Te Tari -o- Ngā Kaitiaki Mana Tangata



#### **EXHIBIT NOTE**

Our Ref: 281590

This is the annexure marked "TM3" referred to in the affidavit of TIM DAVID MAHOOD

10 June 2010

sworn at AUCKLAND before me:

A Solicitor of the High Court of New Zealand

Mr John Morgan Chief Executive Officer National Institute of Water and Atmospheric Research Private Bag 99940 Newmarket Auckland 1149

Dear Mr Morgan

# OFFICIAL INFORMATION ACT 1982 COMPLAINT - MATTHEW BEVERIDGE

I refer to Assistant Ombudsman Richard Fisher's letter of 20 May 2010, concerning the complaint made by Matthew Beveridge, about the decision of the National Institute of Water and Atmospheric Research Limited ("NIWA") to refuse his request for copies of emails between Senior Climate scientists at NIWA, and members of the Climate Research Unit at the University of East Anglia.

I am now able to advise you of my opinion on the complaint.

Having considered all the issues raised, I have now formed the opinion that it was open to NIWA to refuse the request, on the basis that good reason existed under section 9(2)(ba)(i) of the Official Information Act 1982 ("OIA") for NIWA to withhold the information.

I enclose an extract from my letters to Mr Beveridge which explains the basis for my opinion.

I have now completed my investigation of this complaint. Thank you for the assistance that you and your staff, particularly Tim Mahood, have provided.

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Yours sincerely

Beverley A Wakem Chief Ombudsman

### Extract:

### "Section 9(2)(ba)

Subject to section 9(1) of OIA, section 9(2)(ba) provides that good reason exists for withholding information if, and only if the withholding of the information is necessary to:

"Protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information —

- (i) would be likely to prejudice the supply of similar information, or information form the same source, and it is in the public interest that such information should continue to be supplied; or
- (ii) would be likely otherwise to damage the public interest."

NIWA contends that if it were to release the requested information, it may detrimentally affect its ability to perform its role of conducting environmental research. If the Research Unit and other similar agencies are aware that their communications may be released, those agencies would be reluctant to supply information to NIWA in the future.

NIWA also informed me that much of the research conducted on climate change is a collaborative effort, with a significant number of papers written with input from co-authors from scientific agencies in other countries, including peer reviews. NIWA states that there is a real risk that release of communications between it and other research agencies would have a negative impact on the good relationships that are necessary for future collaboration on research. The Research Unit and other agencies would have concerns that NIWA would be unable to maintain appropriate confidentiality on communications.

NIWA argues that there are generally accepted and long standing conventions regarding the free and frank discussions between scientists to robustly and thoroughly test a proposed hypothesis. In order to do so, communications and information is held in confidence by the agencies involved. An example is that papers are only circulated to peer reviewers on a confidential basis. Final versions of papers are only made public once a hypothesis has been through this process. NIWA states that the quality, quantity of research and discoveries would suffer if this process was restricted by the fear that information would be released before it has been properly tested.

NIWA contends that a key part of the research that it undertakes is dependent on its ability to collaborate with international organisations and be a part of large international research and assessment initiatives. NIWA argues that it is in the public interest that it is able to continue to do this, and there is a serious risk to New Zealand's credibility otherwise.

In other words, if the Research Unit was aware that the information they provided in confidence was released in this case, they would not agree to give such information to NIWA in the future. This would prejudice the ability of NIWA to

carry out research projects, which is one of its core functions, and it is clearly in the public interest that it be able to continue to do so.

I have considered the information provided by NIWA regarding the expectation of confidentiality relating to communications with the Research Unit. I am satisfied that there is an implied obligation of confidence between NIWA and the Research Unit in relation to communications between them, and that the tests set out in section 9(2)(ba) have been met in this case.

# **Public interest**

Section 9(1) of OIA requires me to consider whether the interest in withholding the information is "outweighed by other considerations which render it desirable, in the public interest, to make that information available".

I have carefully considered the circumstances in this case. I acknowledge that there is a public interest in the information that was requested in terms of the accountability and transparency of a government agency. However, it is clearly also in the public interest that NIWA is able to conduct environmental research, and participate in projects with other overseas research agencies.

While NIWA does not make policy, the research it does provides valuable information for government policy and operational decisions regarding the impact of climate change.

In addition, NIWA stated that it already makes a great deal of information accessible to the general public. For example, raw temperature data, and research findings are available through its website. NIWA informed me that this enables the public to access the data and methodologies used, and to assess the conclusions reached.

In this particular situation, I am unable to identify any public interest in favour of disclosure of sufficient weight which would override the public interest in withholding the information you have requested."