|  |
| --- |
| Chief Ombudsman’s opinion under the Ombudsmen Act |
|  |
| Legislation Ombudsmen Act 1975, ss 13, 22  Agency Ministry of Education  Complaint about A decision to dispose of farmland used by Taihape Area School; and an omission to reassign this land prior to disposal  Ombudsman Peter Boshier  Case number(s) 536010  Date August 2021 |

Contents

[Summary 2](#_Toc81498587)

[Ombudsman’s role 3](#_Toc81498588)

[Background 3](#_Toc81498589)

[Complaint 5](#_Toc81498590)

[Investigation 5](#_Toc81498591)

[Preliminary observations 6](#_Toc81498592)

[Analysis and findings 7](#_Toc81498593)

[The Ministry’s decision to dispose of the farm was unreasonable 7](#_Toc81498594)

[The Ministry’s omission to not to formally reassign the farm was unreasonable 8](#_Toc81498595)

[The Ministry’s response to provisional opinion 9](#_Toc81498596)

[Chief Ombudsman’s final opinion 10](#_Toc81498597)

[Appendix 1. Relevant statutory provisions 11](#_Toc81498598)

[Ombudsmen Act 1975 11](#_Toc81498599)

Summary

A local landowner gifted Taihape College (the College) a farm, with the intention that it would become a teaching farm administered by the College.[[1]](#footnote-2) Following certain educational reforms in 2004, the College and Taihape School were disestablished and the Taihape Area School (the Area School) established in their place.

The Ministry began the process to dispose of the College’s property. However, in 2014, the Area School approached the Ministry of Education to discuss the farm’s ownership. As it became apparent that the Area School could not prove that it owned the farm, the Ministry disposed of the farm through Land Information New Zealand (LINZ).[[2]](#footnote-3) The farm was then landbanked with Office of Treaty Settlements (OTS) to be reserved for treaty settlement claims.

Subsequently, the Taihape Area School’s Board of Trustees (the Board) raised further concerns with the Ministry about its decision to dispose of the farm. The Area School contended that it was still using it for educational purposes. The Ministry reviewed the matter and indicated to the Board that, if it had known that the Area School was still using the farm, it would not have disposed of it. The Ministry entered into a temporary leasing arrangement to facilitate the Area School’s ongoing use of the farm.

The Board made a complaint to me about the matter.

On the basis of the available information, I formed the opinion that the Ministry’s:

* decision to dispose of the farm; and
* omission to reassign the farm prior to disposal;

were unreasonable in all the circumstances.

I also recommended that the Ministry:

* apologise to the Area School community and the Board regarding the Ministry’s handling of this matter;
* alter its practices to ensure that this situation does not happen again; and
* commit to working with the Board on options to ensure it had ongoing access to land to support its agricultural programmes.

# Ombudsman’s role

1. Under section 13(1) of the Ombudsmen Act 1975 (OA), I have the authority to investigate the administrative acts, decisions, omissions and recommendations of the Ministry.
2. My role is to consider the conduct of the Ministry, and to form an independent opinion on whether that conduct was consistent with principles of good administration (sections 22(1) and 22(2) of the OA refer).
3. The relevant text of these statutory provisions is set out in the **Appendix**.

# Background

1. In 1989, a landowner offered a farm[[3]](#footnote-4) to the principal of the College for $45,000, which was around half the value of the farm at the time. The landowner intended that the farm would become a teaching farm administered by the College.
2. In March 1990, the Taihape College Board of Trustees (the College Board) purchased the farm with community assistance. The community also appears to have provided the animals for the farm.
3. In 2004, the Ministry undertook a review of the local schooling network, which recommended the closure of small rural schools. On 11 May 2004, the then Minister of Education, Hon Trevor Mallard, announced that both the College and Taihape School should close, and a new ‘Taihape Area School’ would be established on the Taihape School site.
4. In January 2005, the College Board advised the Ministry of its intention to transfer ownership of the farm to a private trust. The Ministry advised the College Board that it lacked statutory authority to do so. The Ministry also indicated that transferring the farm into a private trust might also amount to an unlawful misappropriation of publically owned property.
5. In February 2005, papers were prepared for the disposal of the Taihape College site and school house, and the Area School opened on the old school site. However, disposal was not to occur until the Area School’s facilities were constructed.
6. In 2009, the Area School moved to its new premises at Huia Street.
7. In between 2010 and 2012, the Ministry started its disposal of a number of sites it considered were no longer required as a result of the 2004 network review. This included disposal of the College site and school house. The Ministry engaged in some consultation internally as well with the Area School relating to various facilities on the College site. However, the farm was not explicitly referred to in the correspondence between the Ministry and the Area School. It appears the Ministry intended for the farm to be disposed of as part of the College site.
8. In early 2014, the Area School contacted the Ministry to raise concerns about the farm being included in the package of land intended for disposal. The Area School contended that it legally owned the farm. On 24 February 2014, the Ministry instructed LINZ to suspend the disposal process until ownership of the farm was certain. The Ministry sought proof of ownership of the farm from the Area School. The Area School was unable to provide such proof.
9. On 6 March 2014, the Ministry advised LINZ to dispose of the package of land including the farm. It appears the Ministry declared that the farm was surplus to educational requirements. Ownership of the farm was transferred to LINZ under the Public Works Act 1981.
10. LINZ subsequently investigated whether to offer the property back to the former owner. On 19 July 2015, the farm and wool shed were offered back to the former owner. LINZ evidently received no response.
11. On 12 October 2015, LINZ submitted the farm to OTS to be landbanked.
12. In 2016, the Board advised the Ministry that it had expected the farm to have been retained to support its agricultural programmes.
13. In late 2016, the decision was made to landbank the farm. The formal transfer of the farm to the landbank took place on 23 May 2017.
14. The Board again approached the Ministry in 2017 raising concerns about the farm’s disposal. Around this time, the Ministry made enquiries to OTS to explore whether the farm could be removed from the landbank. This enquiry was unsuccessful as iwi stakeholders, Mōkai Pātea Waitangi Claims Trust and Te Rūnanga o Ngāti Hauiti, both advised OTS that they did not support the removal of the property from the landbank.
15. The Ministry met with the then-Minister of Education, Hon Tim Macindoe, and local MP, Ian McKelvie to discuss the matter. Following this, it was agreed that the Ministry would establish a lease agreement with LINZ to provide the Area School with uninterrupted access to the farm to support the delivery of its programmes.
16. On 10 November 2017, the Ministry provided briefing notes to the Minister of Education, Hon Chris Hipkins about this matter.
17. On 26 July 2018, the Ministry wrote to the Board confirming a negotiated agreement with LINZ to ensure that the Area School had ongoing, uninterrupted access to the farm while it remained in the landbank. The Ministry noted that this agreement was an interim measure.
18. In late 2020, the Board made a complaint to me about this matter.

# Complaint

1. The Board complained about the Ministry’s actions, and alleged inactions, in:
   1. disposing of the farm; and
   2. not reassigning it to the Area School for its educational use.
2. The Board made the following points in support of its complaint:
   1. No government money was involved in the initial purchase of the farm.
   2. The intent of the landowner’s offer of the farm, and the community fundraising, was to provide for agricultural education in Taihape.
   3. The former Minister of Education, Hon Trevor Mallard, gave a public gazetted promise that the ownership of the farm would transfer from the College to the Area School.
   4. The Ministry gave a written assurance to the Board in 2004, that the farm would remain a community asset as long as the community wished to keep it.
   5. The Area School has never stopped using the farm for education and it is not, and never has been, surplus land.
   6. The Ministry did not follow its own prescribed disposal processes which should have included consultation with the Area School and community.
   7. The Board believed it has a legitimate expectation that the farm should become part of the Area School as promised by the Ministry.

# Investigation

1. On 24 March 2021, I notified the Ministry of my investigation. I requested a copy of the relevant papers and a report addressing the concerns that had been raised. The Ministry provided the requested material on 28 April 2021.
2. After taking into consideration the information provided by both the Ministry and the Board, I formed a provisional opinion. This was conveyed to the Ministry on 14 May 2021. I invited the Ministry to make any further comments it wished me to consider before I decided whether to confirm my provisional opinion as final.
3. The Ministry responded to my provisional opinion on 11 June 2021.
4. After taking into consideration the information provided by both the Ministry and the Board, I have formed a final opinion on the matter.

# Preliminary observations

1. It seems clear that it was the intention of all parties in 2004 and 2005 for the farm—which legally belonged to the College, at the time[[4]](#footnote-5)—to be reassigned from the Ministry to the Area School once that body had been established. This was evident in the following:
   1. an internet announcement about the Area School by the then-Minister of Education, Hon Trevor Mallard, dated 11 May 2004, which stated that ‘*[t]he Taihape College farm is also to be retained as the property of the new area school*’;[[5]](#footnote-6)
   2. The Ministry’s January 2005 letter to the College Board, advising:
      1. the Ministry’s objection of the College Board’s proposal of putting the farm in a private trust for the benefit of the Area School; and
      2. ‘[t]*he Ministry has no reason to believe that the school farm will not be a community asset for as long as the community wishes to see it as part of its education facilities*’; and
   3. the Ministry’s February 2005 disposal papers clearly indicated that if the farm was owned by the Ministry, the farm was not to enter the disposal process as the Area School required the farm for education purposes, and therefore the farm was to be transferred to the School.
2. When the College was disestablished in 2004, all of the College’s assets and liabilities automatically transferred to Crown ownership, by virtue of section 154(3)(b) of the Education Act 1989. However, despite the clear intention of the parties that the farm would be reassigned to the Area School, this never happened.
3. Between 2012 and 2014, the Ministry looked to dispose of surplus College land. The farm was identified for disposal. The Area School, believing it owned the farm, engaged with the Ministry on that basis.
4. It appears the Ministry held off disposing of the farm through LINZ until it could be satisfied of the Area School’s ownership of the farm. However, on 6 March 2014, ‘*LINZ was advised by MOE to proceed with disposal, as the school could not produce any legal evidence that the farm had transferred to them*’.
5. In its 10 November 2017 briefing notes to the Minister of Education Hon Chris Hipkins,[[6]](#footnote-7) the Ministry advised that:

Unfortunately there had been no formal “re-assignment” of the property following the closure of Taihape College, and we were unaware that the Area School was using it for educational delivery. Had this been understood prior to 2014, the land would not have been placed in disposal.

1. The Ministry advised me in its response to my investigation that prior to the disposal, the Board or the Area School did not indicate that the farm was still in use.

# Analysis and findings

## The Ministry’s decision to dispose of the farm was unreasonable

1. Based on the evidence before me, it seems clear the Ministry was on notice that the College Board expected that the farm would be retained and reassigned to the Area School. This undertaking was conveyed by the Ministry to the College Board at the time. In my view these were clear and unequivocal assurances from the Ministry that should have been actioned.
2. I am uncertain what happened between 2005 and 2012, as the Ministry did not transfer the farm to the Area School and subsequently took a different approach to the farm. The Ministry’s documentation does not shed any light on this.
3. The farm became part of the College’s surplus land for disposal. However, the Area School challenged the farm’s disposal on the basis of its understanding that it owned the farm. It appears that the Area School’s proof of ownership—or lack thereof—became the deciding factor for the disposal of the farm through LINZ.
4. The Ministry contended that the primary factor leading to its disposal of the farm in 2012 was its lack of knowledge that the Area School was still using it, and not the apparent inability of the Area School to prove legal ownership. I do not accept this contention.
5. The Ministry appears to have engaged with the Area School in 2014 only about the question of the ownership of the farm, and only did so at the request of the Area School. It appears the Ministry did not seek information about the usage of the farm, despite having had the opportunity to do so. When the Area School could not prove ownership of the farm, the Ministry disposed of the farm shortly after. It therefore appears the ownership of the farm was the Ministry’s primary (and possibly only) consideration.
6. I also do not accept the Ministry’s contention that it was unaware that the Area School was using the farm at the relevant time. The Ministry’s letter to the College Board, dated 27 January 2005, shows the Ministry clearly was aware that the Area School would be using the farm. I have not seen any evidence to the contrary that would have made the Ministry think otherwise, prior to the disposal of the farm.
7. I have not seen any evidence to suggest the Ministry made enquiries of the Board or the Area School to establish ongoing use of the farm. In the circumstances, I consider that if ongoing use was truly a key consideration for the Ministry prior to its decision to dispose of the farm, it should first have made specific enquiries of the Board or the Area School about it. I consider that it was unreasonable that the Ministry did not make enquiries given the history of the farm’s ownership and what the Ministry knew about the Board’s expectations.
8. I acknowledge that the Ministry now accepts the Area School was still using the farm prior to its disposal. I also acknowledge that the Ministry has made enquiries about reacquiring the farm for the Board, and failing that, to set up a temporary lease agreement with LINZ to benefit the Area School.

## The Ministry’s omission to not to formally reassign the farm was unreasonable

1. The Ministry states:

It is unclear why formal reassignment of the Taihape school farm did not occur in the period following Taihape College’s closure, in line with the commitments made to the school. Had this happened, disposal of the farm would not subsequently have occurred.

1. It seems that the Ministry intended to reassign the farm to the Area School. However, certain opportunities to do so were missed at the relevant times.
2. I understand that it is possible for the Board to legally own the farm, reflected in the fact the College held the title to the farm previously. Although it is rare for a school board of trustees to hold land itself, according to the Ministry, this could legally be done in the following two ways:
   1. In respect of property that was held by a board (for the benefit of a school) immediately before dissolution of that school, the Minister may at any time apply to Public Trust to devise a scheme to modify the trust for the benefit of another school. This is subject to the Solicitor-General’s approval.[[7]](#footnote-8)
   2. As the Board is a ‘*Local Authority*’ under the Public Works Act 1981, the Ministry could have transferred the land under certain circumstances.[[8]](#footnote-9)
3. Looking at the timeline of this case, I have identified three potential opportunities for the Ministry to have reassigned the farm to the Area School, these were as follows:
   1. in January 2005, when the College Board proposed an independent trust for the farm;
   2. in 2009, when the Area School opened on its current premises; and
   3. during the 2012-2014 period, when the Ministry was considering the disposal of the farm.
4. It appears that the Ministry missed these opportunities.
5. Even if the farm was not to be transferred to the Area School, I would have expected the Ministry to enter into a formal arrangement with the Board to ensure, and protect, the Area School’s ongoing use of the farm until it was clearly evident that the farm was no longer used for its educational purpose.
6. I appreciate that this type of arrangement may not be normal practice, given the expectation that the Ministry typically manages the land occupied by schools. I nevertheless believe such an arrangement would have been desirable in this case, to ensure that the Ministry properly considered the Area School’s interests before deciding whether to dispose of the farm.
7. It seems to me that proper consideration of the Area School’s interests could not and did not occur in the absence of such an arrangement.

# The Ministry’s response to provisional opinion

1. In response to my provisional opinion on this complaint, the Ministry stated:

The Ministry broadly agrees with your findings and recommendations, which it has already taken steps to commit to.

…

In our view, our error was in failing to be aware of the commitments made and therefore being unable to consider them when processing the disposal of the site.

Robust processes and record keeping practices are now in place regarding Crown land and buildings, but we will commit to reviewing these again in light of this situation. Should a situation of this kind arise again in the future we would handle this differently and ensure that more thorough checks and balances were in place.

1. The Ministry also agreed to apologise to the Board and the Area School community, addressing the following:
   1. the Ministry’s failure to assign the farm to the Area School when it ought to have done so;
   2. the Ministry’s decision to dispose of the farm through LINZ, without adequate consultation with the Board or the Area School;
   3. the inconvenience the Ministry had caused to the Board and the Area School, including the inconvenience caused by the parties having to repeatedly pursue the issue with the Ministry; and
   4. the Ministry’s general handling of this matter, which has led to this complaint.

# Chief Ombudsman’s final opinion

1. For the reasons set out above, I have formed the final opinion that the Ministry has acted unreasonably in respect of the following:
   1. the Ministry’s decision to dispose of the farm through LINZ; and
   2. the Ministry’s omission to reassign the farm to the Area School prior to the disposal of the farm.
2. I recommend that the Ministry:
   1. apologise to the Area School community and the Board regarding the Ministry’s handling of this matter;
   2. alter its practices to ensure that this situation does not happen again; and
   3. commit to working with the Board on options to ensure it has ongoing access to land to support its agricultural programmes.



Peter Boshier

Chief Ombudsman

*The Ministry accepted the Ombudsman’s recommendations, apologised to the Board and the school community, and committed to working with the Board on options to ensure it had ongoing access to land to support its agricultural programmes. The Ministry will also undertake a review of its internal processes in order to alter its practices accordingly, ensuring that this situation does not happen again.*

*This opinion is published under the authority of the* [*Ombudsmen Rules 1989*](https://legislation.govt.nz/regulation/public/1989/0064/latest/DLM129834.html?src=qs)*. It sets out an Ombudsman’s view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.*

1. Relevant statutory provisions

## Ombudsmen Act 1975

13 Functions of Ombudsmen

(1) Subject to section 14, it shall be a function of the Ombudsmen to investigate any decision or recommendation made, or any act done or omitted, whether before or after the passing of this Act, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the departments or organisations named or specified in Parts 1 and 2 of Schedule 1, or by any committee (other than a committee of the whole) or subcommittee of any organisation named or specified in Part 3 of Schedule 1, or by any officer, employee, or member of any such department or organisation in his capacity as such officer, employee, or member.

(2) Subject to section 14, and without limiting the generality of subsection (1), it is hereby declared that the power conferred by that subsection includes the power to investigate a recommendation made, whether before or after the passing of this Act, by any such department, organisation, committee, subcommittee, officer, employee, or member to a Minister of the Crown or to any organisation named or specified in Part 3 of Schedule 1, as the case may be.

(3) Each Ombudsman may make any such investigation either on a complaint made to an Ombudsman by any person or of his own motion; and where a complaint is made he may investigate any decision, recommendation, act, or omission to which the foregoing provisions of this section relate, notwithstanding that the complaint may not appear to relate to that decision, recommendation, act, or omission…

22 Procedure after investigation

(1) The provisions of this section shall apply in every case where, after making any investigation under this Act, an Ombudsman is of opinion that the decision, recommendation, act, or omission which was the subject matter of the investigation—

(a) appears to have been contrary to law; or

(b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or

(c) was based wholly or partly on a mistake of law or fact; or

(d) was wrong.

(2) The provisions of this section shall also apply in any case where an Ombudsman is of opinion that in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that, in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision.

(3) If in any case to which this section applies an Ombudsman is of opinion—

(a) that the matter should be referred to the appropriate authority for further consideration; or

(b) that the omission should be rectified; or

(c) that the decision should be cancelled or varied; or

(d) that any practice on which the decision, recommendation, act, or omission was based should be altered; or

(e) that any law on which the decision, recommendation, act, or omission was based should be reconsidered; or

(f) that reasons should have been given for the decision; or

(g) that any other steps should be taken—

the Ombudsman shall report his opinion, and his reasons therefor, to the appropriate department or organisation, and may make such recommendations as he thinks fit. In any such case he may request the department or organisation to notify him, within a specified time, of the steps (if any) that it proposes to take to give effect to his recommendations. The Ombudsman shall also, in the case of an investigation relating to a department or organisation named or specified in Parts 1 and 2 of Schedule 1, send a copy of his report or recommendations to the Minister concerned, and, in the case of an investigation relating to an organisation named or specified in Part 3 of Schedule 1, send a copy of his report or recommendations to the mayor or chairperson of the organisation concerned…

1. The ownership of school property is usually vested in the Ministry. However in this case, the College owned the farm land. When the College was later disestablished, the land went into the Ministry’s ownership. [↑](#footnote-ref-2)
2. ‘*Disposal*’ means to get rid of land that is no longer required. In this case, LINZ managed the disposal of the farm on behalf of the Ministry, as LINZ manages the disposal for properties owned by a number of other Crown agencies. Refer [here](https://www.linz.govt.nz/crown-property/acquisition-and-disposal-land/crown-property-disposal-process.), for the Crown’s property disposal process. [↑](#footnote-ref-3)
3. The farm is located on a site adjacent to the College on Rauma Road. [↑](#footnote-ref-4)
4. However, when the College was disestablished, the ownership of the farm moved to the Ministry. [↑](#footnote-ref-5)
5. This was subsequently dated 12 May 2004, refer to: <https://www.beehive.govt.nz/release/new-area-school-taihape>. [↑](#footnote-ref-6)
6. This was after the Board had renewed its challenge in 2016/2017 about the Ministry’s decision to dispose of the farm. [↑](#footnote-ref-7)
7. Refer to Section 154(3A) of the Education Act 1989. [↑](#footnote-ref-8)
8. Refer to Section 50 of the Public Works Act 1981. [↑](#footnote-ref-9)