

**KEI MUA I TE AROARO O TE RŌPŪ WHAKAMANA
I TE TIRITI O WAITANGI**

BEFORE THE WAITANGI TRIBUNAL

WAI 3300

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF Tomokia ngā tatau o Matangireia - the
Constitutional Kaupapa Inquiry

SUBMISSIONS OF THE CROWN ON TREATMENT OF CONFIDENTIAL DOCUMENTS

15 April 2024



Pouaka Poutāpeta PO Box 2858
Te Whanganui-a-Tara Wellington 6140
Waea Tel: 04 472 1719

Whakapā mai: Contacts:

Liesle Theron / James Watson
Liesle.Theron@crownlaw.govt.nz / James.Watson@crownlaw.govt.nz

Barrister instructed:

Gregor Allan
gregor@portnic.co.nz

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Purpose of these submissions

1. These submissions are filed consequent upon the Tribunal's memorandum-directions dated 10 April 2024. Pursuant to those memorandum-directions and to conform with Appendix F of the Tribunal's Guide to Practice and Procedure (the **Guide**),¹ the Crown was directed to file "further submissions on confidential Crown documents being placed on the Public Record of Inquiry for Wai 3300".
2. These submissions explain the confidentiality that subsists in the documents that the Tribunal is considering placing on its public record – confidentiality being a sufficient and conclusive basis to decline to make information publicly available. It seeks that the Tribunal apply the approach set out in Appendix F to the Tribunal's Guide to Practice and Procedure to these documents.

Overview of the Crown's position

3. The confidentiality here implicated is confidentiality of advice tendered by Ministers of the Crown and officials. This confidentiality is orthodox and well-recognised at common law and by the Official Information Act (**the OIA**).
4. At common law, "public interest immunity" (**PII**) may be claimed on the basis of confidentiality in public policy documents. The OIA reflects this by recognising that confidentiality subsists in "advice tendered by Ministers of the Crown and officials". Indeed, the OIA further recognises that this form of confidentiality is protected as a matter of "constitutional convention" (such that "protecting" that convention supplies a ground for withholding under the Act).² Although the submissions that follow address decisions and other materials related to PII and to the OIA, the Crown does not submit that the Tribunal is required to apply either the OIA or the law of PII. In those contexts, the law requires a balancing of competing interests. As explained below (and as reflected by the Tribunal's Guide)

¹ As discussed at the hearing of the urgency application on 8 April 2024: refer draft transcript for the hearing to determine urgent applications held at the Waitangi Tribunal Offices Wellington on Monday 8 April 2024, 12 Apr 24, especially at p 43.

² Section 9(2)(f)(iv).

the issue here arising is simply whether confidentiality subsists in the Crown's documents. The law of PII and the OIA demonstrates that it does.

5. The Guide provides that confidential documents should not be placed on the public record.³ Confidentiality might protect varying interests. The Guide draws no distinctions between these. It is significant that, here, the interests are of sufficient gravity to warrant protection as a matter of constitutional convention.
6. The Crown notes that timing is of particular moment in this case. The documents are confidential because they are part of a process of decision-making which is currently underway and relates to proposals that are yet to go to Cabinet. With the passage of time, justification for confidentiality will reduce.

The Tribunal's Guide: Access to the "public record of inquiry" does not extend to access to "confidential" documents

7. As noted in later submissions (below), the OIA's recognition of confidentiality in "advice tendered by Ministers of the Crown and officials" reflects longstanding recognition of PII at common law. At common law, a claim of PII could allow the Crown to refuse to (inter alia) produce documents to a Court and to parties to litigation due to either the document's content (for example, content related to national security) or its status as a document informing or disclosing ongoing policy decision-making (class-based withholding). Over time, the Courts arrogated to themselves the role of considering whether the public interest in withholding information from the Court and from parties to litigation was outweighed by the public interest in ensuring that the Court and parties have access to all material information – i.e. the public interest in the administration of justice.⁴ (This balancing exercise is reflected today in s 70 of the Evidence Act.)

³ Waitangi Tribunal *Guide to the Practice and Procedure of the Waitangi Tribunal* (August 2023).

⁴ New Zealand cases in the Senior Courts include: *Corbett v Social Security Commission* [1962] NZLR 878; *Konia v Morley* [1976] 1 NZLR 455; *Tipene v Apperley* [1978] 1 NZLR 761; *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 2)* [1981] 1 NZLR 153; *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290; *Brightwell v Accident Compensation Corporation* [1985] 1 NZLR 132 and *Dotcom v Attorney General* [2019] NZCA 412.

8. The Tribunal’s Guide to Practice and Procedure does not require a balancing exercise of this kind. Rather, the Guide is concerned with upholding confidentiality. The Tribunal may restrict access to the record to prevent violations of “privilege or confidentiality” on “well-established bases”:

5.23 Parties may claim privilege or confidentiality in respect of particular documents on the well-established bases.

5.24 In addition, parties may apply to have the Tribunal impose restrictions on access to or use of sensitive evidence on, or to be entered on, the record of inquiry. The process for such applications is explained at paragraphs 5.11–5.14 and Appendix F. The categories of sensitivity are not closed, and the Tribunal will always endeavour to be sensitive to context.

9. These provisions envisage that “privilege or confidentiality” is relevant to restrictions on not only public access to information but on the “use” of information. (Here, the Tribunal has already ruled as to “use” and counsel and parties have now received the Crown’s confidential documents.) Paragraphs 5.11–5.14, which are cross-referenced at 5.24, concern claims of privilege or confidentiality for either purpose (“or both”):

5.11 A party or a person entitled to appear may seek to protect particular sensitive and/or confidential information by applying to the Tribunal for a direction restricting access to it or its use (or both). In considering such applications, the Tribunal must have regard to any applicable legislation or regulations, the rules of natural justice and clause 5A of the second schedule to the Treaty of Waitangi Act 1975.⁴²

10. At this point is worth setting out the footnote to [5.11], which explains these references to “natural justice”:

The rules of natural justice may require that some or all counsel (and their clients) have a right to access and use the evidence for the purposes of the Tribunal’s inquiry, and clause 5A gives every party to proceedings a right to receive a copy of a report that the Tribunal has itself commissioned.

11. Again, these issues of natural justice have already been met through the Tribunal’s Memorandum-Directions of 2 April 2024.
12. The Guide continues by noting that the Tribunal itself is not bound by its own directions as to access or use but concludes that, when it comes to access by the public (access to the “public record of inquiry”)

“[c]onfidential documents will not form part of the public record of inquiry”.

5.12 While the Tribunal will be bound by any rule of law, statutory constraint or direction of the courts that applies, the Tribunal itself is not otherwise constrained by a direction it makes to restrict access to, or the use of, evidence. It may use the evidence as it sees fit for the purpose of conducting its inquiry into, and reporting on, the claim or claims to which the evidence relates, although it will do so with due regard to the sensitivity of the evidence.

5.13 Further, witnesses are to be informed that, irrespective of any Tribunal directions restricting use or access, evidence presented to the Tribunal could be brought before the courts in judicial review proceedings. However, protections apply in such proceedings, under the rules and processes of particular courts, as to how material relating to the proceedings can be used.

5.14 The process for making an application for confidentiality is outlined at Appendix F. Confidential documents will not form part of the public record of inquiry.

13. The injunctive framing of [5.14] - “Confidential documents will not form part of the public record of inquiry” - reflects that the Tribunal’s legitimate concern with its own business is not impeded by restricting access to the “public record”. The Tribunal can proceed with the business of inquiry regardless.
14. Appendix F commences as follows:

This procedure applies generally where parties seek confidentiality directions from the Tribunal in respect of documents that have been or are to be filed with the Tribunal generally because of the sensitive nature of the information. This protocol is distinct from disclosure process outlined at paragraphs 5.18–5.27.
15. The “disclosure process” at 5.18–5.27 is just that: paragraphs 5.18–5.27 outline the Tribunal’s expectations of cooperation between the parties in the absence of a “formal disclosure process”. They appear under the major heading “Disclosure of documents”. (Paragraphs 5.28–5.30, which the Tribunal noted in its memorandum-directions of 28 March 2024, also appear under this heading).
16. In short, the Guide separates out processes for “disclosure” and processes for preserving confidentiality in respect of documents that are to be “filed with the Tribunal generally”. Documents “filed with the Tribunal generally” stand to be “entered on the record of inquiry” (per [5.24]) yet

“[c]onfidential documents will not form part of the public record of inquiry” (per [5.14]).

17. Appendix F then sets out a process pursuant to which the parties must file an “application for confidentiality”. The application must outline the reasons for the “confidentiality sought”. This is directed to the singular purpose of determining whether confidentiality subsists in the documents. The Guide refers to the application as an application for “confidentiality directions”. In short, Appendix F establishes a process directed at upholding the injunction in [5.14] that “[c]onfidential documents will not form part of the public record of inquiry”. This is clearly shown by the following guidance:

Where the Tribunal has directed that information should be treated as confidential:

- the confidential information should only be disclosed in accordance with the Tribunal’s directions, unless otherwise stated;
- the public (redacted) version of the document shall be publicly available and placed on the record of inquiry; and
- the confidential information shall be placed on the record of inquiry as a confidential document appended to the public version and should not be publicly available. The document will appear on the public record of inquiry as a notice document notifying parties that the document is confidential.

18. Appendix F further provides that a party might “make their own confidential information public”, in which case the Tribunal should be notified so that it might “consider whether it is appropriate to maintain the confidentiality directions it has made”. It also provides for closed hearing procedures where witnesses are addressing confidential matters.

Confidentiality subsists in advice tendered by Ministers of the Crown and officials

19. The confidentiality in advice tendered by Ministers of the Crown and officials is clear at both common law and under the Official Information Act.
20. Although Appendix F is not concerned with the sort of balancing exercises required under the common law of PII (and, now, under s 70 of the Evidence Act 2006) and under the OIA, it is relevant to note that these

balancing exercises recognise - indeed, are predicated upon - the confidentiality that subsists in advice tendered by Ministers of the Crown and officials. This is relevant because, as [5.23] of the Tribunal's Guide makes clear, the Tribunal is concerned to ensure that its processes do not unnecessarily intrude upon "well-established bases" for claims of confidentiality.

Public Interest Immunity

21. The common law's embrace of confidentiality in advice tendered by Ministers of the Crown and officials was developed over years and came to be recognised statutorily.⁵ Cases entailing judicial recognition of this confidentiality and the basis of it are manifold; the dicta set out in Appendix 1 are illustrative only.
22. Notably, claims to public interest immunity over documents were available due to not merely their content but also their broader "class" (for example, "Cabinet minutes"). High level Government documents and Cabinet minutes were the most common classes of documents where the "class" PII was claimed. The question then arising in a PII context was whether the PII claim was sufficient to withhold documents from the Court and parties and, thereby, to impact countervailing interests in the due administration of justice. For many years it routinely was.⁶ This notable because it makes the point that is relevant for present purposes: confidentiality subsists in documents comprising advice tendered by Ministers of the Crown and officials.
23. Early New Zealand caselaw on PII concerning high level and Cabinet documents⁷ recognised this, for example:

But it is well recognised that to ensure the proper working of Government some protection requires to be given to papers prepared for Government purposes, particularly for the higher

⁵ In 1950 that common law was supplemented by s 27 of the Crown Proceedings Act 1950, which provides that the court may require the Crown to (inter alia) produce documents but only "without prejudice to any rule of law which authorises or requires the withholding of any document ... on the ground that the disclosure of the document ... would be injurious to the public interest". More recently still, the common law was supplemented by s 70 of the Evidence Act 2006.

⁶ See discussion in *McGechan on Procedure* (online edition) at HHR8.26.06.

⁷ Notably, *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 2)* [1981] 1 NZLR 153; *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290.

echelons of state. It is inherent in the nature of Government that it cannot function at a high level, without some degree of secrecy.⁸

24. *Environmental Defence Society* shows that, at one point, a Crown claim of PII over policy documents presumptively precluded even inspection of documents by the Courts (let alone disclosure to parties litigating against the Crown). Cooke P held that “even inspection by the Court itself should, as regards Cabinet and Executive Council papers, never be ordered without good reason...”.⁹
25. Given the need - on a claim of PII - to balance the countervailing impacts to the administration of justice, the Courts have since resiled from that position, particularly following the enactment of the OIA.¹⁰ For present purposes, however, the salient point is that the common law, and subsequently the OIA, has long recognised confidentiality in advice tendered by Ministers of the Crown and officials. That is salient because the Tribunal is here concerned with ensuring that its processes do not intrude upon “well-established bases” for claims of confidentiality.

The Official Information Act

26. Grounds for withholding under the OIA are important for illustrative purposes: they too illustrate, through statutory recognition, the confidentiality that the Crown seeks to protect in this case. In particular, s 9(2)(f)(iv) of the OIA supplies a basis to withhold documents comprising “advice tendered by Ministers of the Crown and officials”:

Subject to sections 6, 7, 10, and 18, this section applies if, and only if, the withholding of the information is necessary to—
 ...
 (f) maintain the constitutional conventions for the time being which protect—
 ...
 (iv) the confidentiality of advice tendered by Ministers of the Crown and officials

27. Whereas the OIA itself regards this confidentiality as amenable to being “outweighed by other considerations which render it desirable, in the

⁸ *Environmental Defence Society v South Pacific Aluminium (No 2)* [1981] 1 NZLR 153 per McMullin J at 166

⁹ *Environmental Defence Society*, above n 7, at 156.

¹⁰ *Brightwell v Accident Compensation Commission* [1985] 1 NZLR 132.

public interest, to make that information available”,¹¹ the Tribunal is not here engaged in decision-making under the OIA nor is it fulfilling a function akin to that of the Ombudsmen. Again: as the Guide recognises, the Tribunal’s concern is to uphold “well-established bases” for claims of confidentiality.

The documents in issue are confidential

Legislative bid

28. As noted, s 9(2)(f)(iv) recognises that confidentiality subsists in “advice tendered by Ministers of the Crown and officials”. This clearly applies here: the purpose of the legislative bid is to convey the Minister’s view of the priority that should be afforded to the proposed bill within a broader confidential legislative programme. It is important that legislative bids remain confidential to enable the government to go through its process of negotiating and revising this confidential programme.
29. The Crown draws the Tribunal’s attention in particular to the framing of this provision: the interests implicated by this confidentiality are statutorily recognised as interests protected as a matter of “constitutional convention” (such that “protecting” that convention supplies a ground for withholding under the Act).¹²
30. Those interests also implicate section 9(2)(ba)(ii), which turns upon the necessity of protecting confidential information where failure to do so “would be likely otherwise to damage the public interest”. Confidentiality of advice tendered by Ministers of the Crown and officials must be a qualifying “public interest” given the Act elsewhere recognises the need to protect this as a matter of constitutional convention.
31. That said, it is not germane to determine the precise metes and bounds of these provisions and the ways in which they might interact: the Tribunal does not need to consider whether grounds for withholding under the OIA

¹¹ Section 9(1).

¹² Section 9(2)(f)(iv).

are made out because the Tribunal's decision does not entail an application of the OIA.

32. The Crown also draws the Tribunal's attention to the decision of the Ombudsman: "Intended Legislative Programme Able to Be Withheld Under OIA" (December 2001) 7(4) *Ombudsmen Quarterly Review*. The Ombudsman concluded that:

If the Government's intended but not final legislative programme were released prematurely then the quality of the information it contained would likely be reduced. That would impair the orderly and effective conduct of Government business. A case had been brought to the Ombudsmen seeking access to the intended legislative programme, following refusal.

A complaint was made that the information in the intended programme had been withheld improperly under s 9(2)(f)(iv) of the Official Information Act (OIA), the section protecting confidentiality of advice tendered by Ministers and officials.

Traditionally, circulation of the programme has been restricted to Ministers and, on strictly need-to-know basis, certain officials. Additionally, the contents are subject to frequent alteration before the actual programme is settled.

Ministers make decisions on the programme at various times during the year. For example, policy work on proposed legislation may not have been finalised, or it may still be subject to negotiation with other parties in Parliament or with outside groups, yet be identified in an intended programme.

The Chief Ombudsman considered that while there was a public interest in disclosure of information that showed the workings of government, to promote accountability and participation, this did not outweigh the public interest in ensuring that releasing information did not undermine the ability of government to function effectively.

It was observed that substantive decisions of Cabinet on legislation to be actually introduced were made public by numerous means. There were also long-standing and well-established arrangements for public participation.

33. Again, this decision reflects the "well-established" basis of the confidentiality here arising (and, indeed, the gravity of that basis).
34. Finally, the Crown notes that the legislative bid has not yet been considered by Cabinet and it is well-recognised that cabinet papers to be considered by Cabinet are confidential. The Cabinet Manual provides at [5.23]:

Discussion at Cabinet and Cabinet committee meetings is informal and confidential. Ministers and officials should not disclose proposals likely to be considered at forthcoming meetings, outside Cabinet-approved consultation procedures. Nor should they disclose or record the nature or content of the discussions or the views of individual Ministers or officials expressed at the meeting itself. The detail of discussion at Cabinet and Cabinet committee meetings is not formally recorded, or included in the minutes.

35. This confidentiality is not merely a matter of convention: legal confidentiality applies to Cabinet discussions.¹³ Cabinet confidentiality is constitutional in nature, so transcends both convention and the equitable law of confidence. In short, Ministers must be free to frankly debate the issues of the day in Cabinet. This is critical to government's capacity to effectively prosecute its business and to secure good government. Were Cabinet discussions to be disclosed, this would undermine Ministers' ability to speak frankly and would erode trust within Cabinet, thereby impeding the business of government.
36. In addition, the Ombudsman's Guide to the OIA states - as a general position - that the intended recipient of advice be entitled to see it first and have a reasonable period of time to consider it, before it is disclosed to others.¹⁴

Briefing Papers dated 14 December 2023 and 12 March 2024

37. The December and March briefing papers too are confidential for reasons reflected in s 9(2)(f)(iv) of the Official Information Act.
38. The Ombudsman's guidance on the public policy making process¹⁵ is instructive here. This guide helpfully identifies that the key, twin purposes of s 9(2)(f)(iv) lie in facilitating the "generation" and, separately, "consideration" of policy advice. It is worth reviewing the text of this guide in full but, in summary:
- 38.1 the first of these purposes (concerning "generation" of advice) is the purpose of enabling free and frank advice from officials such

¹³ *Attorney-General v Jonathan Cape Ltd* [1976] 1 QB 752.

¹⁴ Office of the Ombudsman *The OIA and the public policy making process A guide to how the OIA applies to information generated in the context of the public policy making process* (August 2019) at 10.

¹⁵ Above n 12 at 3–4.

that advice is not “softened”, incomplete or even driven underground (“conveyed orally”);¹⁶ and

38.2 the second of these purposes (concerning “consideration” of advice) is the purpose of enabling the “orderly and effective conduct of the decision-making process” by allowing this to occur collectively through Cabinet, without diversion from “the core process of developing the policy to the stage where it is fit to inform collective decisions”.¹⁷

39. These are pervasive concerns that transcend the impacts of disclosure upon individual cases. Also in issue (indeed, of most concern) is prejudice to the provision and consideration of official and Ministerial advice in general.

40. The Chief Ombudsman has further accepted that it will be necessary to withhold advice of officials and Ministers where disclosure would prejudice the ability of Ministers and Cabinet to consider *related* advice that might be tendered in the future.¹⁸ Here, the briefing papers in issue are still under consideration. Additional work is underway and further advice has been and will be tendered before final decisions are made by Cabinet. Section 9(2)(f)(iv) is squarely engaged.

The relevance of timing to a “balancing exercise”

41. For reasons given - and as reflected by the Tribunal’s own guidance in this regard - no balancing exercise is required. Natural justice concerns have been accommodated. The Tribunal can get on with its business of inquiry. The decision outstanding concerns simply the public record. The issue arising is whether the Crown has made out a “well-established” basis for claiming confidentiality in its documents.

42. For reasons given, the Crown submits that, clearly, it has made out a “well-established” basis for confidentiality. It is a basis well-recognised by the

¹⁶ Above n 12 at 3.

¹⁷ Above n 12 at 4.

¹⁸ Case 369357(2014)—Ministerial briefings and Cabinet papers on telecommunications and ultra-fast broadband; See also Case 285135 (2010)—Cabinet paper relating to review of the Overseas Investment Act set out in Office of the Ombudsman *The OIA and the public policy making process*, above n 12, at 20.

Courts and in legislation. For completeness, however, the Crown would submit that, even were it otherwise - even were the Tribunal to focus on issues other than its stipulated concern of ensuring that “[c]onfidential documents will not form part of the public record of inquiry” - the Crown’s confidential documents ought not be placed upon the Tribunal’s public record.

43. In this regard, the issue of timing is important.
44. When confidentiality stands to be balanced against natural justice or other concerns (whether under the common law, s 70 of the Evidence Act or the OIA), it is highly relevant to consider the currency of the policy decisions in issue. For example, in the House of Lords case *Burmah Oil v Bank of England (Attorney General intervening)* Lord Keith of Kinkel wrote:¹⁹

In so far as a matter of government policy is concerned, it may be relevant to know the extent to which the policy remains unfulfilled, so that its success might be prejudiced by disclosure of the considerations which led to it. In that context the time element enters into the equation. Details of an affair which is stale and no longer of topical significance might be capable of disclosure without risk of damage to the public interest.

45. This reflects the strong public interest in avoiding premature disclosure of advice to Ministers. So too do the various dicta from the Courts that have been recited above. The Ombudsman’s guidance reflects this too: the twin concerns to protect “generation” and “consideration” are obviously of most importance when - as here - policy is still subject to “generation” and “consideration”.
46. This public interest is not displaced simply because the particular policy in question might be of heightened (or even intense) interest to the public. To the contrary, that prospect only underscores the need for confidentiality. In *Case 175799 (2007) – Advice on electoral finance* the Chief Ombudsman found that, despite the public being (highly) interested proposals of general importance, the “public interest” would not be served by premature release of those proposals because no decision had been

¹⁹ Adopted in New Zealand courts by *Environmental Defence Society*, above n 7.

taken as to whether they proposals would become government policy. The Ombudsman’s concern lay in the clear risk of public confusion and in the need to avoid placing Ministers in difficult and unfair public positions - particularly given the inherent sensitivity and complexity of the overall topic.²⁰

47. This decision demonstrates the clear distinction between what is “in the public interest” and what is “of interest to the public”.
48. In the present case, policy processes are at early stages. Policy is still being “generated”. Policy proposals remain to be “considered”. The constitutional imperatives of confidentiality of advice between Ministers and officials and of Cabinet deliberations are squarely engaged.
49. To be clear, the Crown’s position is that the Tribunal ought to follow its own guidance, for reasons given. The general public can seek access to the Crown’s confidential documents under the OIA. The issue then stands to become one for the Ombudsmen who would then be required to apply a balancing exercise. The Tribunal’s function, by contrast, is to inquire into matters. That function is not affected by the shape of its public record. Nor is the legitimacy of the Tribunal’s discharge of this function compromised by transparency concerns. Under the Evidence Act, Courts and Tribunals are statutorily empowered to uphold confidentiality. They also do so through their inherent and implied powers. The Tribunal’s own guidance reflects this, including through closed hearing procedures.
50. To the extent that matters related to the broader interest of the public in the subject matter at hand are relevant, the Crown submits that:
 - 50.1 this should be a question of timing;
 - 50.2 imperatives of confidentiality reduce over time; and
 - 50.3 it would be premature to place the Crown’s confidential documents on the public record at this point in time.

²⁰ *The OIA and the public policy making process*, above n 12, at 10 and 27.

Next steps

51. Given the significance of these issues, including beyond this particular case, the Crown seeks an opportunity to consider the Tribunal's decision including whether clarification from the courts is warranted, before the Tribunal takes steps that would effectively release the material publicly.

Update

52. By way of update, Counsel is instructed that policy decisions relating to the Treaty Principles Bill will now not be sought from Cabinet prior to 13 May. This timing remains subject to change depending on government priorities which may evolve in response to changing circumstances and for a variety of reasons.

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G H Allan / L Theron
Counsel for the Crown