidential*’ between the parties. The solicitors asked for an urgent review as the reported settlement date for the sale of Railway houses to the company was 17 March 1989 and 38 families of the trust were interested in buying their homes from the Corporation.

The Chief Ombudsman arranged to meet with the Corporation and ascertained that all tenants had received an offer to sell from the Corporation based on 1 June 1988 assessed valuations and that the Corporation had circulated a background paper to Members of Parliament.

In respect of the contract, the Corporation made the following points:

- it contained a clause prohibiting disclosure without consent of the other party;
- the Corporation understood the other party might regard disclosure as a fundamental breach of the contract;
- the purchase price had two elements – the commercial price and the assessment of work—and release of the information would disadvantage the parties in the market place by disclosing their pricing strategy; and
- the Corporation recognised the public interest in disclosure of certain information from the agreement (by way of summary) to show that the interests of tenants/employees had been considered and that the Corporation had acted responsibly in the sale.

A further point put forward on 16 March 1989 was that the schedules to the agreement gave a wealth of detail about the private affairs of tenants who were not clients of the requester and that ample evidence could be given that the Railways Unions took strong exception to the Corporation making information about the affairs of their members available to third parties.

After considering all the information the Chief Ombudsman came to the view that section 9(2)(b)(ii) of the OIA applied to the contract document on the basis that over the previous three years the Corporation had pursued a programme of disposal of surplus Railways' land, a major feature of which had been a policy of offering Corporation employee/tenants first right of refusal to buy the houses they occupied. The sale agreement between the Corporation and Stone Key Ltd sought to dispose of all remaining Railways' houses available for sale via a single transaction. The contract document itself was not simply a standard form Agreement for Sale and Purchase with price and special conditions added, but was a specially drafted document which reflected the negotiating positions adopted by both parties in reaching agreement on the conditions of sale in this case. Under the sale agreement, Stone Key Ltd gained a particular '*commercial position*', namely, the right to obtain ownership of the Railways' houses in question for a price of \$63 million, subject to certain conditions. The requester was effectively competing with Stone Key Ltd for the bulk purchase of houses from the Corporation. The requester's main objective had been to halt the finalising of the sale of the houses to Stone Key Ltd to allow it an opportunity to negotiate with the Corporation for the purchase of the homes of its members.

The Chief Ombudsman considered that the contract document contained information the disclosure of which '*would be likely*', in the sense contemplated by the Court of Appeal in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 378, unreasonably to prejudice the commercial position the company had obtained in its negotiations with the Corporation to buy the houses in question.

The Chief Ombudsman also concluded that section 9(2)(i) of the OIA applied on the grounds that the Corporation was engaged in the ongoing '*commercial activity*' of selling off land which was surplus to its requirements. Disclosure of details of the agreement reached with Stone Key Ltd would reveal (albeit indirectly) to prospective purchasers sensitive information about the Corporation's negotiating stance. The Chief Ombudsman was of the view that knowledge of

such information by prospective purchasers was so likely to *'prejudice or disadvantage'* the Corporation in future sales of surplus land that it was necessary to withhold the information at issue.

Having formed the view that release of the contract document would prejudice interests that the OIA seeks to protect, the Chief Ombudsman then considered whether there were any other considerations, in the public interest, which outweighed the need to withhold the information. The Chief Ombudsman did not accept that individual Corporation employee/tenants had any special right to know the details of the sale agreement reached between the Corporation and Stone Key Ltd. In his view, their position was no different to that of any other tenant whose landlord decided to sell up.

However, the Chief Ombudsman noted the Corporation's public comment that the sale agreement retained two key factors of the Corporation's previous sales policy, namely, that Corporation employee/tenants would be given first right of refusal to buy the house they occupied; that they would be offered appropriate finance packages for that purpose and also that the purchase price offered to the employee/tenants must be within 10 of the special valuations done in June 1988. In these circumstances, the Chief Ombudsman considered there was a public interest in disclosure of the manner in which those undertakings had been incorporated into the contract in that they reflected upon the Corporation's honouring its obligations as a 'good employer' in respect of its employee/tenants.

The Chief Ombudsman also considered that there was a public interest in accountability of officials which favoured disclosure of information to enable an assessment to be made of whether the Corporation had acted responsibly and obtained a *'fair market price'*.

The Chief Ombudsman concluded that these interests could be met by way of a written summary pursuant to section 16(1)(e).

On 21 March 1989 the Chief Ombudsman notified the parties of his preliminary views and on 30 March 1989 a draft summary of the information to be released was provided. After making some adjustments to that summary, the Chief Ombudsman was able to conclude his investigation, having satisfied himself that the summary incorporated:

- the conditions/obligations contained in the contract document under which Stone Key Ltd agreed to offer Railways employee/tenants first right of refusal to buy the houses they occupied; and
- where any of those conditions had been amended by mutual consent between the signing of the document and the date of settlement, the exact nature of and reasons for such amendments.

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