

### Information at issue

This interest has been relied on in connection with communications between the film industry third parties and Ministers in relation to the production of *The Hobbit* -2010.

### Application of section 9(2)(j)

Ministers have argued that disclosing some of the information at issue would prejudice or disadvantage any subsequent negotiations with New Line or similar organisations because the latter would be less forthcoming about their negotiating positions and the reasons for them, if they believed such information would be released.

I have not identified any link between the information at issue and the predicted harm. To my mind, what is in effect being argued is that being subject to the OIA would disadvantage the Government in future unspecified negotiations. But this I take to be one of the consequences of the OIA. It is militated against by withholding grounds (sections 9(2)(j) and (i)) which permit the Government and its agencies to withhold information in specific circumstances. No specific circumstances have been identified here.

A concern was also raised about the effect of the disclosure of some of the information on the negotiating positions of third parties. But section 9(2)(j) does not provide protection for the negotiating positions of third parties, only the current or reasonably anticipated positions of Ministers, departments or organisations which are holding the requested information. I discount this concern as not relevant to section 9(2)(j).

### Outside the scope of the request

#### Information at issue

- Notes for oral Cabinet item in relation to the production of *The Hobbit* – 2010.
- Information deleted from a letter appended to a report from the Ministry for Culture and Heritage to the Minister for Arts, Culture and Heritage – Review of New Zealand Film Commission -2010.
- Information deleted from an Aide Memoire: Meeting with Peter Jackson – 2010.
- Deletion of recipient of Ministerial correspondence regarding infrastructure situation in New Zealand – 2009.

The Minister submitted that the document headed “Notes for Oral Cabinet Item” (identified by me late in this investigation) is not within the scope of the requests.

I disagree. In my view it is captured by Ms Kelly’s request for “...any internal advice between Ministers on the same topic...” and Mr Edwards’ request for “...papers ...received by the Minister in regard to the controversy over the *Hobbit* movies”.

I am not aware of any good reason to withhold the “Notes for Oral Cabinet Item” when the decision on these requests was made and none has been expressed to me.

In my view the redactions made to the aforementioned letters and the aide memoire are justified on the basis that the information at issue is outside the scope of both requests (because the information predates November 2009 and does not relate to relevant subject matter).

## The public interest

Having accepted that some section 9(2) interests apply, I have considered whether “*the withholding of the information is outweighed by other considerations which render it desirable, in the public interest, to make that information available*” (section 9(1) refers).

Section 9(1) is not about whether there is “*a public interest*” in making the information available, but whether any considerations favouring disclosure in the public interest *outweigh* a presumptive justification for withholding information.

I do not consider that the public interest considerations which favour disclosure outweigh the section 9(2) interests which apply, with the exception of the case of one document.

The greater part of the information in respect of which I have accepted that the withholding grounds apply is information about “*film production generally*” which at the time of the request was either still under consideration or involved commercially confidential information. I can identify no public interest factors that would outweigh the withholding grounds in respect of this information, nor were any seriously suggested to me.

On the other hand very little information regarding “*the production of The Hobbit*” in my view attracts the protection of section 9(2) of the OIA. The principal exception is the legal advice generated during the industrial dispute. The fact that this advice concerns a contentious policy issue does not persuade me that its release should override the section 9(2) interests (with the one exception I will discuss below). Contentious policy development is the stuff of government, the decisions taken to secure and expedite the production of *The Hobbit* are not uniquely contentious. While the various parties to the dispute will have their own perspectives on the wisdom of the course chosen, this is so in many other matters. I have seen nothing in this case suggesting impropriety, for instance, that would cause me to take a different view.

Ms Kelly argued, in particular, that the legal advice referred to by the Attorney General in his letter of 29 September 2010 ought to be disclosed. She considered that the topic of the legal opinion and the nature of the amendment to the law increased the public interest in disclosure. I am not persuaded that the public interest in transparency in this case is elevated to a level that outweighs the interest in protecting the Government’s ability to receive legal advice in confidence. The OIA does endorse a general public interest in the availability of official information, but it also recognises that this is not of itself sufficient to require all official information to be available on request. One limitation on availability is where the information is subject to legal professional privilege. Where this is the case, the OIA expressly protects that privilege. It would require circumstances of some exceptional nature (either generally or in respect of the particular advice) to set that privilege aside.

The complainants also referred to the fact that the legislation amending the Employment Relations Act was passed by Parliament in a single day without examination by a select committee. This factor, it was claimed, increased the public interest in disclosure of the legal advice in this case. I am not sure to what extent it would be proper to take into account what is, in effect, a criticism of the parliamentary process followed in enacting the legislation. But I note that (with the exception of advices on Bill of Rights Act compliance) it is not usual for select committees to ask for or to be given copies of the legal advice on which a bill or part of a bill may be based. The particular information at issue is unlikely to have surfaced in any event. I discount this factor entirely in my consideration.

As far as the public interest in transparency is concerned, the Government's reasons for introducing the legislation were publicly aired in the parliamentary debate during the passing of the bill and by way of the released Cabinet papers entitled "*Report Back on the Employment Relations (Film Production Work) Amendment Act 2010*". I thus see no reason for overriding the withholding grounds that apply in respect of the legal advice or the other information relating to the production of *The Hobbit* that does fall within section 9(2).

However, there is one document to which legal professional privilege may apply that I consider should be released in the public interest.

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. In these circumstances I have accepted that it is privileged. The draft was never turned into a letter sent to, or formally received by, the film industry third party. However, I have been told by Ministers that it was shown to that third party at a meeting. Had a letter been sent by Ministers it would not (certainly in its entirety) have been subject to legal professional privilege. Given that this draft was used by the Minister and the Minister for Arts, Culture and Heritage to respond to submissions which had been received, it seems to me that there is a public interest in its release.

Just as persons corresponding with Ministers on issues of public policy cannot expect their correspondence to be treated as confidential by Ministers, Ministers cannot expect their correspondence with submitters on policy issues 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. The fact that limited disclosure may not waive privilege does not mean that such disclosure is irrelevant to a consideration of the public interest in release. I consider that in this case it is highly relevant.

As I have indicated in this opinion, I do not depreciate the interest in protecting legal professional privilege. However, the privilege in this case is very different from the usual form of legal advice. It was a draft letter for Ministers to send to a film industry third party. If the letter had remained as a discarded draft there would in my view be no public interest sufficient to override section 9(2)(h). But it was not discarded; it was used by Ministers to convey their position to another party in the discussions. In its origin it may have been legal advice, but it was adopted by Ministers as representing their own position. It was at least partly as a result of

submissions such as those made by this film industry third party, that the group of Ministers with power to act approved the introduction of the Employment Relations (Film Production Work) Amendment Bill. The Bill was passed on 29 October 2010.

The disclosure of the information at issue will promote the accountability of the Government for its decision-making in relation to this law change. As recognised in the purpose statement of the OIA, there is strong public interest in availability of official information to promote the accountability of Ministers of the Crown and officials. This enhances respect for the law and promotes the good government of New Zealand (section 4(a)(ii)).

I consider that the public interest in release of this document outweighs any interest in maintaining legal professional privilege in it.

### Ombudsman’s opinion and recommendation

I have formed the opinion that the OIA does not provide good reason to withhold the following information:

- the remainder of Document 8 – Report from Ministry of Economic Development to Minister - “*Film Industry Meeting on Actors’ Equity and Immigration Issues*” - 28 April 2010.
- Some information in Document 15 – Email and attachments from Penelope Borland to Tim Hurdle - 12 October 2010.
- All of the information in Document 16 with the exception of a redaction pursuant to section 9(2)(h).
- the remainder of Document 17 with the exception of a private email address – Email from Fran Walsh and Sir Peter Jackson to Tim Hurdle and Mark Da Vanzo - 15 October 2010 - 4.07 pm.
- The remainder of Document 18 with the exception of a private email address – Email and attachments from Sir Peter Jackson to Tim Hurdle and copied to Mark Da Vanzo - 15 October 2010 - 3.45 pm.
- All of Document 19 with the exception of a private email address.
- The remainder of Document 20 - Email from Penelope Borland to Tim Hurdle - 19 October 2010.
- The remainder of Document 42 – Email from Penelope Borland to Tim Hurdle - 23 September 2010.
- The remainder of Document 45 with the exception of a private email address – Email from Sir Peter Jackson to Tim Hurdle -18 October 2010.
- The remainder of Document 49 with the exception of a redaction pursuant to section 9(2)(h) – Email from Tim Hurdle to Hon Gerry Brownlee and others - 28 September 2010.

- All of Document 61.
- All of Document 65.
- All of Document 67 with the exception of a redaction pursuant to section 9(2)(h).
- All of Document 69 - Letter drafted by Crown Counsel and used by the Minister and the Minister for Arts, Culture and Heritage to respond to a film industry third party.
- All of Document 70 with the exception of redactions pursuant to section 9(2)(h).
- All of the attachments to Document 73 with the exception of redactions pursuant to section 9(2)(h).
- All of the immigration policy paper with the exception of redactions pursuant to section 9(2)(g)(i).
- All of the “Notes for Oral Cabinet Item” dated 29 October 2010 and the related Cabinet Minutes.

I recommend, pursuant to section 30(1)(a) of the OIA, that the Minister for Economic Development release this information.

Under section 32 of the OIA, a public duty to observe my recommendation will be imposed from the commencement of the 21st working day after the date of this opinion. This public duty applies unless, before that day, the Governor-General, by Order in Council, otherwise directs.

