KEI TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

WAI 3327
WAI 3077

KEI RARO I TE MANA O	te ture o te Tiriti o Waitangi 1975
I TE TAKE O	te ruku tātari ohotata te reo Māori i te Kāwanatanga, Wai 3327
Ā	
I TE TAKE O	tētahi kēreme nā Nora Rameka me William Skipper (Kipa) Munro hei māngai mō Te Rūnanga o Ngāti Rēhia (Wai 3077)

He Manatū Rōia Tukutahi
Joint Memorandum Counsel

I tēnei rā, i te 31 o Mei 2024

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Waitangi Tribunal
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Ministry of Justice
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TĒNĀ, E TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

1. By way of Memorandum dated 13 May 2024, Counsel signalled ongoing issues with the Crown's approach to, and grounds for, confidentiality over a number of discovery documents and indicated submissions were being prepared on the matter.[1]

2. This Joint Memorandum of Counsel formally responds to the Crown's applications for confidentiality orders in its Memoranda filed on 10 May 2024[2] ("10 May Memorandum"), 27 May 2024[3] ("27 May Memorandum") and 29 May 2024[4] ("29 May Memorandum") respectively. The latter two Crown Memoranda seek confidentiality orders over (parts of) Crown evidence filed and associated bundles.

3. Counsel are cognisant that on 23 May 2024 his Honour Judge Williams directed the Crown to file with the Tribunal a bundle of all unredacted documents it seeks confidentiality orders over for inspection to assess their relevance and whether the grounds under ss 69 and 70 of the Evidence Act have been made out.[5]

4. Counsel agree this was the appropriate course in the circumstances as s 70 confers a judicial discretion to determine whether to withhold documents from the public, and we provide these submissions to assist his Honour in that exercise.

5. These submissions are structured as follows:

   (a) Concerns with the discovery process to date;

   (b) The Crown's confidentiality application;

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1 He Manatu Rōia Ruruku nō te rā 13 o Mei 2024, ki [4(b)]. No ROI# as not registered at time of writing.
2 Wai 3327, #3.1.39.
3 Not registered at time of writing.
4 Not registered at time of writing.
5 Wai 3327, #2.5.12.

(c) Statutory provisions for withholding documents;

(d) Claimant's response; and

(e) Privileged documents (both confidential and open).

6. Attached and marked as Appendix "A" is a list of Counsel in support of this Memorandum.

CONCERNS WITH DISCOVERY PROCESS TO DATE

7. This urgent inquiry was granted on 1 March 2024. At the outset, Counsel raise our concerns with the manner and process in which the Crown has disclosed discoverable documents to Claimant Counsel in this inquiry. Counsel consider the process to date to be disjointed and disruptive to the Claimants preparation of its case.

8. Following Claimant Counsel issuing a discovery request letter to the Crown on 25 March 2024,[6] Crown counsel indicated in response, as well as at the Judicial Conference held on 5 April 2024, an expected timeframe for disclosure of discovery by 15 April 2024. This was subsequently reflected in the post-Judicial Conference hearing timetable released on 18 April 2024.[7]

9. Instead, Crown Counsel has released a total of 8 tranches of discovery documents as follows:

(a) Tranche 1 (51 documents) was released to Counsel on 15 April 2024.

(b) Tranche 2 (36 documents) was released to Counsel on 16 April 2024.

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[6] Wai 3327, #3.1.5(a) at Appendix "O", pages 5 – 7.

[7] Wai 3327, #2.5.6 He Pānui Whakahau o te Kaiwhakawā Williams, and accompanying inquiry timetable #2.5.6(a).

(c) Tranche 3 (81 documents, 18 (initially 20) of which the Crown asserted confidentiality over) was released to Counsel on 17 April 2024.

(d) Tranche 4 (64 documents, 28 (initially 27) of which the Crown asserted confidentiality over) was released to Counsel on 24 April 2024.

(e) Tranche 5 (17 documents) was released to Counsel after 5pm on Monday 29 April 2024.

(f) Tranche 6 (5 documents, all withheld for reasons of confidential communication or information) was released to Counsel after 5pm on Friday 3 May 2024.

(g) Tranche 7 (29 documents, 5 of which the Crown asserted confidentiality over) was released to Counsel after 5pm on Friday 10 May 2024.

(h) Tranche 8 (27 documents) was released to Counsel after 5pm on Friday 24 May 2024.

10. Tranches 6 - 8 were received unexpectedly. Following an email from Co-ordinating Counsel to Crown counsel on 3 May 2024 seeking clarification as to whether further tranches could be expected, the Crown confirmed it had "provided discovery of the last tranche of documents it holds, under urgency." The Crown also indicated that if further documents were received, they would review them immediately and disclose them if relevant, alluding to an ongoing, fragmented approach not akin to a process that was meant to occur under urgency.

11. It is acknowledged that all the documents for which confidentiality orders have been sought were received by Claimant Counsel in full, save for redactions for "irrelevance and privilege" (as asserted by

Crown Counsel). However, as outlined in these submissions, the Crown's approach to discovery has been difficult and obstructive.

12. Claimant Counsel understand that the initial discovery request was provided to the relevant Crown departments the following day, on 26 March 2024.[8] Further, in its Memorandum dated 29 April 2024, Crown Counsel confirmed that "where a Crown department is not listed, departments have provided confirmation that no information within scope of the discovery request is held."[9] However, since that date further discovery has included documents from other departments not initially listed.

13. In total, the Crown has provided discovery of 310 documents including the 56 documents over which the Crown seeks confidentiality. Counsel submit that the manner in which discovery has been released, without prior notice, ad-hoc and well-past the initial indicated date for disclosure and the filing of Claimant evidence, has caused unnecessary time pressure and challenges to Claimants and Counsel.

14. The 56 documents for which the Crown seeks confidentiality over (in whole or in part) are listed at Appendix 2 of its 10 May Memorandum.[10]

THE CROWN'S CONFIDENTIALITY APPLICATION

15. The Crown seeks confidentiality orders over 56 documents which fall into two categories:[11]

    (a) documents relating to industrial negotiations which consists of 18 documents from the Ministry of Housing and Urban Development (MHUD) and the Ministry of Education (MOE); and

[8] As confirmed by Crown memorandum dated 29 April 2024, Wai 3327, #3.1.17.
[9] Wai 3327, #3.1.17 at [13].
[10] Wai 3327, #3.1.39(b).
[11] Wai 3327, #3.1.39 - Memorandum of Crown Counsel dated 10 May 2024. A full list of the Confidential Documents can be found at Wai 3327, #3.1.39.

(b) documents relating to matters under active consideration by Cabinet which consists of 38 documents from Te Kawa Mataaho - The Public Service Commission (TKM) and Toka Tu Ake - The Earthquake Commission (EQC).

("the Confidential Documents")

16. In its 27 May Memorandum, the Crown also sought confidentiality orders in relation to certain parts of the brief of evidence and/or the bundle of Crown witnesses, Ms Chadwick, Ms Cameron and Ms Baggott.[12] These submissions apply equally to those documents, or parts of documents, where confidentiality is claimed by the Crown.

17. In its 29 May Memorandum, the Crown indicated that it now only seeks confidentiality orders in respect of paragraphs 67 and 68 of the initially confidential Public Service Commission report provided in discovery entitled "Better public services and strengthening democracy: Use of the Māori language by public sector agencies."[13]

STATUTORY PROVISION FOR WITHHOLDING DOCUMENTS

18. Counsel set out the relevant statutory framework and our submissions as to its application to the current circumstances, to assist his Honour in making a determination on the confidentiality grounds sought.

19. Section 70(1)-(2) of the Evidence Act states:

> *(1) 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.*

[12] At the time of writing, this Crown memoranda had not been registered on the Wai 3327 ROI.

[13] TKM.001.1536.

(2) A communication or information that relates to matters of State includes a communication or information –

(a) In respect of which the reason advanced in support of an application for a direction under this section is one of those set out in sections 6 and 7 of the Official Information Act 1982; or

(b) That is official information as defined in section 2(1) of the Official Information Act 1982 and in respect of which the reason advanced in support of the application for a direction under this section is one of those set out in section 9(2)(b) to (k) of that Act.

20. The clear wording of s 70 gives the Judge the discretion to make a decision on whether to withhold information or not. The exercise of that discretion requires the Judge to undertake the relevant weighting exercise between the public interest in the information being disclosed in the proceeding, and the public interest in withholding the information.

21. It is necessary to consider the Official Information Act 1982 (OIA Act), including the principle of availability under s 5 (emphasis added):

> *The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the* ***purposes of this Act*** *and the* ***principle that the information shall be made available unless there is good reason for withholding it****.*

22. It is submitted that, contrary to the Crown's submission at [17.1] of its 10 May Memorandum,[14] none of the conclusive reasons for withholding official information outlined in s 6 of the OIA Act, or the special reasons for withholding official information under s 7 are relevant in the circumstances, for the reasons outlined in this Memorandum. Therefore, the OIA Act makes no express prohibition on the production of information to be circulated more broadly than only to Claimant Counsel and the Tribunal, or indeed added to the

[14] Wai 3327, #3.1.39.

public record of inquiry. Counsel also submit that "irrelevance" is not a valid ground under s 6 of the OIA Act.

23. Similarly, it is submitted that the overriding discretion as to confidentiality relied on by the Crown in s 69 of the Evidence Act is misplaced. In our submission, that broad discretion must be read in light of ss 4 and 5 of the OIA and the constitutional significance of Te Tiriti / the Treaty in Aotearoa. In this context, we submit the s 69 broad discretion to withhold information is outweighed by the public interest in disclosure in this proceeding where the documents are germane to the Tribunal's task of inquiring into the Crowns policies, practices, acts and omissions limiting the status and use of te reo Māori me ōna tikanga in the public sector.

24. In addition, and in the alternative, if his Honour considers the Crown has proved it has good reason for withholding official information (which the Claimants do not accept), it is submitted that s 9(1) of the OIA Act is triggered in which the withholding of the 56 documents (in whole or in part) from the Claimants is outweighed by other considerations which render it desirable, in the public interest, to make that information available.

25. In reviewing the purposes of the OIA Act, s 4 provides:

> *The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament –*
>
> > *(a) To increase progressively the availability of official information to the people of New Zealand in order –*
> >
> > > *i) To enable their more effective participation in the making and administration of laws and policies; and*
> > >
> > > *ii) To promote the accountability of Ministers of the Crown and officials – and thereby to enhance respect for the law and to promote the good government of New Zealand;*

(b) To provide for proper access by each person to official information relating to that person;

(c) To protect official information to the extent consistent with the public interest and the preservation of personal privacy.

26. One of the tenets demonstrated across the Claimant evidence is the lack of engagement with Māori on these policies being developed and implemented unilaterally, that directly affect the status and use of te reo Māori in the public sector. Therefore, where documents include information directly pertinent to the subject matter of this inquiry, it is in the public interest that that information is disclosed to enable more effective participation in the making and administration of such policies, and to promote the accountability of Ministers of the Crown and officials.

27. It is acknowledged that the Crown has provided an index of the 56 documents for which it seeks confidentiality orders for.[15] However, it is submitted that the index provides bare minimum details including author, recipient, date (where known) and a brief description of the confidential basis claimed. There is no description of the subject matter, aside from identifying the document type. In Counsel's submission, the content of some of the documents disclosed to claimant counsel is directly relevant to the matters before this Tribunal and having the ability to engage with those documents (by way of submissions and evidence) would assist with the Tribunal's deliberations as to whether the Crown has breached its Te Tiriti/Treaty obligations in relation to the status and use of te reo me ōna tikanga in the public sector.

[15] Wai 3327, #3.1.39(b).

CLAIMANTS' RESPONSE

28. Confidentiality orders were recently considered in another urgency (Wai 3300) and it is submitted that aspects of the decision declining confidentiality in that case, are applicable to this inquiry.

29. In summary, the problem with the Crown's grounds for confidentiality is that it is premised, (falsely, in counsels submission), on:

    (a) The assumption that the Crown's Te Tiriti / Treaty obligations do not apply to the policy formulation process, even if it is iterative; and

    (b) The assumption that advice to Ministers could not benefit from input from its Te Tiriti partner *before* any decision-making.

30. The public interest in the due administration of justice applies here. The general propositions concerning constitutional conventions concerning confidentiality in the development of Crown policy and the legislative programme have limited application given this context. That is because it is important for these proceedings that claimants are adequately informed to be able to prosecute their applications.[16] Prejudice is one of the grounds that must be established.

31. The public interest and participation in these proceedings will aid in the policy formulation process and enhance Cabinet decision making.[17]

32. Also important is the public interest in the Crown honouring its Te Tiriti / Treaty of Waitangi obligations to meaningfully engage with Māori on matters that concern their Treaty rights and obligations as upheld by decades of Waitangi Tribunal reports and court judgments.[18]

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16 Wai 3300, #2.5.15 at [33].
17 Wai 3300, #2.5.15 at [35].
18 Wai 3300, #2.5.15 at [36].

33. The public interest in disclosure is given significant weight during the balancing exercise under s 70 of the Evidence Act 2006 and any alleged harm claimed for preventing disclosure must be 'substantial' to justify withholding. There is also no class of documents considered immune.

34. The Crown has not alleged that harm in disclosure will be substantial and therefore does not justify public interest immunity for these documents when weighed against public interest in disclosure. The Crown application simply makes broad statements of confidentiality without corroboration.

35. In dealing with similar confidentiality orders in the Wai 3300 Treaty Principles Urgency Inquiry, Chief Judge Fox commented:[19]

> *"It is also notable that this Tribunal often receives documents of this type from the Crown to assist it to perform its statutory functions. Usually, the documents are filed without any hesitation if they are relevant and germane to the inquiry. They are usually (unless deemed confidential by the Tribunal) added to the ROI so parties may analyse them, present evidence in support or opposition, make submissions, and cross-examine witnesses. This application marks a new approach to this standard practice."*

36. The principle that the due administration of justice requires that justice be done and that, except in very rare cases, it must be seen to be done.[20]

37. Crown Counsel addressed the issue of timing and the need to reflect the strong public interest in avoiding premature disclosure of advice to Ministers. This public interest is not displaced simply because the particular policy in question might be heightened (or even intense). The Crown asserts policy processes are at early stages, however, the issue for this Tribunal is not whether the policy is finalised, it is what the documents demonstrate regarding the policies' ultimate fulfilment

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[19] Wai 3300, #2.5.28 CONFIDENTIAL Memorandum-Directions of Chief Judge Fox dated 26 April 2024 at [22].

[20] *Sankey v Whitlam* (1978) 142 CLR, as quoted in *Environmental Defence Society v South Pacific Aluminium* (No 2) [1981] 1 NZLR 153, 162.

38. The approach proposed by the Crown at [9] of its 27 May Memorandum, for Claimants to seek full disclosure of redacted/confidential documents on a case by case basis is onerous and prejudicial to the ability of claimants and Counsel to properly prepare for the hearing fixture, particularly in the short time available.

39. It is submitted that the Crown has failed to demonstrate good grounds to justify confidentiality and that the public interest in disclosure outweighs the public interest in withholding the confidential documents. Where the Tribunal agrees, the documents should be placed on the record of inquiry.

PRIVILEGED DOCUMENTS (BOTH CONFIDENTIAL AND OPEN)

40. Counsel bring to the Tribunals attention a related issue concerning redacted documents (both open and confidential) for which the Crown claims are privileged.

41. On 23 April 2024, Co-ordinating Counsel sought clarification from the Crown as to the nature of a number of documents for which privilege was claimed and the relevant grounds on which privilege was being asserted. A copy of that letter to the Crown is attached and marked as Appendix "**B**" to this Memorandum.

42. Whilst the Crown provided a list of fully and partly privileged documents on 1 May 2024, no formal response was given as to the grounds upon which privilege was claimed. In that regard, the issue remains outstanding.

43. Counsel understand from the Crown's 27 May Memorandum at [5] that the versions of the unredacted documents that were provided to the Tribunal in response to His Honour's Memorandum-Directions of 23 May 2024 still contain redactions for privilege or irrelevance. It remains unclear whether fully privileged documents were provided to his Honour.

44. Counsel note his Honour's directions dated 23 May 2024 stated the Crown was to provide "all unredacted documents" it seeks confidentiality orders over, as opposed to redactions of irrelevant material only. Counsel further submit that the Crown's approach to filing its application for confidentiality orders did not strictly comply with Appendix F of the Waitangi Tribunal Guide to Practice and Procedure because the Crown did not file unredacted versions of the documents directly with the Registrar at the same time. Instead, it unilaterally decided not to, until directed to do so by his Honour.

45. Accordingly, Counsel seek that these documents be provided to the Tribunal unredacted in full, and that they be included in the review exercise being undertaken by His Honour with respect to confidentiality orders sought from the Crown, pursuant to clause 5.28 of the Waitangi Tribunal Guide to Practice and Procedure. A list of these documents are attached and marked as Appendix "C". This list includes:

(a) 10 documents the Crown asserts are fully privileged and do NOT seek confidentiality over;

(b) 5 documents the Crown assert are partly privileged and do NOT seek confidentiality over; and

(c) 4 documents the Crown assert are partly privileged and have sought confidentiality over.

I TĒNEI RĀ, i Tāmaki Makaurau, i te rā 31 o Mei 2024

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