

Naomi Wallwork

From: Naomi Wallwork
Sent: Monday, 15 February 2010 2:31 p.m.
To: 'officialinfo@lawcom.govt.nz'
Subject: OIA Survey response - NZ On Air

Please find attached comments from NZ On Air regarding the review of Official Information legislation. We have only responded to question 3.3 as we feel that is the area that impacts us most.

Official or Requester – Official

Usual involvement with official information, eg media, legal adviser, prepare responses, politician, research, public interest group – Legal adviser

Name (optional) – Naomi Wallwork

Organisation (if applicable) – NZ On Air (Broadcasting Commission)

Topic 3.3 Questions

(a) What is your experience of the commercial interest withholding provisions and the way they are applied?

We occasionally receive requests from third parties for disclosure of proposals for the funding of radio or TV programmes. The requester is often a person who has a particular issue with a programme that has been funded by us (eg a creditor of the production company, the subject of the documentary/drama, a disappointed applicant for a similar programme, someone who has pitched a similar idea to the production company etc).

We require each proposal to include a synopsis of the programme, detailed treatment or script, details of key personnel, a production schedule and a budget. These are very detailed documents without which we cannot adequately perform quality and risk assessment procedures, along with reference pricing assessments. As public funding administrators, we need to receive good quality proposals with a high level of transparency, detail and candour. At this early stage of a programme's life a high level of uncertainty exists.

We do not automatically release proposals if we receive a request as we consider that the following provisions of the Act may apply:

S(9)(2)(b)(i) – the proposal may include a trade secret;

S(9)(2)(b)(ii) – disclosure may be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information;

S(9)(2)(ba)(i) – proposals are subject to an obligation of confidence and disclosure would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied.

Proposals may also include personal information that we may wish to withhold for reasons of privacy.

Because of the detailed analysis involved in applying the Act we occasionally get legal opinions, at some expense, to aid in our response. In general, we have disclosed proposals or parts of proposals despite there being a risk that by doing so we could prejudice the supply of similar information to us. We mitigate this risk by refusing to disclose some detail on the basis that this would have a chilling effect on future proposals and also because it may compromise the producer's commercial position when negotiating with its suppliers or if it is a competitor to the producer making the request. Budget detail such as payments made to individuals is often withheld. We are unclear if our approach is legitimate. Releasing this information is an unpopular stance, often challenged by production companies.

In general, we do not think there is an over-riding public interest in disclosing the details of proposals. Please note that we are completely transparent in our funding decisions in terms of the amount of our funding, the type of production and who the production company is: probably the most transparent of any funding agency in the world. Every single investment (several hundred each year) is made public within weeks of the decision.

The current wording of the Act seems cumbersome and there is much cross-checking required between sections. The Ombudsman's Guidelines are somewhat useful but also cumbersome. Ideally, we would not have to feel the need to seek legal advice when we receive a request but the case-by-case approach sometimes necessitates this.

(b) Have you any suggestions for improvement?

Under S9(2)(ba)(i), we consider that it is not just the commercial position of the person who supplied or is the subject of the information that is relevant. In our case, the commercial position of the commissioning broadcaster is also relevant: the inclusion here of the concept of a "directly related party" would be helpful.

More general guidance from the Ombudsmen on frequently recurring situations (as suggested by question 2.1(d)) would also be useful.

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10th December 2010

The Law Commission
Via email: officialinfo@lawcom.govt.nz

NZ On Air response to Law Commission's Review of Official Information Legislation

In February 2010 NZ On Air emailed to you its response to various questions the Law Commission asked in preparation for an issues paper on the OIA.

The Law Commission released the OIA issues paper on 29th September 2010, seeking responses by 10th December 2010. NZ On Air would like to submit the following:

NZ On Air Response to specific questions in Chapter 5 – Protecting Commercial Interests
(to be read in conjunction with our February email response, copy attached):

Q.16 Do you think the commercial withholding ground should continue to be confined to situations where the purpose is to make a profit?

NZ On Air submits that the Ombudsmen Practice Guidelines requirement of a profit motive for 'commercial' is too narrow. NZ On Air suggests that there can be commercial activities which do not involve profit and asks for a broader interpretation. Further, as specified in our February email, under s9 (2)(ba)(i) we consider that it is not just the commercial position of "the person who supplied or is the subject" of the information is relevant. In our case, the commercial position of the commissioning broadcaster is also relevant. We suggest the provision be amended to include the concept of a "directly related party".

Q.17 If you favour a broader interpretation, should there be a statutory amendment to clarify when the commercial withholding ground applies?

For greater clarity and to avoid cross checking between section 9 and the Ombudsmen Guidelines, a statutory amendment for any broader interpretation on commercial interests would be beneficial. More general guidance from the Ombudsman on frequently recurring situations on what commercial interests encompass could then supplement these statutory changes.

Q.18 Do you think the trade secrets and confidentiality withholding grounds should be amended for clarification?

We agree with the Law Commission suggestion that better guidance, coupled with reliance on precedent as suggested in Chapter 3 of the Issues Paper, is probably the best avenue for creating certainty and clarity.

General Response:

It was encouraging to read the suggested proposals to clarify the scope and intentions of the OIA Act. In general we agree with the Law Commission's recommendations set out in its Issues Paper and thank the Law Commission for seeking our feedback.

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NZ On Air – Irirangi Te Motu