

Reference: 20120295

7 September 2015



***OFFICIAL INFORMATION ACT COMPLAINT – Information relating to undertaking in respect of costs and damages arising from the restraint of assets in the case of Commissioner of Police v Dotcom***

I refer to your request made under the Official Information Act, received on 5 July 2012. Your request was for:

*“all information held, sent or received by Treasury regarding Kim Dotcom and the Megaupload company. The request aims to include (but not to the exclusion of other material) any assessment of contingent liability on the Crown as a result of the undertaking as to liability offered by the Commissioner of Police.”*

As you are aware, on 26 July 2012 we transferred your request to the Ministry of Justice. The Ministry subsequently responded to your request, including in their response the decision to withhold several Treasury documents in full. You subsequently complained to the Office of the Ombudsmen about this decision.

On 16 June 2015 the Chief Ombudsman wrote to you with her provisional opinion on the investigation, providing a summary prepared by the Treasury of the contents of part of the information at issue. The Chief Ombudsman has now released her final opinion regarding the investigation, and we have agreed to send you a further copy of the summary with an OIA watermark, as per our usual practice. Please find this summary attached.

This now brings to a close your original OIA request and the subsequent Ombudsman investigation.

Yours sincerely

Adam Wood  
Deputy Treasury Solicitor

cc: Hon Beverley Wakem, Chief Ombudsman

## Document summary

### Introduction

1. On 5 July 2012 David Fisher from the New Zealand Herald made a request to Treasury under the Official Information Act 1982 (**OIA**). The information sought was in relation to the undertaking in respect of costs and damages arising from the restraint of assets in the case of the *Commissioner of Police v Dotcom*. Mr Fisher made a complaint to the Ombudsman about Treasury's decision to withhold documents in its response to his OIA request.
2. Certain documents have been withheld by the Crown (under sections 9(2)(g)(i) and 9(2)(h) of the OIA) on the basis they are legally privileged, and contain free and frank advice to ministers. However, given the public interest in the Dotcom litigation, the Crown has produced the following summary containing information from those documents which may be of public interest. This information is being released on the basis that it should not compromise the Crown's ability to engage in the ongoing litigation in this case.
3. By way of background it is noted that further information (including about the role of the Commissioner of Police and Minister of Finance in relation to this matter) is available in two publicly available High Court judgments on the foreign restraint order issue in the Dotcom proceedings:
  - 3.1 *Commissioner of Police v Dotcom & ors* High Court Auckland CIV-2012-404-33, 16 March 2012, and
  - 3.2 *Commissioner of Police v Dotcom & ors* [2012] NZHC 643.
4. The following summary provides an overview of the approach that the Government took in addressing the Court's request that the Crown give an undertaking in the Dotcom proceedings.

### Summary

5. Between 15 March 2012 and 2 April 2012 the Minister of Finance was updated by a formal briefing paper from a Treasury Analyst and Team Leader and by way of emails exchanged between officials in Treasury and the Minister's Office.
6. On 15 March 2012 (document 5) an e-mail was sent by a Treasury analyst to the Minister's office which set out that:
  - 6.1 the Courts had asked the Commissioner of Police to provide Mr Dotcom and his associates with an undertaking for damages;
  - 6.2 the undertaking related to the proceedings that were underway to register a foreign restraining order over Mr Dotcom's New Zealand based assets under the Criminal Proceeds (Recovery) Act 2009 (**CPRA**);
  - 6.3 the Court had given a relatively tight timeframe for a decision to be made. The Crown's decision on the undertaking had been requested by 4 April 2012;

- 6.4 two interagency meetings had been held with Crown Law, NZ Police, Ministry of Foreign Affairs, Ministry of Justice and Treasury to discuss the case and decide how to inform Ministers of the issue; and
- 6.5 a report would be drafted by the agencies and provided to Ministers setting out the context, the tight deadlines involved and the options available.
7. On 22 March 2012 (document 45) emails were exchanged by Treasury officials and the Minister's office explaining the Minister's role in the proceedings:
- 7.1 the Minister of Finance did not have a role in approving or signing off this kind of undertaking as this is the role of the Commissioner of Police under the CPRA;
- 7.2 the Minister would be kept updated on the intention of the Commissioner to give the undertaking.
8. On 26 March 2012 (document 55) emails were exchanged by Treasury officials and the Treasury's Office of the Executive giving advance warning that a briefing would be received by the Minister of Finance the next day from the Minister of Police and Attorney-General.
9. On 2 April 2012 (document 59) a report from an analyst, Justice and Security and the team leader, Justice and Security was sent to the Minister of Finance. The report formally briefed the Minister on the issues involved in the undertaking in the Dotcom case including that:
- 9.1 The Court had asked the Commissioner of Police to provide an undertaking as to damages by 4 April 2012;
- 9.2 The undertaking related to the proceedings that were underway to register a foreign restraining order over Mr Dotcom's New Zealand based assets under the CPRA;
- 9.3 This is the first case to involve an undertaking under the CPRA;
- 9.4 The Ministry of Justice was leading a review of the mutual legal assistance framework, which was due to report to Cabinet in August 2012, and Treasury was involved in the inter-agency process and intended to use the forum to recommend the establishment of a consultation process and set of criteria for issuing undertakings; and
- 9.5 it is possible that there could be other (unrelated) cases in the future where this kind of undertaking is requested by the Court.