

12 March 2010

Thomas Beagle  
PO Box 5641  
Lambton Quay  
WELLINGTON 6145

Dear Thomas

## **ACTA NEGOTIATIONS**

Thank you for your letter of 10 February 2010 inquiring under the Official Information Act 1982 (the "OIA") about the Anti-Counterfeiting Trade Agreement (ACTA) negotiations.

The participants in the ACTA negotiations have agreed that general information about ACTA's objectives and the negotiating process should be made public, and the Ministry of Foreign Affairs and Trade (MFAT) has published information about ACTA on its website. However, ACTA participants have also agreed that information relating to formal negotiating positions of governments should be protected while the ACTA text is being developed, in accordance with standard practice in trade negotiations. Some of the information and documents you have requested has therefore been withheld, in accordance with the OIA, as set out in more detail below.

In response to your specific questions:

- 1 *When did the New Zealand Government decide to take part in the ACTA negotiations?*

The decision was taken on 28 May 2008 and that decision was announced by the Associate Minister of Commerce by way of a media statement on 29 May 2008. A copy of that media statement is available from the Ministry of Economic Development's website.

- 2 *Who made the decision to take part in the ACTA negotiations?*

The decision was made by Cabinet.

- 3 *What were the key factors that lead to New Zealand to decide to participate in the ACTA treaty negotiations?*

These are discussed in the attached copy of the Cabinet paper seeking approval for New Zealand officials to participate in ACTA negotiations. Parts of this document are withheld under s6(a), s6(b)(i), s9(2)(j) and s9(2)(g)(i) of the OIA.

Where parts of this document have been withheld under section 6(a) of the OIA, this is because the making available of that information would be likely to prejudice the international relations of the Government of New Zealand.

Where parts of this document have been withheld under section 6(b)(i) of the OIA, this is because the making available of that information would be likely to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such a government.

Where parts of this document have been withheld under section 9(2)(g)(i), this is necessary to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown [or members of an organisation] or officers and employees of any Department or organisation in the course of their duty, and, in the circumstances of the particular case, the withholding of that information is not outweighed by other considerations which render it desirable, in the public interest, to make that information available.

Where parts of this document have been withheld under section 9(2)(j) of the OIA, this is necessary 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) and, in the circumstances of the particular case, the withholding of that information is not outweighed by other considerations which render it desirable, in the public interest, to make that information available.

- 4 *Please send me copies of any paper or documents that were used in making the decision to take part in the ACTA treaty negotiations.*

A copy of that Cabinet paper is attached. As noted above, parts of this document are withheld under s6(a), s6(b)(i), s9(2)(j) and s9(2)(g)(i) of the OIA.

- 5 *Was New Zealand's participation with the ACTA treaty negotiations influenced by any indication that it would help negotiate a trade agreement with any country? If so, which countries?*

MFAT is not aware of any indication that New Zealand's participation in ACTA would help it negotiate a trade agreement with any country.

- 6 *Who has developed the negotiating position for the ACTA treaty negotiations?*

The negotiating mandate for the ACTA negotiations was given to officials by Cabinet when it initially took the decision for New Zealand to participate. The Ministry of Economic Development develops New Zealand's negotiation position for each round, in consultation with other government agencies, including the MFAT (as the agency leading the negotiations), and the New Zealand Customs

Service. The position is determined by comparing each proposal tabled for inclusion in ACTA against the mandate. When a proposal is determined to be inconsistent with the negotiating mandate, the delegation opposes its inclusion in ACTA.

7 *What is the New Zealand position for the ACTA treaty negotiations?*

The mandate given to officials is specified in the Cabinet External Relations and Defence Committee ERD (08) 4/5.

This paper is withheld under s9(2)(j) because it is necessary to enable a Minister of the Crown or any department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations and, in the circumstances of the particular case, the withholding of that information is not outweighed by other considerations which render it desirable, in the public interest, to make that information available.

The paper is also withheld under s6(a) of the OIA, because the making available of that information would be likely to prejudice the international relations of the Government of New Zealand.

8 *Please send me copies of all documents concerning the New Zealand negotiating position.*

Documents concerning New Zealand's negotiating position for each negotiating round are withheld s6(a), s6(b)(i) and s9(2)(j).

Documents have been withheld under section 6(a) of the OIA, because the making available of that information would be likely to prejudice the international relations of the Government of New Zealand.

Documents have been withheld under section 6(b)(i) of the OIA, because the making available of that information would be likely to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such a government.

Documents have been withheld under section 9(2)(j) of the OIA, necessary to enable a Minister of the Crown or any department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations and, in the circumstances of the particular case, the withholding of that information is not outweighed by other considerations which render it desirable, in the public interest, to make that information available.

9 *Please send my any draft text or other materials that the Ministry of Foreign Affairs and Trade has concerning the current proposals and other content of the draft ACTA treaty so far.*

All copies of draft text and documents related to proposals for inclusion in the Agreement are held in confidence by negotiators. Copies of these documents relevant to this request are withheld under s6(a) and s6(b)(i).

Documents have been withheld under section 6(a) of the OIA, because the making available of that information would be likely to prejudice the international relations of the Government of New Zealand.

Documents have been withheld under section 6(b)(i) of the OIA, because the making available of that information would be likely to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such a government.

- 10 *Who has the Ministry of Foreign Affairs and Trade met within New Zealand about the ACTA treaty negotiations?*

Officials from MFAT have participated in briefings the ACTA negotiations, which have been led by the Ministry of Economic Development. MFAT does not have a definitive list of every person, party or group that has been briefed about ACTA. Persons, parties and groups that officials from MFAT have met with include:

Representatives from the ICT

The New Zealand Computer Society, Telecommunications Carrier Forum, Telecommunication Users Association of New Zealand, Internet Service Providers Association of New Zealand, InternetNZ, New Zealand Information and Communication Technologies Group Inc, Google Australia and New Zealand, and Catalyst IT.

Copyright user groups and others

New Zealand Open Source Society, Creative Freedom Foundation, Tech Liberty NZ, and a number of individuals, whose identities are withheld under s.9(2)(a).

Right holders, their licensees and representatives and others

New Zealand Retailers Association, Recording Industry Association of New Zealand, New Zealand Federation Against Copyright Theft, TradeMe Ltd, Cosmetic Toiletry and Fragrance Association of New Zealand Inc, Gemella Australia Pty Ltd, Henry Hughes Ltd, Baldwin Intellectual Property, James and Wells, New Zealand Institute of Patent Attorneys, Inc, AJ Park, Kensington Swan, Lowndes Jordan and a number of individuals whose identities are withheld under s9(2)(a).

- 11 *Please send me copies of minutes from all consultation meetings that the Ministry of Foreign Affairs and Trade have taken part in.*

MFAT officials have not kept minutes from meetings that they have attended. Therefore, pursuant to s18(e) of the OIA, MFAT is unable to provide copies of any minutes. Copies of presentations made at briefings are available on the Ministry of Economic Development website.

Consultation on the ACTA negotiations has also been carried out by way of invitations to the public to make written submissions. Summaries of submissions

received have been published on the Ministry of Economic Development's website: [http://www.med.govt.nz/templates/MultipageDocumentTOC\\_42015.aspx](http://www.med.govt.nz/templates/MultipageDocumentTOC_42015.aspx)

- 12 *At what venue will the April round of the ACTA treaty negotiations take place?*

The April round of ACTA will be held in Wellington.

- 13 *Will interested parties be able to attend the ACTA treaty negotiations in New Zealand as observers?*

Because these are government to government negotiations and in line with previous practice, only officials from governments participating in the ACTA negotiations will be attending the negotiating round in New Zealand. Others will not be able to observe the negotiations.

The New Zealand government intends to hold an event for stakeholders in conjunction with the round, at which stakeholders will be able to interact with negotiators from the New Zealand and other delegations.

- 14 *Has the Ministry of Foreign Affairs and Trade done any economic analysis of the cost/benefits that may come from participating in the ACTA treaty? If so, please send me copies.*

At this stage, there has been no economic analysis of the costs/benefits that may come from participating in the ACTA treaty, because until negotiations are concluded, the potential impacts of ACTA are unknown. Therefore, pursuant to s18(e) of the OIA, MFAT is unable to provide any economic analysis.

In accordance with standard treaty practice, a National Interest Analysis, assessing the benefits and costs of joining ACTA, will be undertaken once negotiations are concluded, to assist the New Zealand government to decide whether or not to join the treaty. The text of ACTA, along with the National Interest Analysis, would then be submitted to Parliament and reviewed by a Parliamentary Select Committee, before Parliament makes a final decision whether to ratify the agreement.

- 15 *At which point in the ACTA treaty negotiations did the participants decide to keep the proceeding secret?*

The proceedings have not been kept secret. Agendas for negotiating rounds, reports on rounds and summaries of the issues under discussion are regularly published on MFAT's website.

- 16 *Which country or countries pushed for the ACTA treaty negotiations to be kept secret?*

No country or countries participating in the negotiations have pushed for the Agreement to be kept secret, rather countries participating have agreed by consensus to keep the negotiations in confidence.



- 17 *Who within the New Zealand negotiating team or New Zealand government agreed to keep the contents of the ACTA treaty negotiation secret?*

The Agreement has not been kept secret. As with any negotiation however, it is important that when working towards an agreement on complex issues, participants are able to exchange views in confidence. For this reason, the participants in ACTA have agreed that the actual text under debate should be kept in confidence between the participants. New Zealand needs to respect our negotiating partners' views on this, and work with them over the release of information about the negotiations. The ACTA participants have taken a number of steps to ensure greater transparency in the process, including by publishing a regularly updated Summary of Key Issues Under Discussion. Agendas for upcoming meetings, and reports on meetings that have taken place, are also published. These documents are available at [www.mfat.govt.nz](http://www.mfat.govt.nz).

You have the right by way of complaint under section 28(3) of the Official Information Act 1982 to an Ombudsman, to seek an investigation and review of my refusal to release the information referred to above or to answer your questions.

Yours sincerely



Peter Ferguson  
for Secretary of Foreign Affairs and Trade