

Chief Ombudsman’s opinion under the Official Information Act

Legislation	Official Information Act 1982, ss 9(2)(g)(i), 28 (see Appendix 1 for full text)
Requester	Mr Simeon Brown
Respondent	The Ministry of Business, Innovation and Employment
Request for Chief Ombudsman	Communications regarding Minister Kiritapu Allan
Case number(s)	Peter Boshier
Date	607983
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Summary

Mr Simeon Brown (Member of Parliament) made a request to the Ministry of Business, Innovation and Employment (MBIE) for correspondence regarding the behaviour or conduct of the Minister for Justice and Regional Development, and Associate Minister for Transport and Finance, Hon Kiritapu Allan.

MBIE explained the only information it held was a text message from a senior manager to the Chief Executive, and that it was withholding this under section 9(2)(g)(i) of the OIA in order to maintain the effective conduct of public affairs through the free and frank expression of opinions between officials.

During my investigation, MBIE further considered one aspect of Mr Brown's request, and released some further contextual information about the text message.

Based on the information before me, I have formed the opinion that MBIE was entitled to withhold the text message itself under section 9(2)(g)(i) of the OIA.

Chief Ombudsman's role

1. I am authorised to investigate and review, on complaint, any decision by which a Minister or agency subject to the OIA refuses to make official information available when requested. My role in undertaking an investigation is to form an independent opinion on whether the request was properly refused according to the provisions in the OIA.

Background

2. On 24 April 2023, a member of Mr Brown's staff requested from MBIE:

1. *A copy of any correspondence, including emails and text messages, sent from yourself or any of the senior leadership team at the Ministry of Business, Innovation and Employment that references the behaviour or conduct of Hon Kiritapu Allan.*

2. *A copy of any correspondence, including emails and text messages, that you or any of your senior leadership team at the Ministry of Business, Innovation and Employment [‘received’ presumably omitted] that references the behaviour or conduct of Hon Kiritapu Allan.*

3. *A copy any letters you have sent or received, to any individual, that reference the behaviour or conduct of Hon Kiritapu Allan.*

4. *For any incidents or concerns that are detailed in any of the material above, a brief outline of the incident, the dates in which it concerned, the location, and the nature of the role or the title of any individuals involved.*

3. On 8 May 2023, MBIE's Chief Executive, Ms Carolyn Tremain, responded to the request, advising that the only information within scope was a text message she received from an MBIE senior manager on 10 March 2023. She advised MBIE was withholding this information under section 9(2)(g)(i) of the OIA, in order to maintain the effective conduct of public affairs through the free and frank expression opinions.
4. On 10 May 2023, Mr Brown complained to me about MBIE's response. In doing so, he queried whether the content of the text message is such that it constitutes an 'opinion', and suggested that in any case there is a public interest in its release as it relates to the conduct of a Government Minister. He also raised concerns about MBIE's response to question 4 of his request, noting that this requested further details of the '*triggering event*' behind the text message itself, and that such information was not provided.
5. On 26 May 2023, I notified the Chief Executive of MBIE that I was investigating her decision on the request.
6. On 21 June 2023, I received a response from MBIE setting out its reasons for withholding the text message.

Comments received during investigation

7. In response to my request for comment, MBIE explained the message in question was sent to Ms Tremain from her Deputy Secretary Mr Robert Pigou, Head of Kānoa – Regional Economic Development & Investment Unit.¹ It explained that, at the time this was sent, Minister Allan was a new MBIE Minister for Kānoa, and the context behind the message was that it was part of an ongoing dialogue, and Ms Tremain had enquired about how the relationship with the Minister was progressing.
8. MBIE's position was that, if the message was released, then its senior management team would become much more guarded in terms of how they communicated with their Chief Executive, due to the impact this might have on MBIE's relationship with its various Ministers. It considered this would prejudice the effective conduct of public affairs, as it would result in a reduction in the transmission of information which MBIE considers is necessary to effectively manage such relationships.
9. In terms of question 4 of Mr Brown's request, MBIE advised it had considered releasing contextual information, but noted Mr Brown had requested information about specific incidents or concerns, and the message did not relate to any specific events, and was instead part of an ongoing dialogue between Ms Tremain and Mr Pigou. However, it acknowledged that some further explanation behind the text message might assist Mr Brown's understanding.

¹ It is now public knowledge that Mr Pigou was the sender of the text message.

10. On 29 June 2023, I wrote to Mr Brown to advise him of my provisional opinion that section 9(2)(g)(i) provided good reason to withhold the text message itself. I invited his comments in response.
11. That same day, I wrote to MBIE in regards to its response to question 4 of the request. I advised I had not formed an opinion on the adequacy of its proposed explanation on this point, but suggested there was an opportunity to provide some additional information behind the context of the message which Mr Brown might find helpful. I also suggested that this sort of explanation could go some way towards addressing the public interest in the matter.
12. On 30 June 2023, MBIE wrote to Mr Brown in response to question 4 of his request to advise:

To give more background, in the week ending 10 March 2023 the Deputy Secretary was travelling with the Minister over the course of a few days, supporting her in a programme of regional engagements pertaining to Kānoa. This was the Minister's first set of regional engagements for this portfolio, and we were still establishing a working relationship with her. As part of ensuring we were able to best support the Minister in her new portfolio I was keen to understand how the engagements on these projects were going, and so was checking in with my Deputy Secretary. Our exchange was aimed at ensuring that MBIE was providing the Minister with the best support in her regional engagements. I regularly exchange this type of information with my senior managers because this ensures that as officials, and as the Chief Executive with ultimate responsibility for our engagement with our Ministers and their offices, we are providing support in a way that meets the needs of each Minister.

13. On 6 July 2023, I received Mr Brown's response. He advised he accepted my provisional opinion that section 9(2)(g)(i) of the OIA applied to the text. However, he noted there was currently significant media and political interest in the Minister's conduct, and considered the text message should nevertheless be released as it would assist in ensuring Government Ministers are accountable for their actions, and to assist in the promotion of public trust in the Government. For those reasons he considered the public interest should override any need to withhold the text under section 9(2)(g)(i) of the OIA.

Analysis and findings

Section 9(2)(g)(i) of the OIA – maintenance of the effective conduct of public affairs through the free and frank expression of opinions

14. Subject to any stronger public interest in release, section 9(2)(g)(i) of the OIA applies where withholding of information is necessary to:

...maintain the effective conduct of public affairs through the free and frank expression of opinion by or between...officers and employees of any public service agency or organisation in the course of their duty.

15. The provision recognises that the effective conduct of public affairs requires the candid and unreserved expression of opinions, and that public exposure of those opinions can sometimes have a chilling effect on officials' willingness to express themselves openly, honestly and completely in future. An 'opinion' is the expression of a view or judgment. However, the information itself does not need to constitute an opinion for this section to apply. Rather, the issue is whether its release would inhibit the free and frank expression of opinions in the future.
16. For section 9(2)(g)(i) to apply, the following criteria must be met:
 - a. release of the information at issue would inhibit the free and frank expression of opinions in future; and
 - b. that inhibition would somehow prejudice the effective conduct of public affairs.
17. Having considered the content of the text message, as well comments received from MBIE and Mr Brown, my opinion is that section 9(2)(g)(i) of the OIA applies.
18. The nature and context of communications is highly relevant to an assessment of the applicability of section 9(2)(g)(i). In this case, the information in issue is a text message to a Chief Executive from one of their senior managers. I recognise that it is important that Chief Executives and their senior managers are able to communicate in a free, frank and efficient manner. Were such information to be released, then I consider it likely that officials would become more inhibited in communicating in such a way in future.
19. In terms of maintaining the effective conduct of public affairs, I consider that release would prejudice such conduct, as an inhibition to communicate in such a way, through concern communications might be released, would likely result in less robust, efficient and engaged discussions between senior officials.

Section 9(1) of the OIA – the public interest

20. Before section 9(2)(g)(i) of the OIA can provide 'good reason' to withhold the information, it is necessary to consider under section 9(1) whether:

... in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.
21. Common public interest considerations include increasing the accountability of public sector agencies and Ministers, increasing the transparency of decision-making, and increasing public participation in this decision-making.
22. Having considered MBIE's decision on Mr Brown's request, its comments and Mr Brown's response to my provisional opinion, I do not consider that any public interest in release

of the information is sufficient to outweigh the need to withhold it under section 9(2)(g)(i).

23. I readily acknowledge that there is a high public interest in the accountability of Ministers for their conduct, including in relation to their interactions with members of the Public Service. However, the communication at issue relates to everyday interactions between the Minister and a senior public official, part of whose core role is to work directly with the Minister on complex and sometimes contested issues. It is now publicly known that in relation to Mr Brown's request for *'correspondence ... that references the behaviour or conduct'* of the Minister, one text message was sent from a MBIE Deputy Secretary to the Chief Executive, whilst travelling with her for a series of regional engagements and establishing a working relationship with her. Mr Pigou has also publicly commented that the message *'does not express concerns about staff working in the office and therefore no follow-up action was needed.'*
24. Having viewed and carefully considered the text message, I do not consider release of its exact content would contribute meaningfully to public debate to the extent required to outweigh the need to withhold it under section 9(2)(g)(i). Instead I consider that the public interest in release has been adequately met by the provision of the contextual information provided by MBIE in its answer to question 4 of Mr Brown's request (set out at paragraph 12 above).

Chief Ombudsman's opinion

25. For the reasons set out above, I have formed the final opinion that MBIE was entitled to withhold the text message under section 9(2)(g)(i) of the OIA. I consider that any public interest in its release has been adequately met by provision of contextual information by MBIE in its answer to question 4 of the request.

Peter Boshier
Chief Ombudsman

Appendix 1. Relevant legislative provisions

Official Information Act 1982

9 Other reasons for withholding official information

- (1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.
- (2) ...this section applies if, and only if, the withholding of the information is necessary to...
 - (g) maintain the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any public service agency or organisation in the course of their duty...

28 Functions of Ombudsmen

- (1) It is a function of the Ombudsmen to investigate and review any decision by which a ... Minister of the Crown or organisation...
 - (a) refuses to make official information available to any person in response to a request made by that person in accordance with section 12...