IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2015-485-000583
[2015] NZHC 2497

UNDER	The Judicature Amendment Act 1972 and Part 30 of the High Court Rules
IN THE MATTER OF	An application for judicial review
BETWEEN	JANE KELSEY First Applicant
	CONSUMER NEW ZEALAND INC Second Applicant
	NGĀTI KAHUNGUNU IWI INC Third Applicant
	OXFAM NEW ZEALAND Fourth Applicant
	GREENPEACE OF NEW ZEALAND INC Fifth Applicant
	ASSOCIATION OF SALARIED MEDICAL SPECIALISTS Sixth Applicant
	NEW ZEALAND NURSES ASSOCIATION INC Seventh Applicant
	NEW ZEALAND TERTIARY EDUCATION UNION TE HAUTŪ KAHURANGI O AOTEAROA
AND	THE MINISTER OF TRADE Respondent

Hearing:	28 September 2015
Counsel:	M S R Palmer QC for Applicants V L Hardy and K Laurenson for Respondent
Judgment:	13 October 2015

JUDGMENT OF COLLINS J

Summary of judgment

[1] The applicants have sought judicial review of a decision of the Minister of Trade (the Minister) in which he refused to release to Professor Kelsey official information contained in eight categories of documents she requested under the Official Information Act 1982 (the Act). The information requested by Professor Kelsey concerns material associated with negotiations that have led to a multi-lateral free trade agreement called the Trans-Pacific Partnership Agreement (TPP Agreement).

[2] When the Minister refused Professor Kelsey's request, neither he nor his officials assessed each piece of information requested against the criteria in the Act for withholding official information. Instead, the Minister adopted a "blanket approach" to the request based upon his knowledge of the categories of documents requested by Professor Kelsey. I have concluded this approach did not comply with the Act.

[3] The applicants have applied for a series of declarations concerning the lawfulness of the Minister's approach and the meaning of specific provisions of the Act.

[4] Rather than issue specific declarations I have quashed the Minister's decision in relation to six of the categories of documents requested by Professor Kelsey. I explain in this judgment the aspects of Professor Kelsey's request which have to be reconsidered. When the Minister reconsiders his decision he will be required to do so in a way that is consistent with his obligations under the Act, which I explain in this judgment.

[5] This judgment is divided into three parts. Part I explains the context to the decisions I have had to make. I explain in Part I who the parties are, the relevant

provisions of the Act, the TPP Agreement negotiations, Professor Kelsey's request, the Minister's response, a review undertaken by the Chief Ombudsman and the grounds for judicial review. Part II of this judgment sets out my analysis of each of the grounds of judicial review. In Part III of this judgment I explain the reasons for the relief I am granting.

PART I

CONTEXT

The parties

The applicants

[6] Professor Kelsey is a member of the Faculty of Law of the University of Auckland. She teaches and researches in a wide field of subjects, including international economic regulation, law and policy. Professor Kelsey's academic interests have led her to conduct extensive research into the TPP Agreement.

[7] Consumer New Zealand Inc collects and disseminates information for the benefit of consumers in New Zealand. It is concerned the TPP Agreement is likely to adversely impact upon New Zealand consumers.

[8] Ngāti Kahungunu Iwi Inc is a significant iwi organisation whose "mission is to enhance the mana of Ngāti Kahungunu alongside its whanau and hapu".[1] It is concerned the TPP Agreement may adversely affect its rights and the rights of other Māori in Aotearoa.

[9] OXFAM New Zealand is a trust which aims to reduce poverty and injustice. It is concerned the TPP Agreement may adversely impact upon vulnerable people in New Zealand and elsewhere.

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1 Statement of claim, 5 August 2015 at [1.3].

[10] Greenpeace New Zealand Inc is an environmental organisation which is concerned the TPP Agreement may adversely affect New Zealand's ability to protect its natural heritage.

[11] The Association of Salaried Medical Specialists is concerned about the potential impact of the TPP Agreement on the New Zealand health system and in particular New Zealand's ability to negotiate the purchase of less expensive pharmaceutical products and develop public health policies that are in New Zealand's best interests.

[12] The New Zealand Nurses Organisation is concerned the TPP Agreement could lead to a significant increase in the costs of medicines and medical devices in New Zealand.

[13] The New Zealand Tertiary Education Union Te Hautū Kahurangi o Aotearoa is concerned the TPP Agreement may lead to education becoming a commodity that can be traded and that as a consequence the quality of education of New Zealand could be compromised.

The Minister of Trade

[14] Prior to entering Parliament the Minister held senior diplomatic and trade positions. He had been the New Zealand Ambassador to the World Trade Organisation and the New Zealand Ambassador to Indonesia. He has also held a number of positions within the Ministry of Foreign Affairs and Trade (MFAT). The Minister has been Minister of Trade since 2008 and has a very intimate knowledge of the TPP Agreement negotiations.

The Official Information Act 1982

Purpose

[15] The Act was substantially based on a report of the Committee on Official Information chaired by Professor Danks. The committee is referred to as "the Danks Committee". The Danks Committee published a general report and a supplementary report, which contained a draft Official Information Bill and Commentary. Many of

the provisions of the Danks Committee draft bill were enacted when Parliament passed the Act.

[16] In its general report the Danks Committee said:[2]

> … [I]t is *no longer acceptable to set out a sweeping rationale for the protection of official information*, or to expect that the public will accept in the future that certain areas of government business are inviolate simply because government says so. … (Emphasis in original)

[17] The Danks Committee recognised, however, that there were some legitimate reasons for governments to withhold and protect information. The Danks Committee acknowledged:[3]

> In no country where access to official information has become an issue has the case been made for complete openness. Few dispute that there are good reasons for withholding some information and for protecting it.

[18] The Danks Committee also explained:[4]

> One general area for which it is generally accepted that protection is needed, can be collectively described under a "national interests" heading. It includes such fields as *security, defence, and international relations*. We consider that *maintenance of law and order and the substantial economic interests* of New Zealand also merit assurances of protection, so that government can operate in the best interests of the public as a whole. (Emphasis in original)
>
> …
>
> The nation's economic interests have always demanded that it should be possible to protect the processes of negotiation and fiscal regulation. The "intangible capital of economic organisation" is seriously open to damage if options are prematurely canvassed or predictions come to be self fulfilling. *Internationally, economic affairs are equally susceptible to loss of confidence and actual damage if confidentiality is unable to protect negotiations with overseas governments or organisations*. (Emphasis added).

[19] The approach adopted by the Danks Committee marked a significant shift towards the release of official information from the approach prescribed in the Official Secrets Act 1951, which had been based on a United Kingdom statute of

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2 Committee on Official Information *Towards Open Government: General Report* (Wellington, 1980) at [53].

3 At [33].

4 At [35] and [37].

1911. The Danks Committee advocated a move towards more open government and greater access to official information. This approach is reflected in the provisions of the Act relevant to the present case and demonstrates why the Act is an important component of New Zealand's constitutional matrix.[5] The Act aims to simultaneously ensure access to information in which citizens have a legitimate interest and balance the interests of the state in withholding official information against that ensured access in limited circumstances.

[20] The title to the Act explains it makes "… official information more freely available, … [and] protect[s] official information to the extent consistent with the public interest …".

[21] Section 4 explains that the purposes of the Act are consistent with the principle of the Executive Government's responsibility to Parliament. The purposes of the Act include:

> (a) … increas[ing] 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 thereby to enhance respect for the law and to promote the good government of New Zealand:
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> …
>
> (c) … protect[ing] official information to the extent consistent with the public interest …

[22] Section 5 of the Act requires official information decisions to be determined:[6]

> ... 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.

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5 The Act has been described "as a constitutional measure"; *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA) at 391; Ian Eagles, Michael Taggart and Grant Liddell (eds) *Freedom of Information in New Zealand* (Oxford University Press Auckland, 1992) at 5-8.

6 Official Information Act 1982, s 5.

[23] The Act draws a distinction between documents and information by regulating access to official information rather than documents or records. "Official information" is defined to mean any information held by, amongst others, a department named in Part I of Schedule I of the Ombudsmen Act 1975[7] or a Minister of the Crown in his or her official capacity.[8]

Withholding information

[24] The Act enables a department, a Minister or an organisation to refuse a request for access to official information if one of the statutory grounds for not releasing the information requested applies. In the present case, three provisions of the Act relate to the decision by the Minister to withhold official information, namely:

(1) section 6 which concerns "conclusive reasons" for withholding official information;

(2) section 9 which concerns "other reasons" for withholding official information; and

(3) section 18 which sets out administrative reasons for withholding official information.

[25] Section 6 of the Act explains that "good reason" for withholding information exists for the purposes of s 5 if making available that information would be likely to have certain consequences, including:

> (a) … prejudic[ing] … the international relations of the Government of New Zealand; or
>
> (b) … prejudic[ing] the entrusting of information to the Government of New Zealand on a basis of confidence by–
>
> (i) the Government of any other country or any agency of such a Government; or
>
> …

[7] Other than the Parliamentary Counsel Office.
[8] Official Information Act 1982, s 2.

(e) … damag[ing] seriously the economy of New Zealand by disclosing prematurely decisions to change or continue government economic or financial policies relating to–

…

(vi) the entering into of overseas trade agreements.

[26] Section 9 of the Act sets out six "other" good reasons for withholding official information for the purposes of s 5. Two of those grounds are relevant, namely where it is necessary to withhold information in order:

(1) to "avoid prejudice to the substantial economic interests of New Zealand";[9] and

(2) to "enable a Minister of the Crown or any department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations)";[10]

[27] Before official information can be withheld under s 9 of the Act, the decision-maker must do more than conclude that the information requested falls within one of the categories listed in s 9(2) of the Act. Section 9(1) of the Act requires the decision-maker to undertake a balancing exercise and decide whether the public interest in withholding information is outweighed by other considerations that support disclosure of the information.[11]

[28] Section 18 of the Act sets out a number of administrative reasons for withholding official information. Three of those provisions are relevant, namely s 18(a), (d) and (f), which enable official information to be withheld where:

(a) … by virtue of section 6 … or section 9, there is good reason for withholding the information; and

(d) … the information requested is or will soon be publicly available; and

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9 Official Information Act 1982, s 9(2)(e).

10 Section 9(2)(j).

11 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 275.

> (f) … the information requested cannot be made available without substantial collation or research.

[29] Before refusing to release information because it requires "substantial collation or research" the decision-maker must:

> (1) consider whether fixing a charge would enable the request to be granted;[12] or
>
> (2) consider whether extending the time limit would enable the request to be granted;[13] or
>
> (3) consider whether consulting the person requesting the official information "would assist that person to make the request in a form that would remove the reason for the refusal".[14]

Procedures

[30] Section 15 of the Act imposes a duty on every department, Minister or organisation to whom an Official Information Act request is made:

> ... as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received by that department or Minister of the Crown or organisation … [to] decide whether the request is to be granted … and give or post to the person who made the request notice of the decision…

[31] Under s 15(1A) of the Act charges may be imposed upon those persons who request the supply of information under the Act. Any charge must be reasonable. Regard may be had to the cost of the labour and materials involved in making the information available.[15]

[32] Section 15A of the Act empowers a department, Minister or organisation to extend the statutory time limit for responding to any person who makes a request for information. The grounds for extension include:

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12 Official Information Act 1982, s 18A(1)(a).
13 Section 18A(1)(b).
14 Section 18B.
15 Section 15(2).

> … consultations necessary to make a decision on the request are such that a proper response to the request cannot reasonably be made within the original time limit.

[33] Section 19(a) of the Act states:

> **19 Reason for refusal to be given**
>
> Where a request made in accordance with section 12 of this Act is refused, the department or Minister of the Crown or organisation, shall,—
>
> (a) subject to section 10, give to the applicant—
>
> (i) the reason for its refusal; and
>
> (ii) if the applicant so requests, the grounds in support of that reason, unless the giving of those grounds would itself prejudice the interests protected by section 6 or section 7 or section 9 and (in the case of the interests protected by section 9) there is no countervailing public interest…
>
> …

Ombudsman

[34] Those who are dissatisfied with decisions refusing to release official information or with conditions imposed upon the use of any official information may ask the Ombudsman to investigate and review the decision in question.[16]

[35] The Ombudsman can decline to investigate a complaint.[17] Under s 34 of the Act, no application for judicial review can be commenced unless the Ombudsman has declined to investigate and review the decision in question or determined the complaint. This reflects Parliament's intention that those who are dissatisfied with a decision-maker's response to a request for official information should first take their case to the Ombudsman and exhaust that avenue of redress before resorting to the courts.[18]

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16 Official Information Act 1982, s 29.
17 Ombudsmen Act 1975, s 19.
18 *Police v Keogh* [2000] 1 NZLR 736 (HC).

The Trans-Pacific Partnership

[36] New Zealand and 11 other countries have negotiated the TPP Agreement.[19] Those negotiations concluded in Atlanta in the United States on 6 October 2015.

[37] Dr Walker, a Deputy Secretary at MFAT and New Zealand's chief negotiator for the TPP Agreement, has described the TPP Agreement negotiations as the most significant undertaken by New Zealand to eliminate trade barriers since New Zealand's entry into the World Trade Organisation.[20]

[38] Negotiations to achieve the TPP Agreement commenced in March 2010 and grew from a smaller free trade agreement among New Zealand, Brunei Darussalam, Chile and Singapore.[21]

[39] Dr Walker has explained that the countries that negotiated the TPP Agreement account for 45 per cent of New Zealand's total trade.[22] Under the TPP Agreement New Zealand will have free trade agreements with the world's three largest economies, namely, the United States of America, Japan and China.[23] The government "… strongly believes … [the] TPP [Agreement] will be in the overall interests of New Zealand"[24] as it will enhance opportunities for New Zealand exporters. Dr Walker has referred in his affidavit to a study that suggests the TPP Agreement will increase New Zealand's exports by USD 4.1 billion by 2025.[25]

[40] Similar evidence has been provided by the Minister, who has stressed the government's belief that significant economic benefits will be achieved for New Zealand through the TPP Agreement.[26]

[41] In his affidavit, Dr Walker explained the importance of confidentiality in the TPP Agreement negotiating process. He explained:[27]

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19 The other countries are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore, the United States and Vietnam.
20 Affidavit of D J Walker, 4 September 2015 at [28].
21 Trans-Pacific Strategic Economic (P4) Agreement.
22 Affidavit of D J Walker, above n 20, at [29].
23 China and New Zealand signed a free trade agreement in 2008.
24 Affidavit of D J Walker, above n 20, at [32].
25 At [35].
26 Affidavit of T J Groser, 3 September 2015 at [7]-[12].

> … In general, negotiating partners require that negotiations take place in confidence. Parties will often disclose their high-level objectives as New Zealand has consistently done, but it would be impossible for our negotiators to secure the best outcome for New Zealand if we publicly declared our detailed mandates to our negotiating partners in advance of negotiations. Furthermore, many partners are simultaneously negotiating a number of different [free trade agreements] with different countries. They therefore wish to ensure that their negotiating position with one [free trade agreement] partner remains confidential and is not released to another negotiating partner as that would inhibit their ability to conclude agreements with all countries and on favourable terms. …

[42] Dr Walker has explained that all countries that negotiated the TPP Agreement have agreed that documents created in relation to the negotiations will be treated in confidence in order to facilitate candid and productive negotiations:[28]

> … All TPP participants have agreed to hold documents in confidence for four years after the agreement enters into force, or if no agreement enters into force, for four years after the last round of negotiations. …

[43] Now that the negotiations have concluded, Cabinet will need to make a decision to sign the TPP Agreement. Thereafter, the TPP Agreement will be tabled in Parliament together with a national interest analysis. The TPP Agreement will then be referred to Parliament's Foreign Affairs, Defence and Trade Select Committee. That Committee may invite public submissions. Any legislation needed to give domestic effect to the provisions of the TPP Agreement will then be passed by Parliament.[29] The final step involves the formal ratification of the TPP Agreement by Cabinet.[30] Dr Walker anticipates the TPP Agreement will not come into force until 18 to 24 months after the conclusion of the negotiations.[31]

Professor Kelsey's request for information

[44] Not all New Zealanders approve of the TPP Agreement. One of New Zealand's most assiduous critics of the TPP Agreement is Professor Kelsey. She has

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27 Affidavit of D J Walker, above n 20, at [39].
28 Affidavit of D J Walker, above n 20, at [40].
29 David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Ltd, Wellington, 2005) at 590.
30 Cabinet Office *Cabinet Manual 2008* at [7.112]-[7.122].
31 Affidavit of D J Walker, above n 20, at [63].

closely monitored free trade agreements and concluded that the TPP Agreement negotiations have extended:[32]

> into areas of public policy that have little or no relationship to traditional forms of trade, and … impinge on the regulatory autonomy of domestic governments, Parliament's authority and te tino rangatiratanga of iwi, Māori under the Treaty of Waitangi".

Professor Kelsey's research has focused upon the TPP Agreement. She and her fellow applicants believe the TPP Agreement "will impose potentially far-reaching and unprecedented constraints on governments in ways that adversely affect New Zealand".[33] Professor Kelsey is concerned that the TPP Agreement will impact upon New Zealand's sovereignty. She also believes the economic benefits of the TPP Agreement to New Zealand have been significantly overstated.

[45] Professor Kelsey has also stressed a number of inconsistencies in the approach taken to confidentiality in relation to the TPP Agreement negotiations and other international trade and similar agreements. Professor Kelsey explains that she has:[34]

> … made repeated requests for information in the [TPP] negotiations under the Act because [she] believe[s] that the implications of the [TPP Agreement] for future governance of New Zealand requires active and informed debate, and that release of these documents is essential to a functioning democracy.

[46] Professor Kelsey has explained the concerns harboured by her and the other applicants:[35]

> … are compounded by the secretive nature of the [TPP Agreement] negotiations and the refusal of the government to release information to enable effective engagement with the issues at stake. …

Professor Kelsey believes:[36]

> … that responsible and democratic governance, and the Crown responsibility to engage effectively with Māori, requires public access to information and genuine opportunities for effective participation in government decisions

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32 Affidavit of J E Kelsey, 3 August 2015 at [3].
33 Affidavit of J E Kelsey, 3 August 2015 at [8].
34 At [147].
35 At [9].
36 At [9].

> before they are made. That is especially important in relation to the [TPP Agreement] because the initiation, negotiation, signing and ratification of an international trade and investment treaty is an Executive act and the resulting obligations are enforceable extraterritorially through the application of commercial sanctions or monetary arbitral awards.

[47] On 25 January 2015, Professor Kelsey made a request to the Minister under the Act for information concerning the negotiation of the TPP Agreement. Professor Kelsey requested eight categories of documents:[37]

> *Category A*
>
> The original negotiating mandate for the financial services and investment chapters of the Trans-Pacific Strategic Economic Partnership and the inclusion of the United States in those negotiations, and the subsequent negotiating mandates and/or amendments to those mandates in relation to the [TPP Agreement] negotiations.
>
> *Category B*
>
> A list of the titles, dates and topic of all documents tabled by New Zealand in the [TPP Agreement] negotiations.
>
> *Category C*
>
> All papers tabled by New Zealand during the negotiations up to 31 December 2013, aside from proposed texts.
>
> *Category D*
>
> All papers tabled by New Zealand during the negotiations since 31 December 2013, aside from proposed texts.
>
> *Category E*
>
> All proposals for texts and amendments to the text tabled by New Zealand during the negotiations up to 31 December 2013.
>
> *Category F*
>
> All proposals for texts and amendments to the text tabled by New Zealand during the negotiations since 31 December 2013.
>
> *Category G*
>
> Briefing notes and position papers provided by the Ministry to the [Minister], to the Cabinet, to other government agencies or to Opposition parties or spokespersons on general or specific matters.
>
> *Category H*
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> Any cost-benefit study, impact assessment or similar analysis of the proposed agreement as a whole, of specific provisions, or impacts on particular sectors or policies that have been conducted by or for the New Zealand government.

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[37] Affidavit of J E Kelsey, above n 32, Exhibit B.

[48] Professor Kelsey has explained the eight categories of documents she requested broadly reflect 10 categories of documents recommended for release by Ms O'Reilly, the European Union Ombudsman, after Ms O'Reilly had initiated an inquiry into the transparency of negotiations between the European Union and the United States in relation to the Trans-Atlantic Trade and Investment Partnership. Ms O'Reilly's report was issued on 6 January 2015. On 7 January 2015, the European Commission agreed to release a range of negotiating documents, including its negotiating mandate and negotiating texts.[38]

[49] In her letter to the Minister, Professor Kelsey emphasised that she wished to have her request treated with urgency under the Act. Professor Kelsey requested answers from the Minister within the 20 day timeframe specified in s 15(1) of the Act and without extensions being assumed by the Minister under s 15A of the Act.

The Minister's response

[50] Professor Kelsey's request was referred by the Minister to MFAT for evaluation and advice.[39]

[51] On 23 February 2015, the Minister's office advised Professor Kelsey that a five day extension would be required to complete the Minister's response.

[52] On 24 February 2015, MFAT sent a memorandum to the Minister "for action by 27 February 2015" which set out a proposed response for the Minister to send to Professor Kelsey.[40]

[53] On 27 February 2015, the Minister sent his response to Professor Kelsey. There were five reasons advanced by the Minister for refusing Professor Kelsey's request.

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38 Affidavit of J E Kelsey, above n 32, Exhibit D.
39 Affidavt of D J Walker, above n 20, at [65].
40 Affidavit of J E Kelsey, above n 32, Exhibit DDD.

[54] First, the Minister said that making the information available to Professor Kelsey would be likely to prejudice the international relations of the government.[41]

[55] Second, the Minister said that making available the information requested by Professor Kelsey would be likely to damage seriously the economy of New Zealand. The Minister explained his assessment that damage would be caused by prematurely disclosing economic or financial policies.[42]

[56] Third, the Minister said that it was necessary to withhold the information requested by Professor Kelsey to enable the government to carry on negotiating without prejudice or disadvantage.[43]

[57] Fourth, the Minister said the information requested could not be made available without substantial collation or research, particularly all the briefing notes and position papers requested by Professor Kelsey.[44]

[58] Fifth, the Minister said withholding the information requested by Professor Kelsey was not outweighed by any other considerations which rendered it desirable, in the public interest, to release the information requested.[45]

[59] On 2 March 2015, Professor Kelsey wrote to the Minister pointing out he had provided "general reasons for refusing to release the documents requested, but [had] not provided the grounds in support of those reasons".[46] Professor Kelsey requested from the Minister an explanation of the grounds relied upon by the Minister. That request was made pursuant to s 19(a)(ii) of the Act. On 12 March 2015, the Minister responded to Professor Kelsey's request for the grounds for the Minister's decision by saying he had already explained his grounds for refusing Professor Kelsey's request.[47]

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41 Official Information Act 1982, s 6(a).
42 Official Information Act 1982, s 6(e)(vi).
43 Section 9(2)(j).
44 Section 18(f).
45 Section 9(1).
46 Affidavit of J E Kelsey, above n 32, Exhibit CO.
47 Third affidavit of J E Kelsey, 15 September 2015, Exhibit 4.

[60] In his affidavit, the Minister has explained that he "… did not need to review any documents that might fall within the scope of [Professor Kelsey's] request to make [his] decision". The Minister says he:[48]

> … understood the nature of the documents requested and it was clear to [him] from the categories requested that [he] would have seen many of the documents, or examples of those types of documents, that would fall within those categories during the course of [his] Ministerial role.

[61] The Minister has also said:[49]

> … it … was … clear to [him] from the categories of documents requested that the documents falling within those categories would be of the utmost sensitivity and could be properly withheld under sections 6(a), 6(e)(vi) and 9(2)(j) of the Act.

[62] In his affidavit the Minister has said:[50]

> Being aware of the material in the categories sought, [he] did not assess individual documents as to whether they contained any anodyne material that might be released in response to the request or any material that is already in the public domain. This [could] not have been the intent of the request …

[63] The Minister has also explained that in preparing his affidavit for this proceeding he reviewed 21 documents which MFAT officials subsequently made available to the Chief Ombudsman as part of her investigation. The Minister has said that his:[51]

> … decision to withhold information in response to the request under the Act would not have been any different had [he] reviewed those documents at the time of [his] decision. They were all documents with which [he] was already familiar in [his] role as Minister of Trade.

[64] During the course of the hearing I asked Ms Hardy, senior counsel for the Minister, approximately how many documents were thought to be encompassed by the request made by Professor Kelsey. Ms Hardy advised that a computer search by MFAT suggested "roughly 30,000 documents" might be relevant to Professor Kelsey's request. The applicants are sceptical about the accuracy of that estimate.

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48 Affidavit of T J Groser, above n 26, at [18].
49 Affidavit of T J Groser, above n 26, at [20].
50 At [23].
51 At [21].

Review by the Ombudsman

[65] On 6 March 2015, Professor Kelsey made a "complaint" to the Chief Ombudsman about the Minister's refusal to provide the information she had requested. Professor Kelsey explained, however, that she intended to judicially review the Minister's decision to withhold all of the categories of documents she had requested. Professor Kelsey appreciated she could not commence judicial review proceedings unless the Chief Ombudsman declined to investigate or unless the Chief Ombudsman considered and determined Professor Kelsey's complaint. Professor Kelsey urged the Chief Ombudsman to take the first of these courses of action and decline to consider her complaint on the grounds that there was an adequate remedy in the form of judicial review which Professor Kelsey intended to pursue.[52]

[66] On 12 March 2015, the Chief Ombudsman's office advised Professor Kelsey that the Chief Ombudsman would not follow the course urged by Professor Kelsey and that the Chief Ombudsman would consider and determine her complaint.

[67] As part of her investigations, the Chief Ombudsman and her officials met with Dr Walker on 2 April 2015. During the course of that meeting Dr Walker provided the Chief Ombudsman with 21 documents which fell within the scope of Professor Kelsey's request. The Chief Ombudsman also met with Dr Walker on two other occasions.

[68] In addition to meeting with Dr Walker and other MFAT officials, the Chief Ombudsman received and considered detailed written submissions from MFAT. The Chief Ombudsman has explained those:[53]

> … written submissions provid[ed] detailed explanations as to the volume and nature of the documents covered by [Professor Kelsey's] request, the harm that the Minister believes would result if the documents … requested were in the public domain at this stage, details of relevant information made public so far and the plan for proactive and progressive release of information about the TPP [Agreement] negotiations, including the proposed stages in the negotiation process when information will be released, the

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52 Ombudsmen Act 1975, s 19.

53 Report of the Chief Ombudsman to Professor Kelsey, 29 July 2015; contained in the affidavit of J E Kelsey, 3 August 2015, Exhibit M at 7.

nature of information to be released, and how such release will assist public participation in the process.

[69] Included within the 21 documents which Dr Walker made available to the Chief Ombudsman were:

(1) the Cabinet mandate for negotiating the TPP Agreement, which included New Zealand's "bottom lines";

(2) papers provided to Cabinet by the Minister concerning negotiating strategies;

(3) assessments of proposals submitted by other negotiating countries; and

(4) the draft text of the TPP Agreement as at 8 April 2015.

[70] On 23 July 2015, the Chief Ombudsman issued a draft report provisionally upholding all elements of the Minister's refusal to release the information requested by Professor Kelsey.

[71] A final report was released by the Chief Ombudsman on 29 July 2015. In that decision the Chief Ombudsman deferred her final decision in relation to two categories of information requested by Professor Kelsey. Those categories were:

(1) The list of the titles, dates and topics and all documents tabled by New Zealand in the TPP Agreement negotiations (Category B in Professor Kelsey's request to the Minister).

(2) Any cost-benefit study, impact assessment or similar analysis of the proposed agreement as a whole, or specific provisions, or impacts upon particular sectors or policies that have been conducted by or for the New Zealand government (Category H in Professor Kelsey's request to the Minister).

[72] The Chief Ombudsman endorsed the Minister's decision not to release to Professor Kelsey the balance of the documents she had specified in her request.

[73] The Chief Ombudsman's report to Professor Kelsey is comprehensive. It includes:

(1) an explanation of Professor Kelsey's case and the Chief Ombudsman's investigation;

(2) an explanation of the relevant provisions of the Act and legal principles; and

(3) the Chief Ombudsman's analysis and findings.

[74] In the first portion of her report the Chief Ombudsman recorded that:[54]

> … some parts of the documents covered by [Professor Kelsey's] request to the Minister would not be sensitive and require withholding because the information is either anodyne in nature or is already in the public domain, such as for example, background material setting out the history of the agreement, participants, etc.

[75] The Chief Ombudsman explained she wished to continue to assess the Minister's decision not to release information covered by Categories B and H of Professor Kelsey's request. The Chief Ombudsman appeared to suggest some of those documents contained information which is "not sensitive and disclosure would not harm any interests protected under the [Act]".[55]

[76] The Chief Ombudsman also recorded:[56]

> MFAT acknowledged that some parts of the documents are not sensitive and could be released without harm to interests protected under sections 6 and 9 of the [Act] but argued that such information is either already publicly available or could only be retrieved following substantial collation and research. MFAT commented that it did not consider it reasonable or useful to provide heavily redacted documents with just the anodyne material remaining. MFAT observed that, in any event, to the extent that [Professor

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54 Report of the Chief Ombudsman to Professor Kelsey, above n 53, at 2.
55 At 2.
56 At 7.

> Kelsey's] request covered publicly available material, it could be refused under s 18(d) of the [Act].

[77] In her explanation about the relevant provisions of the Act and legal principles, the Chief Ombudsman focused upon ss 6 and 9 of the Act. When explaining the balancing exercise required by s 9(1) of the Act the Chief Ombudsman made the following statement:[57]

> … The considerations favouring disclosure must outweigh the interest in withholding. If the competing considerations are so equally balanced that the decision maker (and Ombudsman on review) is in two minds as to whether the information should be disclosed in the public interest, notwithstanding any harm to interests protected under section 9(2), then the information should be withheld. Only if the considerations favouring disclosure and the public interests outweigh the need to withhold must the information be made available pursuant to the principle of availability set out in section 5 of the [Act].

[78] The Chief Ombudsman's grounds for rejecting Professor Kelsey's complaint in relation to the documents specified in Categories A, C, D, E, F and G of Professor Kelsey's request can be distilled to three grounds.

[79] First, the Chief Ombudsman concluded under s 6(a) of the Act that making available the information requested would be likely to prejudice the international relations of the government of New Zealand.

[80] Second, making available the information would be likely to prejudice the entrusting of information to the government of New Zealand where that information has been provided in confidence by the government of another country. This ground for upholding the Minister's decision was based on s 6(b)(i) of the Act.

[81] Third, the Chief Ombudsman concluded under s 9(2)(d) of the Act that withholding the information requested was necessary to avoid prejudice to the substantial economic interests of New Zealand.

Grounds for judicial review

[82] The application for judicial review was advanced on six grounds.

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[57] Report of the Chief Ombudsman to Professor Kelsey, above n 53, at 9.

[83] First, the applicants challenge the lawfulness of the Minister's decision to withhold documents on a "blanket basis" irrespective of whether there was official information in those documents which could not be withheld.

[84] Second, the applicants argue the Minister's reliance on s 6(a), (b)(i) and (e)(vi) of the Act to withhold all the information requested involved a misunderstanding and misapplication of those provisions of the Act.

[85] Third, in invoking s 6 of the Act, the Minister failed to identify with sufficient particularity the nature of the prejudicial effect or damage to the interest protected by s 6 of the Act.

[86] Fourth, the information requested could not all be justifiably withheld under s 9(2)(d) or (j) of the Act.

[87] Fifth, the Crown cannot override domestic law by entering into an international confidentiality agreement.

[88] Sixth, the Minister's decision was unlawful in the following respects:

(1) withholding information on the grounds of substantive collation or research without following the pre-conditions set out in ss 18A and 18B of the Act;

(2) failing to give grounds for refusing Professor Kelsey's request; and

(3) failing to respond to Professor Kelsey's request as soon as reasonably practicable or within the time specified in s 15 of the Act.

PART II

ANALYSIS

General principles

[89] The applicants seek to judicially review the decision of the Minister on the basis he erred in law when he refused Professor Kelsey's request. The applicants do not directly challenge the report of the Chief Ombudsman.

[90] The applicants appreciate this proceeding is not a forum to engage in an analysis of the merits of the Minister's views about the potential economic and other benefits of the TPP Agreement. Nor is this proceeding an appropriate vehicle to critically assess the Minister and MFAT's assessment of the potential prejudice to New Zealand's international relations and its ability to carry on trade negotiations if all of the information requested by Professor Kelsey is released.

[91] This proceeding is confined to questions about the correct interpretation and application of the Act, not the substantive merits of the Minister's decision or the report of the Chief Ombudsman. Accordingly, this case is quite different from *Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council* in which Jeffries J said:[58]

> … The allegations of errors, unreasonableness and failure to take into account relevant matters are attacks on the several judgments the Chief Ombudsman had to make in the functions ordained for him by the Act. That Act requires him to exercise his judgment using experience and accumulated knowledge which are his by virtue of the office he holds. Parliament delegated to the Chief Ombudsman tasks, which at times are complex and even agonising, with no expectation that the Courts would sit on his shoulder about those judgments which are essentially balancing exercises involving competing interests. The Courts will only intervene when the Chief Ombudsman is plainly and demonstrably wrong, and not because he preferred one side against another.

[92] Although the Chief Ombudsman's decision has not been directly challenged, the applicants have invited me to consider aspects of the Chief Ombudsman's understanding of the Act. In particular, the applicants have expressed concern about

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[58] *Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180 (HC) at 191.

the Chief Ombudsman's interpretation of s 9(1) and her application of 9(2)(d) of the Act, which was not referred to by the Minister in his decision.

[93] The applicants accept that because the Chief Ombudsman has yet to finally determine Professor Kelsey's claim in relation to the information covered by Categories B and H of her request to the Minister, their application for judicial review is confined to the information in Categories A, C, D, E, F and G of Professor Kelsey's request to the Minister. This judgment is therefore limited to the information covered by those six categories of documents.

First ground of review: the Minister's "blanket" approach

[94] The gravamen of the first ground of review is that the Minister erred in law when he relied upon the advice of officials to reject Professor Kelsey's request on a "blanket basis".

[95] The applicants say the Minister assumed all of the documents encompassed by Professor Kelsey's request could be lawfully withheld because he believed he knew the contents of those documents. The applicants submit the Minister's decision to withhold all the documents requested by Professor Kelsey without actually determining what information was in them to ascertain if any of the documents could be released either wholly or in a redacted form was unlawful.

[96] In her helpful submissions, Ms Hardy emphasised the Minister was, by virtue of his position and experience, very familiar with the information requested by Professor Kelsey, as were the officials advising the Minister. Ms Hardy argued that the Minister's knowledge and experience entitled him to rely on the advice he received from MFAT and adopt a pragmatic approach to Professor Kelsey's request. It was suggested on behalf of the Minister that officials did not have to undertake a document by document analysis of the information held by MFAT and that the Minister was entitled to simply consider the nature and subject matter of the material requested by Professor Kelsey, particularly as she had emphasised her request was urgent.

Anodyne information

[97] In her report the Chief Ombudsman explained that some of the information requested by Professor Kelsey did not need to be withheld by the Minister because it was either "anodyne" in nature or was already in the public domain.

[98] Ms Hardy submitted that the reference to "anodyne" information was to information that was already in the public domain.

[99] The difficulty with this aspect of the Minister's case is, as I have explained in paragraphs [62] and [74] of this judgment, both the Minister and the Chief Ombudsman drew distinctions between "anodyne" information and information that was already in the public domain. In the absence of further explanation from the Minister I must infer that when he referred to "anodyne" information he had in mind information that could lawfully have been released to Professor Kelsey and which was not already in the public domain. Thus, it would appear some of the information requested by Professor Kelsey could and should have been released by the Minister.

Professor Kelsey's intentions

[100] Part of the Minister's explanation for withholding "anodyne" information from Professor Kelsey was the Minister's belief that release of that information could not have been intended by Professor Kelsey.

[101] As I will explain in paragraphs [102] to [112] the Minister's role was to assess whether information could be properly released in accordance with the Act. The Minister should not have assumed Professor Kelsey's intentions. If the Minister wished to clarify his understanding of Professor Kelsey's request then he should have followed the process set out in the Act rather than make assumptions about her intentions.

Analysis

[102] I adopt as the starting point of my analysis the obligation placed upon the Minister to release information that could not be lawfully withheld under the Act.

Although Professor Kelsey's request referred to documents, the Act's focus is on information, not documents.

[103] At the time it was passed the Act departed from comparable overseas legislation by making "information" and not documents or records the subject matter of access.[59] Since the Act was passed other jurisdictions have taken a similar course to that contained in the Act. Thus, the Freedom of Information Act (UK) 2000 confers an entitlement to information.[60]

[104] There is no definition of "information" in the Act. As noted earlier, the definition of official information merely says that information is "official" when "held by a department, a Minister of the Crown in his or her official capacity, or an organisation". It has been suggested a reason for New Zealand emphasising an entitlement to information under the Act rather than to documents or records was to disincentivise attempts to avoid the effect of the Act by not recording information.[61]

[105] When the Minister received Professor Kelsey's request his duty was to ensure his officials ascertained if he and/or MFAT held the information requested by Professor Kelsey. If, when undertaking that exercise it became apparent the request involved substantial collation or research, the Minister was required to ensure compliance with ss 18A and 18B before rejecting Professor Kelsey's request on the basis that her request would involve officials undertaking a large exercise to collate and research the information requested. That is to say, the Minister needed to ensure his officials considered:

(1) whether fixing a charge to supply the information; or

(2) whether extending the time to comply with the request

would have enabled the Minister to comply with the Act.

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59 Committee on Official Information, *Towards Open Government: General Report*, above n 2, Supplementary Report at 61.

60 Philip Coppel *Information Rights Law and Practice* (4th ed, Hart Publishing, Portland, 2014) at 354.

61 Ian Eagle, Michael Taggart and Grant Liddell, above n 5, at 21.

[106] The Minister was also obliged to ensure his officials conferred with Professor Kelsey to see if she could modify her request before the Minister rejected her request on the basis the information she requested could not be made available without substantial collation or research.

[107] None of the steps required by ss 18A and 18B of the Act were undertaken. Instead, the Minister acceded to his officials' advice that he should reject Professor Kelsey's request without considering whether each individual piece of information held by the Minister and MFAT could be lawfully withheld.

[108] I appreciate the Minister subsequently looked at the 21 documents which Dr Walker made available to the Chief Ombudsman and then reconfirmed he had previously reached the correct decision when dismissing Professor Kelsey's request. That approach, however, fails to address the fundamental point that the Act required the Minister to assess each piece of information requested by Professor Kelsey that was held by the Minister and/or MFAT against the criteria in the Act for withholding official information before that request could be refused.

[109] I also appreciate that MFAT believes that complying with Professor Kelsey's request in the way envisaged by the Act would have involved substantial effort. That, however, is the price Parliament contemplated when it passed the Act and is a challenge regularly encountered and addressed by public servants who are charged with ensuring requests for official information are dealt with in accordance with the Act. The genuine administrative challenges associated with complying with the Act in this case did not entitle the Minister or MFAT to circumvent their duties under the Act.

[110] The "blanket" approach taken by the Minister in this case did not comply with the text, scheme and purpose of the Act. As I explain in Part III of this judgment, the appropriate course is for the Minister to reconsider his decision in relation to Categories A, C, D, E, F and G identified in Professor Kelsey's request. In doing so the Minister should comply with his obligations under the Act. I will endeavour to assist by explaining the Minister's duties and the meaning of the relevant provisions of the Act.

Second ground of review: s 6 of the Act

[111] The applicants acknowledge the Minister could lawfully withhold some of the information requested by Professor Kelsey if releasing the information requested would be likely:[62]

(1) "to prejudice … the international relations … of New Zealand;[63] or

(2) "to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by" another government;[64] or

(3) "to damage seriously the economy of New Zealand by disclosing prematurely decisions to change or continue Government economic or financial policies" relating to "the entering into of overseas trade agreements".[65]

[112] Dr Palmer QC, counsel for the applicants, advised that his clients understand that premature disclosure of New Zealand's "bottom lines" or negotiating strategy in international negotiations before those negotiations concluded was an interest the Minister could have legitimately taken into account under s 6(e)(vi) of the Act. The applicants also appreciate that disclosure of other nations' negotiating positions without consent could prejudice the entrusting of information to New Zealand on a basis of confidence by another government within the meaning of s 6(b)(i) of the Act.

[113] The essence of the applicants' second ground of review is that the Minister's assertion that all of the documents requested by Professor Kelsey are encompassed by s 6 of the Act "is entirely implausible". Dr Palmer submitted:[66]

> … the Crown is stretching genuine reasons for confidentiality to cover information for which there is no genuine reason for confidentiality. In this

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62 That is, there is a real or significant possibility; *Commissioner of Police v Ombudsman*, above n 5, at 404-405 and 411-412.
63 Official Information Act 1982, s 6(a).
64 Section 6(b)(i).
65 Section 6(e)(vi).
66 Applicants' submissions, 16 September 2015 at [4.15].

> the Crown is reverting to an Official Secrets Act mindset of secrecy, rather than applying the Official Information Act presumption of disclosure.

[114] Professor Kelsey provided examples of information which the applicants say is not likely to be legitimately preserved from disclosure under s 6 of the Act.[67]

[115] The reasons why the applicants submit the documents identified by Professor Kelsey as examples could not be lawfully withheld under s 6 of the Act include some of the information requested:

(1) has already been released by countries participating in the TPP Agreement negotiations; or

(2) has been released in redacted form by the New Zealand government; or

(3) has been leaked.

Analysis

[116] The insurmountable challenge faced by the applicants in relation to this portion of their case is that it is impossible for me to determine the merits of the Minister's decision, upheld by the Chief Ombudsman, to refuse disclosure of information under s 6 of the Act. Absent an ability to assess the merits of the Minister's decision, it is also impossible for me to definitively decide whether or not the Minister has erred in law when relying upon s 6 of the Act.

[117] I can provide some guidance on the correct approach the Minister should take if he relies on s 6 of the Act when reassessing Professor Kelsey's request. In doing

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[67] (1) Documents which identified the issues that are being negotiated as part of the TPP.
(2) Documents concerning New Zealand government's negotiating mandates or positions that have already been disclosed to other negotiating partners.
(3) New Zealand cabinet papers containing mandates on the "Doha Round of the World Trade Organisation in 2001" and the intended nationally determined contribution under the 2015 Global Climate Change Agreement.
(4) Documents concerning requests to New Zealand by other negotiating partners and requests by New Zealand to other negotiating partners that were released in 2003 as part of the Doha Round.
(5) Text tabled by New Zealand that have already been leaked.
Second affidavit of J E Kelsey, 10 September 2015 at [19].

so I recognise the disadvantages inherent in providing advice on the meaning of legislation in a factual vacuum. I therefore confine myself to the following five points.

[118] First, while there is no onus of proof in relation to s 6 of the Act, "… [H]e who alleges that good reason exists for withholding information would be expected to bring forward material to support that proposition" and if there is no good reason then the information should be released.[68]

[119] Second, the conclusive reasons for withholding official information under s 6 of the Act are only engaged if releasing the information requested would be likely to have one of the consequences set out in s 6(a)-(e) of the Act. In this context, "likely" means a "real or significant possibility".[69]

[120] Third, the transitive verb "to prejudice" in s 6(a), (b) and (c) of the Act should be given its natural and ordinary meaning. In the context of s 6, "to prejudice" means "to impair" the interests identified in s 6(a), (b) and (c) of the Act.[70]

[121] Fourth, the term "to damage seriously" in s 6(e) imposes a high threshold that requires the decision-maker to be satisfied that the economy will be damaged "seriously". It has been observed:[71]

> … the test of harm … imposed [by s 6(e)] was intended to be an onerous one … [as it] seems clear when one contrasts this provision with s 9(2)(d) which seeks only to "avoid prejudice to the *substantial* economic interests of New Zealand". (Emphasis in original)

[122] Fifth, the Act adopts two tests when assessing whether New Zealand's international relations will be prejudiced by releasing official information. The test in s 6(a) of the Act requires evidence that releasing the information requested is likely to actually harm New Zealand's international relations. On the other hand, the test in s 6(b)(i) may be satisfied in the absence of evidence of any likely actual harm. The threshold not to release official information in s 6(b)(i) of the Act may be

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68 *Commissioner of Police v Ombudsman*, above n 5, at 404-405 and 411-412.
69 *Commissioner of Police v Ombudsman*, above n 5.
70 Della Thompson (ed) *The Concise Oxford Dictionary* (9th ed, Clarendon Press, Oxford, 1995).
71 Ian Eagles, Michael Taggart and Grant Liddell, above n 5, at 199.

satisfied if the release of the information requested is viewed by other governments as a breach of trust.[72]

Third ground of review: failing to particularise grounds relied upon by the Minister

[123] The third ground of judicial review is premised on the basis that if the Minister invokes s 6 as a basis for not releasing official information then he "must identify, with sufficient particularity, the nature of the prejudice effect or damage to the protected interest and explain it to the requester". The applicants say that by failing to do so the Minister acted unlawfully.[73]

Analysis

[124] I will address the third ground of review by examining the distinction in s 19(a)(i) and (ii) of the Act between the "reasons" for refusing to release official information and the need for a decision-maker to give "the grounds in support of that reason" if "the applicant so requests … unless the giving of those grounds would itself prejudice the interests protected by section 6 … or section 9".[74]

[125] The noun "reason" in s 19(a)(i) of the Act refers to one of the statutory reasons for refusing a request to release official information set out in s 18(a)-(h) of the Act. The Act requires the decision-maker to specify one of those reasons at the time a request for official information is refused. All the decision-maker needs to do is specify which of the provisions in s 18(a)-(h) has been relied upon when the request for official information is refused.

[126] The Act contemplates a decision-maker providing an explanation for the bases for his or her action for refusing to release official information if the applicant "requests the grounds in support of [the decision-maker's] reason ...".

[127] The terminology used in s 19(a)(i) and (ii) of the Act is contorted. The normal hierarchy of decision-making would involve a decision-maker specifying the

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72 Ian Eagles, Michael Taggart and Grant Liddell, above n 4, at 158.
73 Applicants' submissions, 16 September 2015 at [1.4](c).
74 Official Information Act 1982, s 19(a)(ii).

grounds for refusing an applicant's request by identifying the statutory basis for refusing to release the information requested. Thereafter, adequate reasons would be expected to be supplied.[75] The drafters of s 19 of the Act appear to have used the terms "reason" and "grounds" in the converse manner to which they are normally used.

[128] In the present case, there is no doubt the Minister provided his "reasons" to Professor Kelsey for refusing her request when he set out in his letter of 27 February 2015 the provisions of s 18 of the Act he relied upon. Professor Kelsey sought in her letter of 9 March 2015 the Minister's grounds for refusing her request under s 19(a)(ii) of the Act. The Minister's response on 12 March 2015 replicated the explanation he had previously given when he set out his "reasons" for refusing Professor Kelsey's request.

[129] Ms Hardy drew attention to the observations of Ronald Young J in *Jeffries v Attorney-General*.[76] That case concerned a decision made by the Overseas Investment Office to release a letter sent by Mr Jeffries to the Attorney-General. The letter was released under the Act. The High Court judgment contains the following passage:[77]

> … At present, all that is required of the decision-maker is an assessment of whether there are proper grounds to withhold the release of the information pursuant to the relevant sections of the Act, and advice to the applicant and any persons affected of the result. The interests of interested parties are protected by a merits-based review by the Ombudsman. I see no basis to impose, on decision-makers under the Official Information Act, the burden of providing reasons beyond the current identification of the relevant statutory provisions that must be addressed in deciding whether to withhold official information and the conclusion based on the statutory test.

[130] I do not think *Jeffries* assists in understanding a decision-maker's duty under s 19 of the Act. *Jeffries* concerned a decision to release information. In the present case the Minister refused Professor Kelsey's request. She then applied under s 19(a)(ii) for the grounds relied upon by the Minister. The *Jeffries* case did not analyse whether or not the Overseas Investment Office had complied with its duty

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75 *Clark v Wellington Rent Appeal Board and Smith* [1975] 2 NZLR 24 (SC) at 26-27.
76 *Jeffries v Attorney-General* HC Wellington CIV-2006-485-2161, 20 May 2008.
77 At [99].

under s 19 of the Act to provide grounds for its decision to withhold the release of information.

[131] In my assessment, a decision-maker does not discharge his or her statutory duty to provide an explanation of the "grounds" in support of his or her "reasons" for refusing a request for official information by simply reciting which of the statutory grounds set out in s 18(a)-(h) of the Act were relied upon when refusing that request. The decision-maker must give more information so as to enable the applicant to understand the bases for the decision made. This approach is consistent with the observations of the Court of Appeal in *Commissioner of Police v Ombudsman* where it was said a decision-maker "who alleges that good reason exists for withholding information would be expected to bring forward material to support that proposition".[78]

[132] In my assessment, s 19(a)(ii) of the Act contemplates a decision-maker providing grounds when requested which should include an explanation of his or her decision for withholding requested information. If necessary the comprehensive merits based review process which the Ombudsman can undertake provides an appropriate forum for a more detailed explanation of the reasons why official information is withheld.

Fourth ground of review: s 9 of the Act

[133] The applicants' fourth ground of review was explained by Dr Palmer in the following way:[79]

> Section 9 of the Act requires a balancing of the reason for withholding information against the public interest in its release … if the decision-maker is in two minds as to whether information should be released, the information should be released … The information requested could not all be justifiably withheld under s 9(2)(d) or 9(2)(j) of the Act. Consequently the Minister acted unlawfully …

[134] The Minister referred to s 9(2)(j) when he refused Professor Kelsey's request. The Chief Ombudsman also identified s 9(2)(d) as being applicable.

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78 *Commissioner of Police v Ombudsman*, above n 5, at 411.

79 Applicants' submissions, 16 September 2015 at [1.4](d).

[135] The applicants acknowledge that it is conceivable that s 9(2)(j) might apply to some of the information requested by Professor Kelsey. However, they submitted it is unlikely that all of the information requested falls within the ambit of s 9(2)(j) of the Act.

[136] In her affidavits, Professor Kelsey has provided comprehensive arguments why, in her assessment, the Chief Ombudsman misapplied s 9(2)(d) of the Act when considering the economic reasons for not releasing the information requested. The difficulty with this aspect of the applicants' case is that I cannot engage in any analysis of the merits of the Minister's decision. This problem is compounded by the fact the Minister did not rely on s 9(2)(d) when refusing Ms Kelsey's request.

[137] The most I can do is provide guidance on the approach the Minister should take if he relies upon s 9(1), (2)(d) and (j) of the Act when he reassesses Professor Kelsey's request.

Analysis

Section 9(1)

[138] The applicants have taken issue with the Chief Ombudsman's formulation of the public interest balancing test required by s 9(1) of the Act. They cite the following sentence from the Chief Ombudsman's report:[80]

> … If the competing considerations are so equally balanced that the decision-maker (an Ombudsman on review) is in two minds as to whether the information should be disclosed in the public interest, notwithstanding any harm to interests protected under section 9(2) then the information should be withheld.

[139] I agree with the applicants that read by itself this sentence does not accurately reflect the test set out in s 9(1) of the Act. Suffice for present purposes for me to make it clear that if a decision-maker is in two minds when undertaking the test required by s 9(1) of the Act, then information should be released unless there is good reason for withholding it.

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[80] Report of the Chief Ombudsman to Professor Kelsey, above n 53, at 9.

[140] The sentence in the Chief Ombudsman's report which follows that cited by the applicants reads as follows:[81]

> … Only if the considerations favouring disclosure in the public interest outweigh the need to withhold must the information be made available pursuant to the principle of availability set out in section 5 of the [Act].

That sentence is consistent with the correct approach to the test in s 9(1) of the Act.

"Necessary"

[141] The requirement in s 9(2) of the Act that withholding information must be "necessary" to protect or avoid the interests identified in subs (a)-(k) of s 9(1) and (2) of the Act involves a higher threshold than the "would be likely" requirement found in s 6 of the Act. When the adjective "necessary" in s 9(2) is given its natural and ordinary meaning, a decision-maker would have to be satisfied withholding the information requested is "essential"[82] to protect or avoid the consequences enumerated in s 9(2)(a)-(k) of the Act.

Prejudice or disadvantage

[142] Section 9(2)(j) refers to a Minister or department of any organisation carrying on "without prejudice or disadvantage negotiations …". I have already explained the meaning of "prejudice" in the context of examining s 6 of the Act. The insertion of the transitive verb "disadvantage" into s 9(2)(j) of the Act suggests a potentially less adverse outcome than one that is prejudicial. Any "unfavourable" outcome could be considered a "disadvantage".[83]

Fifth ground of review: contracting out of the Act

[143] The gravamen of the fifth ground of review was explained by Dr Palmer in the following way:[84]

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81 Report of the Chief Ombudsman to Professor Kelsey, above n 53, at 9.
82 Della Thompson (ed) *The Concise Oxford Dictionary*, above n 70.
83 Della Thompson (ed) *The Concise Oxford Dictionary*, above n 70.
84 Applicants' submissions, 16 September 2015 at [1.4](e).

> The Crown has entered into an international confidentiality agreement with other negotiating states parties. This cannot override the domestic legal effect of the Act.

[144] Dr Palmer submitted that the wording of the 2010 Confidentiality Agreement among the TPP partners is sweeping. If applied literally it would effectively reverse the presumption of the release of official information contained in the Act inconsistently with its purpose. Dr Palmer said this would amount to the Crown contracting out of its domestic legal obligations for the entire period of negotiations and for any post-negotiation period agreed to by the states' parties.

Analysis

[145] The difficulty with this aspect of the applicants' case is that s 6(b)(i) of the Act envisages the government receiving information on a confidential basis from another government and then invoking the likelihood of prejudice to breaching confidence as a basis to refuse to release the information requested.

[146] Provisions similar to s 6(b)(i) of the Act can be found in comparable statutes in cognate jurisdictions.[85] These provisions reflect the importance parliaments have placed on governments preserving the confidences reposed in them by other governments. While the consequences of this provision may be frustrating from the applicants' perspective, s 6(b)(i) of the Act is cast in wide terms. More fundamentally, however, without seeing the information withheld pursuant to the 2010 Confidentiality Agreement, I cannot assess whether or not the informationrequested has been lawfully withheld pursuant to s 6(b)(i) of the Act.

Sixth ground of review

[147] The applicants initially sought declarations that the Minister acted unlawfully. Specifically the applicants submitted the Minister acted unlawfully:

(1) when he withheld information on the basis of "substantial collation" in s 18(f) of the Act without taking the steps required by s 18A or 18B of the Act;

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[85] Freedom of Information Act (Cth) 1982, ss 33(b) and 4(10); Freedom of Information Act (UK) 2000, s 27(3).

(2) by not giving the grounds in support of his reasons to refuse Professor Kelsey's request; and

(3) by not responding to Professor Kelsey's request as soon as was reasonably practicable or within the statutory timeframe prescribed in s 15 of the Act.

Analysis

[148] It is not possible for me to make what is essentially a factual finding about whether or not the Minister responded to Professor Kelsey's request "as soon as reasonably practicable".[86]

[149] I have examined the issues identified in paragraphs [147](1) and [147](2). Those issues do not require any further analysis.

[150] Technically, there may in fact not have been any breach of the timeline specified in the Act as the Minister's office communicated with Professor Kelsey on the evening of the 20th working day following her request. The Minister's response was issued five working days later. In any event, as Dr Palmer acknowledged, this was not the most important feature of the applicants' case. The applicants' suggestion that the Minister did not respond within the statutory timeframe is not a matter that requires any further comment in the context of this case.

PART III

RELIEF

Relief sought

[151] During the course of the hearing Dr Palmer varied the terms of the relief sought by applying for one declaration and three orders.

[152] The declaration sought by the applicants at the conclusion of the case was in the following terms:

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[86] Official Information Act 1982, s 15(1).

A declaration that it was not lawful for the Minister:

(a) to withhold information on a blanket basis, including by withholding whole documents or categories of documents;

(b) to withhold information under sections 6 and 9 of the Act where it was not public and there were no reasons to withhold it;

(c) to withhold information requested only on the basis of an international agreement or confidentiality where there are no substantive grounds under the Act for withholding it;

(d) to withhold information under s 18(f) of the Act without undertaking the statutory preconditions of that section in ss 18A and B;

(e) to fail to provide grounds for his reasons for withholding information;

(f) to fail to respond to the request as soon as reasonably practicable or even within the statutory timeframe;

(g) to extend the deadline for release without meeting the statutory preconditions for doing so.

[153] The orders sought were that:

(a) under s 4(5) of the Judicature Amendment Act 1972, the Minister consider whether each piece of information covered by the first applicant's request should be released or withheld under the Act on a case by case basis, having regard to the reasons in the Court's judgment and having regard to:

i. the purpose of the Act and its principle that information should be made available unless there is good reason why it should not;

ii. in relation to s 6, whether release of each piece of information would be "likely" to "prejudice" or "seriously damage" the relevant interests;

iii. in relation to the application of s 9, whether the interests in withholding of each piece of information are outweighed by the significant public interest in release of the information requested;

(b) leave be reserved to the applicants to apply for any supplementary or consequential orders;

(c) awarding costs to the applicants.

Reconsideration

[154] As foreshadowed, I believe the appropriate course to follow in this case is to quash the Minister's decision refusing Professor Kelsey's request and direct the Minister to reconsider his decision in relation to the information encompassed by Categories A, C, D, E, F and G in Professor Kelsey's request to the Minister.

[155] In reconsidering his decision, the Minister should adhere to his obligations under the Act and apply the law in the way I have explained. This order is made pursuant to s 4(5) of the Judicature Amendment Act 1972.[87]

[156] There are two reasons why I am making this order:

(1) First, the Minister's affidavit and the Chief Ombudsman's report reveal that there was no lawful basis for the Minister to withhold, in the way he did, some of the information requested by Professor Kelsey. It is therefore appropriate for the Minister to ensure officials assess each piece of information requested by Professor Kelsey that is in the possession of the Minister and MFAT against the criteria in the Act for withholding information.

(2) Second, the Act plays a significant role in New Zealand's constitutional and democratic arrangements. It is essential the Act's meaning and purpose is fully honoured by those required to consider the release of official information.

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[87] **4 Application for review**

...

(5) Without limiting the generality of the foregoing provisions of this section, on an application for review in relation to the exercise, refusal to exercise, or purported exercise of a statutory power of decision the Court if it is satisfied that the applicant is entitled to relief under subsection (1) of this section, may, in addition to or instead of granting any other relief under the foregoing provisions of this section, direct any person whose act or omission is the subject-matter of the application to reconsider and determine, either generally or in respect of any specified matters, the whole or any part of any matter to which the application relates. In giving any such direction the Court shall—

(a) Advise the person of its reasons for so doing; and

(b) Give to him such directions as it thinks just as to the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration …

No need for declarations

[157] The Court of Appeal has explained:[88]

> It is well-established that a court will generally not make a declaration under the Judicature Amendment Act unless there is a dispute between the parties, the dispute arises from specific facts which are already in existence, the dispute is alive and its determination will be of some practical consequence to the parties or the public. The requirement that the declaration have utility means that it should be fact-specific, efficacious and capable of practical application.

[158] In view of the order I have made quashing the Minister's decision and directing him to reconsider Professor Kelsey's request, I do not think it is necessary to issue the declarations sought by the applicants. I have reached this conclusion for three reasons:

(1) First, I am satisfied the orders I am making and the contents of this judgment appropriately vindicate Professor Kelsey's rights under the Act for the present time.[89]

(2) Second, the orders I have made reinforce to the Minister and other decision-makers the importance of discharging their responsibilities under the Act and promote future compliance.[90]

(3) Third, if the reasons I have set out in subparagraphs (1) and (2) prove to be erroneous, the applicants can seek further orders in accordance with the following paragraph.

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88 *Department of Internal Affairs v Whitehouse Tavern Trust Board* [2015] NZCA 398 at [80] citing *Fowler & Roderique Ltd v Attorney-General* [1987] 2 NZLR 56 (CA) at 78; *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2010] NZCA 513, [2011] 2 NZLR 442 at [141]; Lord Woolf and Jeremy Woolf *Zamir and Woolf: The Declaratory Judgment* (4th ed, Sweet & Maxwell, London, 2011) at [4.57]-[4.109]; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [27.3.3] and Andrew Beck and others *McGechan on Procedure* (online looseleaf, Brookers) at [JAA4.03(12)]. The position under s 3 of the Declaratory Judgments Act 1908 is different: *Mandic v The Cornwall Park Trust Board (Inc)* [2011] NZSC 135, [2012] 2 NZLR 194 at [5]-[9].

89 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [256] per Blanchard J.

90 At [255].

Additional steps

[159] There is merit in the applicants' submission that leave be granted to apply for "any supplementary or consequential orders" because the Chief Ombudsman has still to reach her final decision in relation to the material encompassed by Categories B and H in Professor Kelsey's request to the Minister and in case further orders are required in terms of paragraph [158](3) of this judgment. However, there should be some restrictions on the ability of the parties to seek further orders. To ensure this litigation is concluded in a timely manner, the parties are required to file with the Court either a joint memorandum or separate memoranda explaining what progress has been made and whether supplementary or consequential orders are likely to be required. The parties should take this step within six months of the date of this judgment.

Costs

[160] The applicants have succeeded in relation to their primary cause of action but have had limited success in relation to their other grounds for judicial review. In my assessment, the applicants are entitled to costs calculated on the basis of two-thirds of scale 2B.

D B Collins J

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