

Request for grounds in support of reason for withholding information about the Aarhus Convention

Legislation	Official Information Act 1982, sections 19(a)(ii) and 28; Ombudsmen Act 1975, sections 22(1) and (2)
Agency	Ministry of Foreign Affairs and Trade
Ombudsman	Peter Boshier
Case number(s)	565786
Date	June 2023

Failure by the Ministry of Foreign Affairs and Trade to provide grounds for refusal of an information request, when asked to do so under section 19(a)(ii) – Ministry reiterated statutory reasons for refusal instead of giving fuller explanation – Chief Ombudsman formed the opinion the failure to provide grounds in support of the reasons for the refusal was contrary to law – Ministry responded to requester with updated explanation

Background

The requester sought information from the Ministry of Foreign Affairs and Trade (MFAT) relating to the United Nations Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, more commonly known as the Aarhus Convention.

The requester asked that in the event MFAT refused to release any information within the scope of the request, it provide grounds in support of the reason/s for the refusal, pursuant to section 19(a)(ii) of the OIA.¹ Agencies are required under section 19(a)(i) of the OIA to provide the reasons for refusal of a request when communicating the decision. However, where a requester **specifically asks** for the ‘*grounds in support of [a] reason*’ for refusal, section 19(a)(ii)

¹ Section 19(a)(ii) of the OIA provides that if requested, an agency shall give ‘...*the grounds in support of that refusal, unless the giving of those grounds would itself prejudice the interests protected by section 6 or section 7 or section 9 and (in the case of interests protected by section 9) there is no countervailing public interest...*’.

requires grounds to be provided (unless giving those grounds would itself prejudice the interests protected by sections 6 or 9).

MFAT responded to the request, providing an email and another related document. Certain information was withheld under sections 6(a), 9(2)(g)(i), and 9(2)(h) of the OIA. In its letter to the requester, MFAT stated:

The information relevant to your request is attached. We have withheld some information under the following sections of the OIA:

- *6(a): to avoid prejudicing the security or defence of New Zealand or the international relations of the New Zealand Government;*
- *9(2)(g)(i): to protect the free and frank expression of opinions by departments; and*
- *9(2)(h): to maintain legal professional privilege.*

Where the information has been withheld under section 9 of the OIA, we have identified no public interest in releasing the information that would override the reasons for withholding it.

The requester complained to the Chief Ombudsman, as they did not consider MFAT had met the requirements of section 19(a)(ii) of the OIA to provide, as had been requested, grounds supporting its reasons for refusal.

Investigation

The Ombudsman noted that although a response under section 19(a)(ii) of the OIA is not specifically listed as a matter an Ombudsman can review under section 28 of the OIA, it can be investigated under the Ombudsmen Act 1975 (OA). Under the OA, the Ombudsman can form an opinion as to whether an act or decision was unreasonable, wrong, contrary to law, or otherwise inconsistent with sections 22(1) or (2) of the Ombudsmen Act 1975.

Section 19(a) of the OIA was discussed in *Kelsey v Minister of Trade* [2016] 2 NZLR 218. In that case, Professor Kelsey wrote to the Minister following a refusal of an information request, asking for an explanation under section 19(a)(ii) of the grounds relied on in support of the reasons to refuse the request. The Minister responded that the statutory reasons were adequate as an explanation. The Court found, however, that reciting the statutory reasons for refusal did not fulfil the responsibility under section 19(a)(ii) to explain the grounds in support of the reason for refusal, stating:

...a decision-maker does not discharge his or her statutory duty to provide an explanation of the “grounds” in support of his or her “reasons” for refusing a request for official information by simply reciting which of the statutory grounds ... were relied upon when refusing that request. The decision-maker must give more information so as to enable the applicant to understand the bases for the decision made...

...s 19(a)(ii) of the Act contemplates a decision-maker providing grounds when requested which should include an explanation of his or her decision for withholding requested information...

In the present case, MFAT referenced the detail of the statutory reasons for refusal, which it considered was consistent with section 19(a)(ii) of the OIA. The Ombudsman concluded that this response referenced the statutory reasons in a way that was criticised in *Kelsey*, which established that something more than simply reciting the statutory reasons is required when a request is made under section 19(a)(ii). On this basis, the Ombudsman considered that MFAT had not met the requirements of section 19(a)(ii) of the OIA, which is to provide the grounds used to support the statutory reasons for refusal, when that is requested by the requester.

Outcome

The Ombudsman's final opinion was that MFAT's failure to give an explanation of the grounds in support of the statutory reasons for its decision to refuse a request, when specifically requested by the requester, was inconsistent with section 19(a)(ii) of the OIA, and thus contrary to law.²

In response to the Ombudsman's final opinion, MFAT:

- gave the requester a response that was consistent with section 19(a)(ii) of the OIA, explaining why it considered the prejudice inherent in each statutory reason for refusal applied to the information that it refused to release; and
- updated its internal guidance on the requirements of section 19(a) of the OIA.

On this basis, the Ombudsman did not consider it necessary to make any recommendations.

The Ombudsman made the following observations in relation to section 19(a)(ii):

- *Kelsey* establishes that something more than simply reciting the statutory reasons for refusal is required, when a request for the grounds in support of the reason for refusal is made under section 19(a)(ii) of the OIA. This is consistent with the purpose of section 19(a)(ii) – to ensure that requesters can better understand why they are being refused access and make an informed decision about whether to request a review.
- The extent of the grounds that are required will be fact specific. The overriding objective for an agency is to expand on why the prejudice inherent in each statutory reason for refusal applies to the particular information.
- If giving any of the grounds would be considered to itself prejudice the interests protected by sections 6 or 9, then that should be specifically acknowledged.

² This is pursuant to section 22(1)(a) of the Ombudsmen Act 1975 (applicable pursuant to section 29(1) of the OIA).

- The Chief Ombudsman's [template letter](#) provides some guidance on what agencies should provide, including a brief description of the information (or groupings of information) being withheld, the harm/(OIA reason for refusal) that releasing the information would cause, and the consideration of the public interest in release.
- Where there are section 9 reasons for refusal at issue, and the public interest (balancing) test is applied, an agency should identify what public interest factors in favour of release it identified, and how it weighed or balanced them against the identified harm in release.

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