

Requests for information regarding the production of *The Hobbit* and film production generally

Ombudsman's opinion

Legislation: Official Information Act
New Zealand Council of Trade Unions/Radio New Zealand and Minister for Economic Development

Agency: David McGee

Ombudsman: 302561 and 302600

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Summary

In late 2010 the New Zealand Council of Trade Unions and Radio New Zealand sought information from Ministers regarding the production of *The Hobbit*. The former also sought information about film production generally in New Zealand. These requesters along with a number of other requesters, received a response from the Hon Gerry Brownlee. The Minister noted that because similar requests had been made to a number of Ministers, a decision had been made to release the same documents to all those who had made a request. Although some information was provided (including information that was outside the scope of the requests) some of the requested information was withheld. The New Zealand Council of Trade Unions and Radio New Zealand sought the Ombudsman's review of the information withheld.

On review my key findings are:

- Section 9(2)(ba) of the Official Information Act 1982 (OIA) does not apply to information which was supplied to the Government by the film industry third parties (the parties identified by Ms Kelly in her request). This provision is not intended to permit Ministers or departments to erect a barrier to the disclosure of general policy submissions made to them by third parties on the ground that an obligation of confidence thereby arises that is owed to those submitters.
- Section 9(2)(h) applies to the legal advice obtained by the Government. The conduct of Ministers was not inconsistent with maintaining the confidentiality of the privileged material. The public interest considerations which favour disclosure do not outweigh the section 9(2)(h) interest, with the exception of the case of one document.
- This document is a letter which was drafted by Crown Counsel as part of advice to Ministers on how to respond to submissions made by a film industry third party. Although this draft was never turned into a letter sent to, or formally received by, the film industry third party, it was shown to that third party at a meeting. Accordingly, while in its origin it may have been legal advice, it was adopted by Ministers as representing their own position. Ministers cannot expect their correspondence with third party submitters on issues of public policy to remain confidential (with the exception of personal or commercially prejudicial material), especially when matters which have been urged on Ministers are subsequently implemented by policy or legislative changes. The submitter's urgings and the ministerial response become part of the history (which the public has a legitimate interest in knowing) of how policy or legislation was developed.
- Section 9(2)(g)(i) does not apply to the submissions and comments that were made to Ministers by the film industry third parties. While there will be circumstances in which persons may feel inhibited from making submissions by the prospect of those submissions being made public, this was not so in this case. The submissions and comments that were made to Ministers by these parties were made in their own direct interests with a view to persuading the Government to a policy stance that advantaged them in their commercial dealings. There is nothing improper in this and it has not been suggested that there was. But it is not accepted that persons who have a commercial interest in making submissions to Ministers would be likely to be deterred from doing so

by the prospect of release. They might prefer non-release, but release is a consequence that has to be, and is likely to be, borne with.

Background

On 2 November 2010 Helen Kelly of the New Zealand Council of Trade Unions made requests to the Prime Minister, the Minister for Economic Development, the Minister of Labour and the Minister for Arts, Culture and Heritage for:

“...all correspondence, advice, text or phone records or any other form of communication, within the last 12 months, between any Government Ministers or Government Departments and either Wingnut Films, Peter Jackson, Warner Brothers or Three Foot Seven in relation to either film production generally in New Zealand, the production of the Hobbit or any other matter. I am also requesting any internal advice between Ministers on the same topic and between any Government Departments and Ministers.”

The wording of the request to the Minister for Economic Development was subsequently amended to:

“all correspondence, advice, text or phone records or any other form of communication within the last 12 months between the Minister for Economic Development, Ministry of Economic Development, or NZ Trade and Enterprise, and Wingnut Films, Peter Jackson, Warner Bros, SPADA and Three Foot Seven in regard to any matter in relation to film production generally in NZ or production of the Hobbit, and any advice from Ministry of Economic Development or NZ Trade and Enterprise to the Minister for Economic Development on the same topic”.

On 5 November 2010 Brent Edwards of Radio New Zealand made requests to the Prime Minister, the Attorney-General and the Minister for Economic Development for:

- *“all reports, papers and correspondence, including emails,...you received in regard to the controversy over the Hobbit movies;*
- *official advice you received which led to the announcement the Prime Minister made on October 27 that the movies would be made in New Zealand;*
- *any correspondence, emails or other reports between you and Warner Bros, Sir Peter Jackson and any other company or individual involved in the film dispute;*
- *any correspondence, emails, reports or advice you received in relation to the movies being made here, before the Actors’ Equity dispute began”.*

The Prime Minister’s response related only to information within the scope of the request *“which would not be held by either of those Ministers”.*

On 17 December 2010 Ms Kelly and Mr Edwards, along with a number of other requesters, received the following response from the Hon Gerry Brownlee (then Minister for Economic Development) ('the Minister'):

"I refer to your recent request under the Official Information Act for information relating to the production of the Hobbit or the wider film production industry in New Zealand.

As similar requests have been made to a number of Ministers, we have decided to release the same documents to all those who have made a request. As a consequence the enclosed documents may include some that are outside the scope of your request."

Twenty-six reports, 28 emails and 25 other documents were then released. Some information in the released documents was withheld in part. Other documents were withheld in full. Information was withheld relying on sections 9(2)(a), 9(2)(ba), 9(2)(f)(iv), 9(2)(g)(i), 9(2)(h) and 9(2)(j) of the OIA.

On 21 December 2010 Ms Kelly asked me to investigate and review the Minister's decision. A similar complaint was received from Mr Edwards on 24 December 2010.

Investigation

On 23 December 2010 I notified the Minister of Ms Kelly's complaint. I sought a report on the decision to withhold information and a copy of the information at issue. I also noted that Ms Kelly was seeking an assurance that all the information captured by her request had been considered.

On 28 January 2011 I notified the Minister of Mr Edwards' complaint.

On 1 February 2011 the Minister gave notice of an extension of time in which to respond to Ms Kelly's complaint. He noted that my letter had arrived after his office had closed for Christmas and the office was not fully operational again until 25 January 2011. An extension was thus sought in order to compile the information and write a report. The time for response was extended until 21 February 2011. A further extension in respect of both complaints was sought on 17 February 2011. The time for the response was extended until 7 March 2011.

The Minister provided me with his response on 21 March 2011. He commented:

"As you will see from the report, the compilation of the information and the consultation and communication with other Ministers' offices, government agencies, and third parties that was required made this a large logistical exercise. At the time of the requests my office was extremely busy responding to issues relating to the Pike River tragedy and the Canterbury Earthquake and I believe it was a significant achievement getting to the point of being able to release the documentation when we did.

I am aware there was a particular effort made to release the information the week of 17 December rather than the following week (being the week before Christmas)."

I numbered the documents which had either been withheld in part or withheld in their entirety. There were 60. (I have treated as one document those documents which had attachments and as one a group of emails from members of the public who wrote to Ministers in relation to the production of *The Hobbit*.)

One of the documents referred to a Crown Law legal opinion. I asked the Ministry for Economic Development ('MED') to confirm that this was the Crown Law opinion which the Chief Ombudsman had considered in the context of her consideration of a complaint against the Prime Minister for "*all briefings and reports received... since 1 January 2009 mentioning the Hobbit films, New Line or Warner Bros*" (ref:300619). MED confirmed that it was and I asked for a copy of that opinion so that I could consider it in the context of my own investigation and review.

On 12 April 2011 the investigator assisting me with my investigation, met with officials from MED to discuss the complaints.

On 9 May 2011 I expressed to the Minister a provisional view that the OIA did not provide good reason to withhold all of the information which had been withheld. I asked the Minister to consult the third parties affected by my view and said that I was willing to consider any comments he or the third parties wished to make before I decided whether to confirm my opinion.

On 20 May 2011 I received a copy of the Crown Law legal opinion from the Office of the Minister for Arts, Culture and Heritage. This opinion referred to two documents which also appeared to be captured by Ms Kelly's request but which had not otherwise been identified up to that time. As a result, the Office of the Minister for Arts, Culture and Heritage and the Crown Law Office were asked whether they could locate the relevant documents.

On 20 June 2011 the Minister wrote to me in response to my provisional view. He advised that his officials had reviewed the documents and consulted with other Ministers' offices and agencies as required, as well as with third parties. He agreed that some further information could be released but continued to assert the justification for withholding other information. He advised that he was still considering the status of some of the documents (documents 16-19, 42, 44, 45 and 49) and the views of the third parties involved and he advised that his comments on those documents would be forwarded separately.

On 28 June and 1 July 2011 the Crown Law Office provided me with the two documents which had been referred to in the Crown Law legal opinion. On 7 July 2011 an advisor from the Office of the Minister for Arts, Culture and Heritage advised that he could not "*confirm whether the material you refer to are complete documents or who the authors/recipients are. The reason for this is that we simply do not have original/full copies of those documents in our office...*". On 13 July 2011, after making further enquiries as to whether I had received all information that was within the scope of the requests, an advisor from the Office of the Minister for Arts, Culture and Heritage provided me with a further 14 documents. This increased the number of documents at issue to 77.

On 30 June 2011 I wrote to Ms Kelly regarding the withholding of the Crown Law legal opinion. Ms Kelly had previously made submissions in response to the Chief Ombudsman's view on the withholding of the opinion. I advised Ms Kelly that I could see no reason to depart from the Chief Ombudsman's view that section 9(2)(h) of the OIA provided good reason to withhold this document.

On 20 July 2011 the Minister advised that he had decided to release some previously withheld information from documents 16-19, 42, 44, 45 and 49 but he would continue to withhold other information from those documents. The Minister advised that he was happy to discuss any issues relating to these documents before I provided my final opinion.

On 12 August 2011 I wrote to the Minister confirming my request for a meeting and asking him to release the information which he had agreed could be released and which did not involve documents which contained information which was still in dispute. It was arranged that I would meet the Minister and the Minister for Arts, Culture and Heritage on 25 October 2011 (I was to be absent overseas during the greater part of September and October).

I advised the requesters of my decision to meet with Ministers. I also advised the requesters that in my provisional view there was good reason to withhold some of the information at issue. This information largely comprised advice which had been tendered to the Minister in relation to screen infrastructure in New Zealand and in relation to specific applications for the Large Budget Screen Production Grant. There were also communications between the Crown Law Office and the Minister for Arts, Culture and Heritage and between other legal advisers and third parties which in my view attracted legal professional privilege.

On 16 August 2011 I wrote to the Minister expressing a provisional view on the additional documents which had been forwarded to me by the Office of the Minister for Arts, Culture and Heritage. I expressed the view that there was good reason to withhold some information under section 9(2)(h) of the OIA. I did not see that there was good reason to withhold the remainder of the information.

On 29 August 2011 I met with Ms Kelly to discuss the complaint and the progress of the investigation and review.

On 23 September 2011, the Minister for Arts, Culture and Heritage responded to my provisional view on the additional documents which were within the scope of Ms Kelly's request and which were held by his Office. On 4 October 2011, the Minister released further information to the requesters.

On 17 October 2011 the Minister's Office cancelled the meeting which had been set for 25 October 2011 because of an unexpected Cabinet meeting which had been called by the Prime Minister. Given the then impending general election it was clear that little further progress could be made in regard to a meeting for some time.

Accordingly, on 1 November 2011, I asked the Ministers to release the documents which contained information which they had agreed could be released but which also contained information which was still in dispute. It seemed to me that the requesters should not be

required to wait any longer for the release of information for which no good reason to withhold was still being asserted.

I ultimately met with the Minister on 9 February 2012. Immediately following our meeting I wrote to the Minister, to the Hon Steven Joyce (as the new Minister for Economic Development), and to the Minister for Arts, Culture and Heritage. I noted that the Minister had in light of my comments undertaken to review the disputed material (contained in documents 8, 15-20, 42, 45, 49, 61, 65, 67, 69, 70 and 73) and to respond accordingly. I also noted that there was some information which Ministers had already agreed could be released but which remained undisclosed. I asked the Minister to release that material.

On 24 April 2012 the Minister released further information to the requesters. He also wrote to me and advised that he continued to believe that the OIA provided good reason to withhold the information which remained in dispute. He informed me that he had consulted with the Minister for Arts, Culture and Heritage who had also reviewed the documents and who concurred with his decision.

On 25 May 2012 I wrote to Minister and to the Hon Steven Joyce regarding two further papers which had come to my attention and which appeared to be captured by these complaints, but which had not been provided to me by the Minister. These consisted of an immigration policy paper and a document headed “Notes for Oral Cabinet Item”. This brought the total number of documents at issue to 79.

On 27 June 2012 an official advised this Office that it was proposed that the immigration policy paper be released with minor redactions. I was also advised that there were two Cabinet Minutes which related to the paper and that these were to be released as well. The official advised that he understood the Minister did not intend to release the document “Notes for Oral Cabinet Item” because in the Minister’s view it was not covered by the requests.

On 29 June 2012 I issued a consolidated provisional opinion to the Minister, the Minister for Economic Development and the Minister for Arts, Culture and Heritage. This view covered all the information still in dispute apart from the two papers which I had recently identified. I sought a response by 3 August 2012.

On 30 July 2012 the Minister for Arts, Culture and Heritage wrote to me to advise that he and the Minister would require more time to go through the opinion thoroughly. He advised that they would respond as soon as practicable. He also asked whether I had supplied my opinion to all third parties involved.

On 9 August 2012 I advised the Minister for Arts, Culture and Heritage that I understood that Ministers would undertake the third party consultation as per the practice which was established in earlier correspondence with the Minister. I also noted that, in his letter of 23 September 2011, the Minister for Arts, Culture and Heritage had stated that he would need to engage in consultation with Wingnut Films (“Wingnut”) if I was unwilling to reconsider my view on the application of the OIA. I asked the Minister for Arts, Culture and Heritage to advise me if this understanding was incorrect. I proceeded on this basis.