Office of the Ombudsmen
Te Tari -o- Ngā Kaitiaki Mana Tangata

PV/O

Our Ref: 179247 (W61490)
Contact: Emma Leach

10 November 2009

Mr Thomas Beagle
PO Box 5641
Lambton Quay
Wellington 6145

Dear Mr Beagle

OFFICIAL INFORMATION ACT COMPLAINT
DEPARTMENT OF INTERNAL AFFAIRS
WEBSITE FILTERING LIST

I refer to the letter from Team Leader Andrew McCaw of 7 July 2009, concerning your complaint about the decision of the Department of Internal Affairs to refuse your request for a website filtering list.

As Mr McCaw advised, I have received a response from the Department, providing a report on its concerns. Deputy Ombudsman Leo Donnelly has also met with the Department on my behalf to discuss the issues further and to view the information at issue. Having carefully considered the matter, I have now formed a provisional view on your complaint.

Summary

In essence, it is my provisional view that it was open to the Department to refuse your request, on the basis that release of the list would be likely to prejudice the maintenance of the law.

At this stage, I am willing to consider any further comments you wish to make before I decide whether to confirm this view as my opinion on the matter.

If you do wish to comment, please respond within the next four weeks.

I have set out the details of my provisional view below.

My role

As an Ombudsman, I am authorised to investigate and review, on complaint, any decision by which an agency subject to the Official Information Act (OIA) refuses to make official information available when requested.

My role in undertaking an investigation is to evaluate the grounds for refusing requests for official information in terms of the tests set out in the OIA, and to form an opinion as to whether the request was properly refused.

Background

I understand that the Department has trialled an internet filtering scheme, which uses a list of banned websites to block access to objectionable material. On 13 April 2009, you made a request to the Department for the list used in the trial, as follows:

> *"Please send me a current copy of the list including the reasons for the inclusion of each site/address. (A digital copy in some openly available format will suffice.)"*

The Department declined your request for the list on 24 April 2009, stating:

> *"The release of the filtering list (particularly in an electronic format) would facilitate access to images of child sexual abuse images. I am therefore withholding this information in terms of section 6(c) of the Official Information Act (where the release of this information is likely to prejudice the maintenance of the law, including the prevention, investigation and detection of offences, and the right to a fair trial)".*

Your complaint

You have made a complaint about this decision, stating:

> *"I believe that this is not reasonable for the following grounds:*
>
> 1. *That releasing the list does not contravene section 6(c) in that it does not prejudice the maintenance of the law.*
>
> 2. *That it is in the public interest to be able to confirm that the filtering system is not being abused through the addition of sites that do not contain objectionable material (as has recently been found to be the case in Australia).*
>
> 3. *That it has already been established that the Chief Censor is obliged by law to publish their decisions about banning objectionable material, and any censorship enforced by internet filter should be held to the same standard".*

Comments by Department

In responding to my request for comments, the Department has advised:

"The…official information requested by Mr Beagle and withheld by the DIA is the current list of websites used in the trial website filtering scheme to block access to objectionable material.

Over the last 4 years the Department's Censorship Compliance Unit has developed a large database of websites offering child sexual abuse material. The Unit has become an affiliate of the CIRCAMP[1] initiative, which is initiated by the European Chief of Police Task Force and is solely aimed at combating organised criminal groups behind the commercial sexual exploitation of children. These partnerships, together with the database already created by the Unit, mean that the current website filtering list comprises over 7000 URLs[2].

The images (both still and moving) and text on these websites are not "just images" but are evidence of actual criminal activity. The children who are victims of this activity sometimes suffer the psychological effects of their abuse for many years after the physical offending has ended. Images that are distributed on the Internet never go away. The possession and distribution of this material creates an international market that supports and encourages further exploitation and abuse.

The list of websites is maintained securely within the DIA's computer network and only three members of staff have access to it. The list is reviewed monthly, manually, to ensure that it is up to date. Additions are only made to the list with the agreement of at least 3 warranted inspectors of publications that the material on the website meets the criteria that they explicitly show children being sexually abused. All sites on the list are visited and an investigating officer prepares a report that identifies what he or she saw on the site when it was last reviewed.

Films, Videos, and Publications Classification Act 1993

Section 3(1) of the Films, Videos, and Publications Classification Act 1993 (the Act) provides that "a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good". Subsection (2)(a) deems a publication to be objectionable if it promotes or supports, or tends to promote or support the exploitation of children, or young persons, or both, for sexual purposes.

The Act provides that, possession of an objectionable publication with knowledge or reason to believe it is objectionable is a serious offence carrying a term of imprisonment not exceeding 5 years or a fine not exceeding $50,000. The offence of distributing an objectionable publication, including over the Internet, with knowledge that the publication is objectionable carries a maximum term of imprisonment of up to 10 years.

That Act also provides it shall not be an offence for certain persons to be in possession of objectionable publications when it is in connection

[1] Cospol Internet Related Child Abusive Material Project (http://circarnp.eu/)
[2] Uniform Resource Locator - the global address of resources on the World Wide Web.

with their official duties (eg. classification officers, police officers, other persons in service of the Crown).

Official Information Act — reason for withholding official information Section 6(c)

The Department is strongly of the view that there is good reason for withholding the release of the information requested by Mr Beagle. Grounds exist under section 6(c) of the Official Information Act 1982, namely that making available of the information would be likely to prejudice the maintenance of the law, including the prevention, investigation and detection of offences.

While the website filtering list might not be viewed as objectionable, it directly provides the means to access material that is objectionable. The public release of the list would inevitably lead to members of the public visiting these sites, either out of curiosity or to verify that the websites do contain child sexual abuse images.

A person who views a website containing child sexual abuse images is in possession of those images, if only for the period they appear on the screen. Withholding the filtering list therefore will not only prevent the members of the public from being exposed to horrendous images of child sexual abuse but also prevent them from breaking the law. For those individuals with a sexual interest in children, the public availability of the filtering list, would provide them with a "shopping list" for fulfilling their sexual interest. This in turn will support the trade in child sexual abuse images by creating a demand for new images and the further abuse of children, both in New Zealand and overseas.

...The DIA is currently developing a Code of Practice which will govern the operation of the completed system. The operation of this Code will include an Independent Reference Group (membership yet to be determined) that will help provide further assurance that nothing untoward is occurring through the operation of the Digital Child Exploitation Filtering System".

Section 6(c)

Section 6 of the OIA provides conclusive reasons for withholding official information. Where a provision of section 6 applies, a conclusive reason exists for withholding the information at issue. In effect, Parliament has decided that if a provision of section 6 applies, it is in the public interest to withhold the information. There is no scope to consider whether there is any countervailing public interest in release which would outweigh the need to withhold the information (section 9(1) of the Act refers).

Section 6(c) of the Act provides that:

> "*Good reason for withholding official information exists...if [making the information] available...would be likely...to prejudice the maintenance of the law, including the prevention, investigation and detection of offences, and the right to a fair trial*".

The Court of Appeal has interpreted the phrase *"would be likely"* as meaning *"a serious or real and substantial risk...a risk that might well eventuate"*.[3] Therefore, before I am able to accept that section 6(c) provides good reason to withhold any information, I must be satisfied that there is a serious or real and substantial risk to the maintenance of the law which would arise if the information were released.

The information which has been withheld in this case identifies websites which contain child sexual abuse material. I consider that disclosing the information would create a serious risk to the maintenance of the law, namely the prevention of offences against the Films, Videos, and Publications Classification Act 1993.

If the list of websites which have been identified as containing child sexual abuse material was released, then I consider there is a real and substantial risk that members of the public would use that list to visit the relevant websites. Whether the websites were visited for the purpose of verifying that they do indeed contain child sexual abuse material (and so were legitimately included in the list) or for some other purpose, accessing the websites could in itself breach the law. I understand that it is a criminal offence to access websites that contain objectionable material, with knowledge or reason to believe the material is objectionable.

Section 6(c) clearly states that the maintenance of the law includes the *"prevention...of offences"*. In this case, I consider that release of the list of websites would create a real and substantial risk of criminal offending, and thereby prejudice maintenance of the law.

I have noted your concerns that:

- the filtering system may be abused by the addition of websites which do not contain objectionable material; and

- any censorship enforced by an internet filter should be transparent, in the same way as the Chief Censor is required to publish decisions to ban objectionable material.

Deputy Ombudsman, Leo Donnelly, and another senior member of my staff have inspected the complete list of websites and interviewed the inspectors responsible for generating and updating the list. The Deputy Ombudsman selected a random sample of websites from the current list and viewed the websites as a spot check that they did contain child sexual abuse material. The Deputy Ombudsman has reported to me that all sites he viewed did contain objectionable material of that nature. From the Deputy Ombudsman's inspection of the full list and his viewing of websites he selected at random, there is no evidence to suggest that other websites that do not contain objectionable material concerning child sexual abuse are included in the list.

I appreciate your concerns that the process of adding websites to the list should be transparent. However, as stated above, I have no scope to consider whether there is any countervailing public interest in release of the information. In cases where a provision of section 6 applies, which includes likely prejudice to the maintenance of the law, Parliament has decided that it is in the public interest to

[3] *Commissioner of Police* v *Ombudsman* [1988] 1 NZLR 385, 388.

withhold the information. Thus, consideration of factors favouring disclosure in the public interest is not relevant to an assessment of the applicability of section 6(c).

In any event, I note that the Department has put in place protocols to ensure that websites are appropriately included in the list. In particular, the Department has advised that:

- the list is reviewed on a monthly basis to ensure that it is up to date;
- additions are only made to the list with the agreement of at least 3 warranted Inspectors of Publications that the material on the website meets the criteria that they explicitly show children being sexually abused; and
- all websites on the list are visited and an investigating officer prepares a report that identifies what he or she saw on the website when it was last reviewed.

In addition, the Department is developing a Code of Practice and Independent Reference Group, and has built in a system to review the websites which are on the list, as advised to you on 24 April and 16 July 2009, namely:

- the Chief Censor is available to provide expert advice on any matter that requires further clarification; and
- when a person tries to access a website that is on the list, they are sent to a blocking page that enables them to anonymously seek a review by an Inspector of Publications of the decision to include the website on the filtering list.

My provisional view

In my provisional view, for the reasons set out above, it was open to the Department to refuse your request for the website list under section 6(c) of the OIA, on the basis that release of the information would be likely to prejudice the maintenance of the law.

Your comments

I am willing to consider any comments you wish to make at this point, before I decide whether to confirm this view as my opinion on the matter.

If you do wish to comment, please respond within the next four weeks.

Investigating officer reports

You have also raised a concern in your letter of 4 August 2009 that the Department has deleted reports which constituted part of the information relevant to your request made on 13 April 2009. This issue has been raised with the Department.

The Department has explained that when it replied to you on 24 April 2009, it did not understand your request for "*the reasons for the inclusion of each site/address*" as including a request for the reports prepared by investigating officers. The reason for this is that the reports are prepared by investigating officers, when they visit websites that are on the list, to confirm that they still contain child sexual abuse content. Accordingly, the reports constitute a record of each website's content at a particular point in time, rather than the reasons for the website being included in the list. The Department has further advised that the reasons for the inclusion of each website in the list were set out in its responses to your questions 7 and 8, namely:

> *7. By what process are sites/addresses chosen and added to the list?*
> *8. What types of content get a site/address added to the list?*

As the Department did not understand your letter of 13 April 2009 to include a request for the reports prepared by investigating officers, it did not consider it necessary to retain those reports for the purposes of responding to my inquiries about its response to your request.

However, I note that you have now, in making your request dated 22 May 2009, clarified to the Department that you are seeking those reports. The Department responded to you on 16 July 2009, refusing your request for the reports on the basis that they do not exist as the reports have been deleted.

Having heard the Department's explanation of its actions it does not appear to me that it was intending to (or indeed did) frustrate my investigation. The Department has also advised me that you have made a complaint to Archives New Zealand about the deletion of the reports, and the Department is responding to enquiries by Archives New Zealand in that respect.

Yours sincerely

David McGee
Ombudsman