

11 July 2018

Andrew Ecclestone
fyi-request-7959-8ed64dcd@requests.fyi.org.nz

Dear Mr Ecclestone

Request seeking information relating to decisions made regarding a previous Official Information Act request and official information relating to the design, purpose and intent of section 61 of the Legislation Act 2012

I refer to your email of 30 May 2018 to the Ministry of Justice, received on 13 June, seeking under the Official Information Act 1982:

- *Under section 23 of the OIA, please provide me with:*
 - (a) *the finding on material issues of fact relating to the Ministry's decision of 28 May 2018 that the public interest in disclosure of document 6 (the drafting instructions to PCO of 20 May 2014) did not outweigh the necessity of maintaining legal professional privilege;*
 - (b) *a reference to the information on which those findings were based; and*
 - (c) *the Ministry's reasons for its decision that the public interest in disclosure of document 6 (the drafting instructions to PCO of 20 May 2014) did not outweigh the necessity of maintaining legal professional privilege.*

Please note that, as per section 23(1) of the OIA, section 9(2)(h) legal professional privilege is not a withholding ground that can apply to requests made under section 23.

- *Under section 12 of the OIA, please provide me with:*
 - (a) *all information held by the Ministry relating to design, purpose and intent of the provision that became section 61 of the Legislation Act 2012;*
 - (b) *all information held by the Ministry relating to the interaction of section 61 of the Legislation Act 2012 and the OIA 1982.*

If any of this information is not recorded in writing, please make and supply me with a written note of the information on this topic known to Ministry officials, as the Ombudsmen have made clear that that 'information held' by a department includes unrecorded information held by officials in their heads.

As per section 16 of the OIA, I would like to receive this information as electronic attachments to your email responding to this request. Also as per section 16, my preference is to receive any documents in the native file format in which they were created and are held by the Ministry, rather than rasterised/image-only PDF files.

If you decide that any part of the OIA provides a ground for withholding information when you respond to this request, please could you - as per section 19(a) of the

OIA - provide details of the reasons in support of those grounds, including the public interest factors considered by the Ministry under section 9(1).

In addition, in the event that the Ministry decides that there is reason under the OIA to withhold some information in full, please provide me with a list of all the documents it has determined fall within the scope of my request.

Finally, when responding to these requests, please could you provide me with a list of the search terms used by Ministry officials when searching for information within the scope of the two requests detailed above.

I address each request in turn.

Request for information relating to decisions made regarding your previous Official Information Act request

You have requested information about my previous decision to withhold information under s 9(2)(h) (legal professional privilege) under s 23 “as it is a decision that affected [you] in [your] personal capacity...as it affected [your] right to information under the OIA”.

I am treating your request as a further request for reasons under s 19(a)(ii) as s 23 applies to decisions personally affecting a person’s rights, interests, and liabilities, rather than general OIA matters.

When deciding to withhold document 6 (drafting instructions to PCO), I referred to the Ombudsman’s guidance on legal professional privilege.¹ Using that framework:

1. I identified that the instructions were legally privileged as they were a communication to a legal advisor (acting in that capacity) from the Ministry of Justice (the client) for the purposes of seeking or receiving legal advice or assistance (drafting).
2. I considered that it was necessary to withhold the document in order to maintain legal professional privilege, because I considered that releasing the document would constitute waiver. Legal professional privilege is a fundamental element in the administration of justice. As such, the public interest in ensuring the maintenance of the privilege is very high.
3. I considered that there was public interest in enabling people to effectively participate in the making of laws by providing information to assist in making submissions to the Justice Committee. However, I did not think that releasing the document would in fact promote those considerations as the instructions did not provide detailed reasons for why the Law Commission’s recommendation 37 was accepted on a modified basis only. Those reasons were provided by document 1, which set out the policy rationale behind the decision.

¹http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/1247/original/part_2c__other_reasons_for_refusing_official_information_-_legal_professional_privilege.pdf?1450324180

4. Accordingly, I did not think the countervailing public interest in this case was strong enough to outweigh the important public interest in maintaining legal professional privilege.

As you are aware, my view on whether privilege in the instructions had been waived was revised following your supplementary 28 May 2018 request.

Request for official information relating to the design, purpose and intent of s 61 of the Legislation Act 2012

The Ministry of Justice and the Parliamentary Counsel Office (PCO) jointly administer the Legislation Act 2012. Justice is responsible for Part 3, relating to subordinate legislation, while PCO is responsible for the balance of the Act, including s 61. Accordingly, this part of your request is more closely connected with PCO's functions. As PCO is not subject to the Official Information Act, I am unable to transfer your request under s 14. However, you could approach PCO directly with your question.

I have arranged a review of the electronic and hardcopy files held by Justice concerning the Legislation Act to determine whether Justice holds any information about the design, purpose and intent of s 61. A list of documents is provided in Appendix A.

In particular, I draw your attention to pages 22 – 23 of the Departmental Report on the Legislation Bill, which sets out PCO's advice to the Regulations Review Committee about s 61. PCO advised that the provision is based on Australian legislation and was included in the Bill to codify the application of legal professional privilege to confidential communications between the PCO and instructors, Bill promoters, and those who provide comments on Bills during the drafting process.

Request for information relating to the interaction of section 61 of the Legislation Act 2012 and the Official Information Act

I have arranged for searches listed in Appendix B to be undertaken on Justice's electronic database and undertaken a manual search of electronic folders related to Official Information Act guidance. We have been unable to find recorded information relating to the interaction between s 61 of the Legislation Act and the Official Information Act.

Paragraphs 4.69 – 4.74 of the *Cabinet Manual* (2017), however, set out the process for releasing legal advice. Paragraph 4.72 provides:

Where a request is made under the Official Information Act 1982 or the Privacy Act 1993, the decision on release must be made by the Minister or chief executive who received it. The Attorney-General (through the Crown Law Office) should be consulted about the request.

Cabinet Office Circular 14 (4): *Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown* then says that requests under the Official Information Act 1982 will continue to be dealt with (even if they involve waiving Crown legal professional privilege) under paragraph 4.68 of the *Cabinet Manual* (2008) (now paragraph 4.72 of the 2017 Manual). The Circular also says that drafting instructions to Parliamentary Counsel are released according to the general Cabinet Manual process.

Accordingly, requests for drafting instructions and draft legislation held by departments subject to the Official Information Act will be determined under s 9(2)(h). Draft legislation prepared to assist the Select Committee report back to Parliament, however, is subject to parliamentary privilege and so falls within s 18(c)(ii) of the Official Information Act.

If you have any further questions related to this request, please contact Antony Paltridge, Team Leader (Media and External Relations) on 04 9188980 or 027 6890667 or media@justice.govt.nz

I trust this information is of assistance to you. You have the right, under section 28(3) of the Act, to complain to the Office of the Ombudsmen. It can be contacted at: Office of the Ombudsmen, PO Box 10152, Wellington.

Yours sincerely



Chris Hubscher
Manager, Electoral and Constitutional

APPENDIX A

Document #	Document	Status
1	Draft Legislation Bill (consultation version)	<ul style="list-style-type: none"> Withheld under s 9(2)(h) as it is legally privileged. The public interest in enabling effective participation in the administration of laws does not outweigh the important public interest in maintaining legal professional privilege. Information about the policy rationale for s 61 of the Legislation Act is available through the Departmental Report (Document 2).
2	Legislation Bill (as introduced)	<ul style="list-style-type: none"> Refused under s 18(d) as it is publicly available: http://www.legislation.govt.nz/bill/government/2010/0162/8.0/DLM2997666.html
2	Departmental Report for the Legislation Bill	<ul style="list-style-type: none"> Refused under s 18(d) as it is publicly available: https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/49SCRR_ADV_00DBHOH_BILL10035_1_A143131/legislation-bill-departmental-report
3	Draft Regulations Review Committee report to the House about the Legislation Bill	<ul style="list-style-type: none"> Refused under s 18(c)(ii) as it is subject to parliamentary privilege. A final version of the report is publicly available: https://www.parliament.nz/resource/en-NZ/49DBSCH_SCR4939_1/1d6df6d69ca563e378d0a1738b1136f7d9d3ba8c
4	Draft RT version of the Bill	<ul style="list-style-type: none"> Refused under s 18(c)(ii) as it is subject to parliamentary privilege. A final version is publicly available: https://www.parliament.nz/en/pb/sc/reports/document/49DBSCH_SCR4939_1/legislation-bill-162-2

APPENDIX B

The following searches were undertaken on Justice's jukebox filing system for all documents and without date ranges:

- "official information act" AND "legislation act"
- "OIA" AND "legislation act"
- "OIA" AND "s 61"
- "official information act" AND "s 61"
- "official information act" AND "section 61"
- "official information act" AND "s 61"
- "OIA" AND "legal professional privilege"
- "OIA" AND "legal privilege"
- "official information act" AND "legal professional privilege"
- "official information act" AND "legal privilege"
- "official information act" AND "PCO"
- "OIA" AND "PCO"