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

BEFORE THE WAITANGI TRIBUNAL **WAI 3327**

IN THE MATTER OF	**the Treaty of Waitangi Act 1975**
AND	
IN THE MATTER OF	**the Te Reo in the Public Sector urgent inquiry**

MEMORANDUM OF COUNSEL FOR THE CROWN

10 Haratua | May 2024

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MAY IT PLEASE THE TRIBUNAL:

1. In this memorandum, the Crown applies for confidentiality orders under Appendix F of the Tribunal's Guide to Practice and Procedure.[1]

2. The documents for which confidentiality orders are sought fall into two categories.

   2.1 The first category is documents relating to industrial negotiations, where the Crown has agreed to the documents remaining confidential. This category consists of 18 documents from the Ministry of Housing and Urban Development (**MHUD**) and the Ministry of Education (**MoE**).

   2.2 The second category is documents relating to matters under active consideration by Cabinet. This category consists of 38 documents from Te Kawa Mataaho-The Public Service Commission (**TKM**) and Toka Tu Ake-The Earthquake Commission (**EQC**).

3. The Crown is mindful of the public interest in the disclosure of relevant documents in this inquiry. To strike the appropriate balance between that interest and the confidentiality of those documents, it proposes that they be disclosed to counsel for the claimants and interested parties, but not more widely. It also proposes that leave be reserved for counsel for those parties to apply to disclose particular documents or information to their clients, where necessary for the purposes of preparing evidence.

Background

4. At 10 May 2024, the Crown has provided discovery of 282 documents, including 56 documents over which the Crown asserts confidentiality.

5. As noted in the memorandum filed by the Crown on 29 April 2024, all of the documents in which confidentiality orders were sought were provided to claimant counsel in full, save for redactions for irrelevance and privilege. At that time, there were some 50 confidential documents.

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[1] Guide to Practice and Procedure, p 65.

6. On 3 May 2024, the Crown received a letter (**Appendix 1**) from Kaupare Law, as co-ordinating claimant counsel, in respect of confidential discovery. The letter addressed the third and fourth discovery tranches. Claimant counsel agreed to the Crown's disclosure proposal in respect of tranche three, subject to:

   6.1 The confidential documents also being made available to the interested parties; and

   6.2 The confidential documents being disclosed to claimants and interested parties, ie the clients of claimant counsel and counsel for interested parties.

7. Claimant counsel informed the Crown that they did not accept the claims of confidentiality on the basis that decisions are still under active consideration. They sought further information about the matters under active consideration and the relevant timeframes.

8. Counsel for the Crown responded to claimant counsel on 6 May 2024: (**Appendix 1**)

   8.1 Agreeing to release two documents.

   8.2 Indicating that the Crown intended to seek confidentiality orders over the balance of the confidential documents.

   8.3 Explaining the timing of the decisions in relation to the tranche four documents.

9. The Crown continues to seek confidentiality orders on the conditions set out above at [3] over 56 documents. Those documents are listed in **Appendix 2**.

Confidentiality: the principles

10. Confidentiality in court proceedings is governed by ss 68 to 70 of the Evidence Act 2006 (**the Act**), which also applies to the Tribunal.[2]

[2] Treaty of Waitangi Act 1975, Schedule 2, clause 6(3).

11. Two of those sections are relevant here: s 69, which confers a general discretion to order that confidential information not be disclosed, and s 70, which allows a Judge to direct that a communication or information relating to a matter of State not be disclosed.

Section 69

12. Section 69 confers a broad discretion on a Judge to prevent disclosure of confidential information.[3]

13. Information must be confidential for the Court to exercise its overriding discretion. However, the Act does not define "confidential information". The Court of Appeal has held that:

    13.1 Whether or not information is confidential requires an objective assessment.

    13.2 Information will be confidential where there is a reasonable expectation of confidentiality. Information can be confidential if that reasonable expectation exists, even in the absence of a particular kind of relationship, or agreement, importing confidentiality.[4]

14. If the information is confidential, the Court must then weigh the public interest in the disclosure of the information against the relevant countervailing public interest.[5] Here, the two relevant countervailing public interests are in ss 69(2)(b) and (c):

    14.1 Preventing harm to the particular relationship in the course of which the confidential communication or information was made, obtained, recorded or prepared, or to whom it was communicated.

    14.2 Maintaining activities that contribute to or rely on the free flow of information.

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3 *R v X* [2009] NZCA 531 at [29]

4 *R v X* [2009] NZCA 531 at [48]

5 *R v X* [2009] NZCA 531 at [85]

15. The factors in s 69(3) of the Act outline the considerations the Court must have in exercising its discretion, including:[6]

    15.1 The likely extent of harm that may result from the disclosure of the communication or information;

    15.2 The nature of the communication or information and its likely importance in the proceeding;

    15.3 The nature of the proceeding;

    15.4 The availability or possibility availability of other means of obtaining evidence of the communication or information;

    15.5 The availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and

    15.6 The sensitivity of the evidence, having regard to both the time elapsed since the communication was made or the information was compiled and the extent to which the information has already been disclosed to other persons.

Section 70

16. Section 70 provides:

> A Judge may direct that a communication or information that relates to matters of State must not be disclosed in a proceeding if the Judge considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in withholding the communication or information.

17. Per s 70(2), communications or information relating to matters of State include (but are not limited to) matters for which:

    17.1 There is a conclusive reason for withholding official information under s 6 of the Official Information Act 1982 (**OIA**). For example, information which, if made available, would seriously damage the New Zealand economy by prematurely disclosing specified government economic or financial policies.

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6 Evidence Act 2006, s 69(3)(a)-(f)

17.2 There is a good reason for withholding the information under s 9(2)(b) to (k) of the OIA. These include, relevantly, maintaining the constitutional conventions which protect collective and individual ministerial responsibility (s 9(2)(f)(ii)) and the confidentiality of advice tendered by Ministers of the Crown and officials (s 9(2)(f)(iv)); maintaining the effective conduct of public affairs (s 9(2)(g)) and enabling Ministers of the Crown and public agencies to carry on, without prejudice or disadvantage, industrial negotiations (s 9(2)(j)).

18. Where a claim to confidentiality under s 70 is established, the detrimental effect of that restriction on the public interest in disclosure can be mitigated by summarising the document, producing relevant extracts, or even producing the document on a restricted basis.[7]

Ministry of Housing and Urban Development: industrial negotiations

19. Document HUD.001.0073 was in the control of the MHUD. It contains notes from bargaining negotiations the MHUD undertook with the Public Service Association (**PSA**) as part of the MHUD Collective Employment Agreement, including discussions on a te reo Māori allowance. As to that:

19.1 The MHUD and the PSA expressly agreed in the bargaining process agreement that all information exchanged during the negotiations would be in confidence.

19.2 The document includes confidential information relating to the PSA (eg, its negotiation talking points).

19.3 Disclosure of this information, which was agreed to be held in confidence, to the claimant and interested party group would have a chilling effect on future employment agreement negotiations.

20. In the Crown's submission, it is confidential under:

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7 *R v Chief Constable of the West Midlands Police, ex parte Wiley* [1994] 3 All ER 420 at 447.

20.1 Section 69(2)(b) and(c): preventing harm to the relationship between MHUD and the PSA, and maintaining activities that rely on the free flow of information.

20.2 Section 70: maintaining the effective conduct of public affairs, and allowing a public service agency to carry on industrial negotiations (OIA, ss 9(2)(g) and (i)).

21. Counsel for the Crown note that:

21.1 The MHUD Collective Employment Agreement has now been agreed. However, its disclosure to a wide group of people (ie, all of the claimants and interested parties) would damage confidence in the confidentiality of the negotiation process.

21.2 The Crown has provided the relevant sections of the MHUD Collective Employment Agreement as an 'open' document.

21.3 Not disclosing the document to the full claimant group and interested party group is unlikely detrimentally to affect the inquiry, as its content appears to be a matter for submission rather than claimant evidence.

Ministry of Education: industrial negotiations

22. Two of the documents provided by the MoE subject to confidentiality restrictions have now been provided on an open basis.[8] However, the Crown seeks confidentiality orders over the documents that relate to the implementation of section 10 of the MoE Collective Employment Agreement.

23. Section 10 of the MoE Collective Employment Agreement covers Te Aō Māori and MoE's commitment to Te Tiriti o Waitangi. Section 10.2 states:

> 'The Ministry acknowledges the mana of Te Reo Māori me ōna Tikanga, its necessity, and the significant benefits all employees and Ministry business realise from Te Reo Māori me ōna tikanga expertise in the workplace'.

8 EDU.001.0770; EDU.001.0172

24. Section 10 provides for, among other things, a te reo Māori me ōna Tikanga recognition allowance. Applications for the allowance are received and validated by the Section 10 Tautoko Mai Panel.

25. The Crown submits that those documents are confidential because:

25.1 They provide details of an employment process that is being undertaken in good faith and not yet agreed between the parties.

25.2 They contain free and frank advice on the implementation and associated issues.

25.3 The process is still in train, and employees and officials must be able to negotiate the implementation in confidence.

25.4 Implementation of section 10 is not yet complete. Counsel are instructed that MoE, the PSA and the Education Review Office have set up a panel to assess applications for entitlements within clause 10. The panel met in early April to undertake benchmarking and discuss an approach to the assessment of applications, of which a first tranche has been received.

25.5 There will also be a second phase within section 10, focusing on leave, learning and development. This work is anticipated to progress further once the panel is nearing the end of the assessment process.

25.6 Disclosure of the free and frank advice connected to the implementation of section 10 have a chilling effect on current and future negotiations.

25.7 As with the MHUD document above, there is no obvious significant public interest in the disclosure of those documents to the claimant or interested party group, given their counsel will have access and the information in the documents is more likely to be a matter for submission by, than evidence from, the claimants.

26. In the Crown's submission, those documents are confidential under:

26.1 Section 69(2)(c): maintaining activities that rely on the free flow of information.

26.2 Section 70: maintaining the effective conduct of public affairs, and allowing a public service agency to carry on industrial negotiations (OIA, ss 9(2)(g) and (i)).

Te Kawa Mataaho and Earthquake Commission: active consideration

27. As the Crown has submitted to the Tribunal in other recent urgent inquiries,[9] policy formation involves a process of iterative analysis and advice from departments to decision-makers (Ministers), to inform the decisions they make and actions they take. Issues can be vigorously debated in the process of Ministerial consultation and Cabinet decision-making. These discussions are highly confidential.

28. Robust advice from an independent public service is crucial to informing these discussions and improving the quality of the decisions ultimately made.

29. The consequence of releasing advice or information in the early and formative stages of the policy-making process may be that the quality of future advice is undermined and risks are left explored or unstated.[10] That can have adverse consequences for the ultimate decisions reached. There is a significant public interest in preserving the confidentiality of information in the early stages of the policy process when sensitivities are high.

30. This public interest is reflected in the withholding grounds in the OIA, imported by s 70 of the Act, on which the Crown relies.

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9. Wai 3300, #3.1.03; Wai 3300, #3.1.023; Wai 3300, #3.1.040.

10 See the discussion in "The OIA and the public policy making process at pp. 3-4 (available https://www.ombudsman.parliament.nz/resources/oia-and-public-policy-making-process-guide-how-oia-applies-information-generated-context).

Te Kawa Mataaho

31. The confidential documents provided by TKM relate to two policy workstreams:

    31.1 The Government Workforce Policy Statement (**GWPS**); and

    31.2 A report entitled 'Better public services and strengthening democracy: Use of the Māori language by public sector agencies' (**the 5 December report**).

32. Neither the GWPS nor the 5 December report have been the subject of Cabinet decisions. The policy considerations described above are clearly engaged in this context.

33. The GWPS documents should remain confidential for two reasons:

    33.1 *Conduct of public affairs / conventions protecting advice to Ministers*. The Minister is likely to take decisions on the content of the GWPS within the next few weeks, subject to the Cabinet decision-making process. It is important that the Minister is able to consider advice about the GWPS in a confidential manner. Confidentiality is also required allow Ministers to reach a collective Cabinet position.

    33.2 *Avoid prejudice to industrial negotiations*. The draft GWPS, and advice on it, indicate matters that the Crown will take into account when making or negotiating employment contracts. Premature release of that information may prejudice the Crown's ability to carry out the industrial bargaining processes detailed above.

34. This memorandum attaches a chart (**Appendix 3**) showing key bargaining in the state sector and the timing of upcoming negotiations. The green bubbles show the upcoming negotiations, totalling over 100. The Crown notes that this is not a complete picture, due to the number of collective agreements with some agencies. TKM also does not maintain a complete picture of Crown Entity bargaining.

35. Confidentiality will lapse once the Minister has approved the GWPS. The Crown will provide many of the GWPS documents on an open basis to parties and the Tribunal at that point, and confidentiality will only remain in respect of the information in the confidential bundle provided by agencies or unions reflecting their strategy, claims or bargaining until those processes are concluded.

36. As to the 5 December report:

    36.1 The advice relates to a subject that is highly sensitive: the use of te reo Māori in the public sector. It was provided proactively by officials, rather than at the Minister's request, and the Minister then indicated that she did not wish to progress the matters covered by the briefing in a future Cabinet paper.

    36.2 The relationship between the parties in the Coalition Government is guided by the 'no surprises' principle.[11] The Coalition Government parties have agreed to work together in good faith and undertake best endeavours to achieve consensus on Cabinet decisions, with consideration to the position of each party in the Coalition Government.

    36.3 Disclosure of the 5 December report to the public, prior to consultation between Ministers taking place, may restrict the ability of Cabinet to reach agreement as to government policy.

    36.4 Counsel for the Crown are instructed that there is currently no timeframe in place for further consideration of these issues at a Cabinet level.

37. Given the above, the Crown submits that the 5 December report is confidential because (in terms of s 70) its release would (1) breach constitutional conventions protecting collective and individual ministerial responsibility, and the confidentiality of advice tendered by Ministers of the Crown and officials; and (2) hinder the effective conduct of public affairs

[11] Cabinet Office Circular 24(2)

through the free and frank expression of opinions by and to Ministers of the Crown in the course of their duty.

38. Counsel understand that the Minister has released part of the briefing paper in response to an OIA request. To the extent the information has been released, the Crown proposes that it is provided to claimants and interested parties without restriction.

Documents under active consideration: Earthquake Commission

39. The documents provided by the Earthquake Commission (**EQC**) relate to the name of that entity.

40. The Crown seeks confidentiality orders in relation to one document: EQC.001.0007. In that document, the Associate Minister indicates that he will be seeking further advice on the actions recommended by advisers in that briefing. As the matter is still under active consideration, the Crown submits it should remain confidential: disclosure to the public would prejudice the provision of robust advice. As with the GWPS report, it is important that the Minister is able to consider advice on this matter in in a confidential manner, before making a decision.

41. Given the nature of the document, it is unlikely to require evidence from the claimants or interested parties. Providing it to counsel allows submissions to be made to the inquiry while protecting the public interest in free and frank advice.

Orders sought: balancing the interests

42. The Crown is mindful that the public interest in withholding the information and communications set out above must be balanced with the public interest in disclosure.

43. To that end, the Crown does not seek orders preventing the confidential documents listed in Appendix 2 from being disclosed, or referred to, in this proceeding. It proposes orders that:

    43.1 The confidential documents and information should be disclosed to counsel only.

43.2 Those documents should be entered on the Tribunal's formal record as confidential documents appended to the public version and should not be publicly available. On the public record of inquiry, these documents should instead appear as notice documents notifying parties that they are confidential.

43.3 Leave should be reserved to seek disclosure of any particular documents to some or all of the claimants on a case-by-case basis.

44. In its submission, those orders are the minimum necessary to protect the confidentiality interest in the documents.

45. The claimants' co-ordinating counsel have argued that all of the claimants and interested parties, require access to the MHUD and MOE documents to allow counsel to take instructions and prepare appropriately.[12] Co-ordinating counsel do not accept the claims of confidentiality over the TKM documents and appear to propose open disclosure, with no restrictions, in respect of these documents. However, in their letter (acknowledging that this process has been rushed, owing to the urgency of the inquiry):

45.1 They do not explain why disclosure was necessary for instructions, by reference to particular documents or particular issues.

45.2 Nor do they make any proposals to ensure that the relevant confidentiality interests – which are important – were protected.

46. In the time available in this urgent inquiry, it has not been possible further to progress these issues directly with claimant counsel.

47. However, the Crown submits that restricting access to confidential documents to counsel only is entirely usual in the context of civil litigation. It is the minimum possible restriction available, short of disclosing the documents to the entire claimant / interested party group.

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12 Letter dated 3 May 2024.

48. Most of the documents over which confidentiality is asserted relate to the Crown's internal processes. They will not, therefore, be documents about which the claimants or interested parties will be able to give direct evidence. Their relevance is primarily to the submissions to be made by counsel for the claimants and interested parties, who will have access to them.

49. If, and to the extent that, instructions are required or evidence from the claimant / interested party groups is appropriate, the leave reserved would ensure that, those issues could be addressed for particular identified documents in the light of the facts pertaining to them.

Confidentiality orders

50. The Crown seeks confidentiality orders under Appendix F of the Tribunal's Guide to Practice and Procedure, for the reasons outlined above.

51. Should the Tribunal grant confidentiality orders, the Crown requests that the confidential information be placed on the public record of inquiry as notice documents, notifying parties that the document is confidential.

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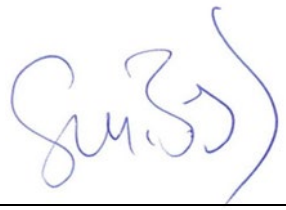

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AND TO: Claimant Counsel