



# KiwiRail's processing of a request for official information

<b>Legislation</b>	Ombudsmen Act 1975, ss 13, 22 Official Information Act, ss 14, 15
<b>Agency</b>	KiwiRail Holdings Limited (KiwiRail)
<b>Ombudsman</b>	Chief Ombudsman Peter Boshier
<b>Case number(s)</b>	456080
<b>Date</b>	27 July 2017

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## Summary

In response to public concern, I have conducted a self-initiated investigation under the Ombudsmen Act (OA) of KiwiRail's processing of an Official Information Act (OIA) request for the Third Main Business Case (the business case).

I have formed the opinion that KiwiRail did not act in a manner that was wrong, unreasonable or contrary to law in terms of the OA. However, there were aspects to the processing of this request that were less than ideal, and could be subject to a level of criticism.

I have made some suggestions for improvement, including that KiwiRail:

- review its OIA processes;
- consider developing, in consultation with the Minister, a protocol on dealing with OIA requests that involve the Minister; and
- provide OIA training for its staff.

I have also identified some actions that my office can take, including producing guidance on the good government withholding grounds (addressing in part the issue of budget secrecy), and the negotiations withholding ground (section 9(2)(j) of the OIA).

## Ombudsman's role

1. Under the OA, it is my function to investigate the administrative acts, decisions, omissions and recommendations of the agencies listed in its first schedule.<sup>1</sup> KiwiRail is one of the scheduled agencies.
2. I can investigate either on receipt of a complaint, or on my own initiative,<sup>2</sup> as I have done in this case. My role is to consider the administrative conduct of the agency, and to form an independent opinion on whether that conduct was wrong, unreasonable or contrary to law.<sup>3</sup>
3. To be clear, the acts of the Minister himself are beyond my purview under the OA. Ministers of the Crown are not subject to that Act.
4. Also outside the scope of this particular investigation is the decision that KiwiRail ultimately took to partially refuse this and other OIA requests for the business case. The focus of this investigation is on the decision making process, rather than the merits of the decision itself (although some observations of the process may reflect indirectly on the merits of the decision). A separate complaint on the partial refusal was investigated and resolved when KiwiRail agreed to release the business case with only minor redactions.

## Background

5. On 6 June 2017, the Rt Hon Winston Peters tabled in Parliament emails between KiwiRail and the Office of the Minister of Transport (the Minister) regarding an OIA request for a copy of the business case.
6. Mr Peters alleged that the emails revealed the Minister's office *'deliberately trying to influence officials behind closed doors, covertly and secretly, not to release information that is owed to the public of this country'*.
7. At 6.30pm that same night, New Zealand First issued a press release which accused the Minister's office of *'blocking KiwiRail from releasing information to the public'* and characterised the emails that had been tabled in Parliament as *'a clear example of interference by Minister Simon Bridges' office in the workings of a state-owned enterprise'*.

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<sup>1</sup> See [s 13\(1\) OA](#). See [Schedule 1 OA](#).

<sup>2</sup> See [s 13\(3\) OA](#).

<sup>3</sup> See [ss 22\(1\) and \(2\) OA](#).

8. Beginning early the following morning, 7 June 2017, Mr Peters' allegations were repeated by a number of mainstream media outlets.<sup>4</sup>
9. I considered that these allegations, if left untested, had the potential to undermine public trust and confidence in the OIA. I therefore decided on my own initiative to conduct an investigation under the OA into KiwiRail's processing of the OIA request.

## Investigation

10. On 21 June 2017, I notified KiwiRail of my investigation. I sought a copy of all information held by KiwiRail about the OIA request, including (but not limited to) working documents, reports, letters, memos, emails and text messages, as well as a summary of undocumented meetings or telephone calls. I gave KiwiRail the opportunity to comment if it wished.
11. Also on 21 June 2017, I advised the Minister that I would be investigating KiwiRail's processing of the OIA request, and afforded him the opportunity to make comments if he wished.
12. On 27 June 2017, I met with the Minister to receive his comments.
13. On 30 June 2017, I received the information I requested from KiwiRail. On 7 July 2017, I received KiwiRail's comments.
14. On 10 July 2017, I received some further information from the Minister's office.
15. The comments received (insofar as they are pertinent), are incorporated in the analysis and findings below.

## Analysis and findings

### Findings of fact

16. I set out below the relevant findings of fact in relation to the business case, and the processing of the OIA request.

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<sup>4</sup> See Radio New Zealand <http://www.radionz.co.nz/news/political/332428/transport-minister-tries-to-block-official-information-request>; <http://www.radionz.co.nz/news/political/332538/transport-minister-defends-attempt-to-block-information-request>; and <http://www.radionz.co.nz/news/political/333106/rail-proposal-that-minister-s-office-tried-to-block-released>. See New Zealand Herald [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11871115](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11871115), See Newshub <http://www.newshub.co.nz/home/politics/2017/06/simon-bridges-defends-attempt-to-block-oia-request.html> and <http://www.newshub.co.nz/home/politics/2017/06/simon-bridges-under-investigation-over-oia-block.html>.

## The business case

17. The business case deals with a project (the Third Main Line) that was identified in the Auckland Transport Alignment Project (ATAP) for the first decade of delivery. The Government has committed to delivering the projects in the ATAP.
18. The business case was initially progressed jointly by KiwiRail and the New Zealand Transport Agency (NZTA).
19. NZTA sourced and funded the business case under the direction of its former Chief Executive, Geoff Dangerfield. The business case was prepared by consulting firm WSP Parsons Brinckerhoff.
20. In March 2016, after Mr Dangerfield stepped down as NZTA Chief Executive, NZTA *'gave ownership'* of the document to KiwiRail.
21. Reference is made in the supporting documents to the business case being *'finalised'* by KiwiRail, and to the fact that it was *'not in draft form'*. However, the revision status table on the inside cover of the business case records that as at 7 December 2016 it was a *'final draft'*, and a note underneath indicates the revision status table would be deleted on production of a final version. It seems fair to say, therefore, that while the business case was not a *'final'* document, it was in near final form.
22. In December 2016, KiwiRail submitted the business case to the Ministry of Transport for consideration as to whether it might form part of a potential bid for funding in Budget 2017. It was not put forward by the Ministry for inclusion in the budget.
23. The business case was never submitted to the Minister by either KiwiRail or the Ministry of Transport, although one of the Minister's senior advisors has said this would have been expected, given that the business case was commissioned by the Minister as part of the work for integrated and coordinated transport planning and awareness, and that it would likely be subject to a future budget bid.
24. KiwiRail is currently working with Auckland Transport to prepare a submission for Budget 2018 which will include an investment bid for the Third Main project.

## The OIA request

25. On 4 May 2017, NZTA received an OIA request for the business case from Greater Auckland (an Auckland transport blog) via [www.fyi.org.nz](http://www.fyi.org.nz).
26. On 10 May 2017, NZTA transferred the OIA request to KiwiRail, on the basis that the business case was more closely connected with its functions.<sup>5</sup>
27. On 11 May 2017, KiwiRail acknowledged receipt of the OIA request to the requester. It noted that a decision on the request was due by 8 June 2017 at the latest.
28. Also on 11 May 2017, KiwiRail submitted its weekly report to the Minister. A standing

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<sup>5</sup> See [s 14\(b\)\(ii\) OIA](#).

item on 'OIA requests, ministerial and parliamentary questions' included notice of the OIA request in question.

29. On 16 May 2017, one of the Minister's staff members emailed KiwiRail asking 'can we please see [the OIA] before [it is] released'.
30. On 17 May 2017, a copy of the business case was retrieved.
31. On 19 May 2017, the Communications Co-ordinator sought internal legal advice on whether the business case could be released. The legal advisor in turn sought information on the background and context of the business case. On 23 May 2017, the Group Manager Asset Management and Investment advised simply that the document was prepared as part of a bid to secure funding.
32. On 25 May 2017, the legal advisor noted the document was not marked confidential, and did not seem to contain commercially sensitive information, with the possible exception of cost estimates, which appeared to be high level. She sought the Group Manager Asset Management and Investment's view on whether this information might be sensitive in the context of procurement.
33. On the same day, the Group Manager Asset Management and Investment replied that the main numbers were already in the public domain and he was not concerned about any commercial impact of release.
34. On the basis of this discussion, the Communications Co-ordinator drafted a reply to the requester releasing the business case in full. This was sent to and approved by the Communications and External Relations Manager, and forwarded to the Minister's Private Secretary on 29 May 2017. KiwiRail asked the Minister's Private Secretary to let them know if the Minister had any comments by 4pm 6 June 2017.
35. On 30 May 2017, the Minister's Private Secretary emailed KiwiRail stating:

*Given that this document formed part of a budget bid, we strongly recommend that it is withheld. Although the previous bid was unsuccessful, there is a chance that it will form part of a future budget bid—in this light the document can be withheld under multiple grounds. We recommend [with]holding it under s 9(2)(j) of the Act as it is the most relevant.*
36. Over the following two days KiwiRail considered the suggestion that section 9(2)(j) might provide good reason for withholding the business case. KiwiRail's legal advisor said the questions to consider were whether 'release of the business case [would] be likely to prejudice [its] negotiations with the Crown for funding for it in future years', and if so, whether 'that prejudice [is] to such an extent that it overrides any public interest in the release of the information'.<sup>6</sup> The Communications and External Relations Manager

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<sup>6</sup> Note, the public interest test in section 9(1) of the OIA is whether the public interest in disclosure outweighs any identified need to withhold, not the other way around. For more information see our guide to the [Public interest](#) test.

concluded the answer to both these questions was no. The Group Manager Asset Management and Investment added *'I would struggle to say release would prejudice those discussions/negotiations'*.

37. On 1 June 2017, KiwiRail emailed the Minister's Private Secretary stating:<sup>7</sup>

*We have had discussions with our legal team and their advice is that we would struggle to justify non-release on the grounds that s 9(2)(j) 'protects' negotiations and the Ombudsman's guidance note makes it clear that the section 'only protects information, disclosure of which would be so likely to prejudice or disadvantage the agency in their negotiations, that it is necessary to withhold that information'.*

*Our advice is that releasing the Third Main Business Case would be unlikely to prejudice our negotiations with the Crown for funding for it in future years and prejudice to such an extent does not override any public interest in release of the information.*

*Are there other reasons for your proposed withholding of the document?*

38. The Minister's Private Secretary acknowledged this email and indicated further comments would be provided.

39. On 2 June 2017, the Minister's Private Secretary emailed KiwiRail's Group General Manager Network Services, Todd Moyle, who was shortly due to assume the role of Acting Chief Executive, stating:<sup>8</sup>

*I'm not sure if you have been brought into the loop yet on Kiwirail's Official Information Act Request regarding the Third Main Line Business Case (attached), but the Office has some concerns about the proposed response. Kiwirail is currently proposing to release the Third Main business case in full.*

*In general, unsuccessful budget bids are withheld in OIA requests under section 9(2)(j): to protect the department in carrying on, without prejudice, negotiations. Given that the funding for this business case is most likely to come from a future budget bid, the Office feels that this would be a sufficient reason alone to withhold the document. Notwithstanding this reason, the business case is clearly still a draft and should be withheld to allow it to be completed and finalised, without prejudice or interference, before being submitted in future budget bids.*

*The report is also, strangely, in a NZ Transport Agency template. This is very likely to lead to a false understanding that the NZ Transport Agency has commissioned or written the report. We have spoken with the Agency and they have informed us that not only is this not the case, but that senior*

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<sup>7</sup> This was one of the emails tabled in Parliament.

<sup>8</sup> This was another of the emails tabled in Parliament.

*management has not seen this business case before so have no base to even support the idea. Once again, the release of this document is likely to prejudice any decision making that needs to happen around the level of support that is given to the business case, especially given it already looks like the Agency is backing the case. We understand the business case was developed by a third party who used an NZTA template and if the business case went to senior Agency management they would have immediately advised to remove it from an NZTA template.*

*I understand that the OCU unit has already spoken with your legal team to get their views on the proposed response, but we are still extremely uncomfortable with the idea of releasing the document—as I have outlined above.*

*We would like to resolve this before advising the Minister and I'm happy to discuss this further. We are very keen to get your thoughts on the proposal.*

40. One of the Minister's senior advisors has since explained that staff in the Minister's office sought guidance from the Ministry of Transport to confirm they had taken the correct approach to the request. The Ministry advised that budget bids which are likely to be submitted or re-submitted any time soon are withheld to protect the preparation of the next budget(s). The Ministry further advised that departmental practice is to release a budget bid/related document if a bid failed and is not likely to be re-submitted any time soon, or where decisions have been announced. Staff in the Minister's office believed this particular test had been met given the business case was highly likely to be a bid for Budget 2018.
41. On 2 June 2017, senior KiwiRail staff met to discuss the email they had received from the Minister's Private Secretary, and decided not to make a final decision on the request until after KiwiRail's regular scheduled meeting with the Minister on 8 June 2017.
42. However, on 6 June 2017, a new decision withholding the business case in full under section 9(2)(j) of the OIA was circulated and agreed internally, and shared with the Minister's Private Secretary, who indicated support for that approach.
43. It was at this point that the exchange between KiwiRail and staff in the Minister's office became public, and began attracting media commentary.
44. Late on 7 June 2017, Mr Moyle, now Acting Chief Executive, proposed release of the business case with redactions.
45. On 8 June 2017, KiwiRail prepared a redacted version of the business case. The redactions were made under sections 9(2)(ba), 9(2)(g)(i), 9(2)(i) and 9(2)(j) of the OIA.
46. KiwiRail also prepared two draft responses to the requester, one refusing the request on the basis that the business case would soon be publicly available (in redacted form), and the other withholding the business case in full.

47. At 5pm on 8 June 2017, the Chair and Acting Chief Executive had their regular meeting with the Minister and Ministry of Transport officials.
48. KiwiRail's record of that meeting says the OIA request was only discussed '*at a high level*' at the end of the meeting.
49. However, the Minister recalls advising KiwiRail at the meeting that '*given the public interest in this matter, as a result of the administrative error on KiwiRail's behalf, there was now a public interest test and on that basis he would support the full release of the report*'.
50. The Minister's senior advisor says the same message was conveyed immediately after the meeting by telephone call to KiwiRail's Communications and External Relations Manager. This is supported by a handwritten note (recorded contemporaneously by a member of the Minister's staff) of the telephone discussion, which states:
  - *Our position changed*
  - *In light of public interest now*
  - *Releasing it might be warranted*
  - *Your decision to release.*
51. The Communications and External Relations Manager nevertheless offered to deliver to the Minister's office a copy of the business case with proposed redactions, which the Acting Chief Executive did later that evening.
52. On 9 June 2017, the Acting Chief Executive recalls discussing with staff in the Minister's office KiwiRail's plan to publish the redacted business case on its website. KiwiRail's account of these discussions records that the Minister's office '*had no other comments*'. This accords with the Minister's office's account, which records that '*the Minister's office offer[ed] no view to KiwiRail*'.
53. Later on 9 June 2017, KiwiRail emailed the requester to advise the business case would soon be made publicly available. It made no reference to the fact that substantial parts would be redacted. It said it would be in touch the following week to advise when and where the business case could be accessed.
54. On 11 June 2017, the redacted business case was sent to the Chair, who commented to the Acting Chief Executive '*can you just confirm that the redactions are as requested as I still can't see anything which from our point of view would require redaction*'. It is not clear from the information provided whether he received a reply.
55. On 12 June 2017, the Minister's office sought a copy of the proposed redactions. The Minister's office is recorded by KiwiRail as having '*verbally oked for the doc to go up on website*'.



56. The account from the Minister's office is, in essence, that it refrained from making any further comment on KiwiRail's proposed decision. It has stated *'the Office advised KiwiRail that it has "no comments, and it is a matter for KiwiRail"'*.
57. On 14 June 2017, KiwiRail published the business case on its website and sent the relevant link to the requester. The business case appeared at the bottom of the website's publications page, along with other predominantly corporate publications. There was no contextual material to explain the background or status of the business case. An accompanying document noted that redactions had been made to the business case under sections 9(2)(a), 9(2)(ba)(i), 9(2)(g)(i), 9(2)(i) and 9(2)(j) of the OIA.<sup>9</sup>

## The law and principles of good administrative practice

58. I set out below the relevant law and principles of good administrative practice.

### Making OIA decisions

59. The starting point for considering any request for official information is the principle of availability. That is, information must be made available on request unless there is a good reason for withholding it.<sup>10</sup>
60. Agencies must read, review and assess the requested information in order to decide whether the whole or any part of it engages one of the withholding provisions in sections 6 or 9 of the OIA. In the case of the withholding provisions in section 9, agencies must go on to consider whether the public interest in release outweighs the interests protected by the withholding provisions. If it does, the information must be released.
61. The decision on an OIA request must be made by the agency that receives it unless the request is transferred to another agency or Minister in accordance with section 14.<sup>11</sup> The decision must be made and communicated to the requester as soon as reasonably practicable and within 20 working days, unless that time is extended.<sup>12</sup>
62. The potential need for agencies to consult others before making a decision on a request for official information is implicitly recognised in section 15A of the OIA, which permits an extension of the time limit to decide on a request where *'consultations necessary to make a decision on the request are such that a proper response to the request cannot be made within the original time limit'*.<sup>13</sup> It is good administrative practice for agencies to

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<sup>9</sup> Note, the business case has since been re-released with only minor redactions, along with an accompanying contextual statement, at the top of the KiwiRail website's publications page.

<sup>10</sup> See [s 5 OIA](#).

<sup>11</sup> See [s 15\(4\) OIA](#).

<sup>12</sup> See [s 15\(1\) OIA](#).

<sup>13</sup> The matter of **departmental** consultation with Ministers is explicitly recognised in [s 15\(5\) OIA](#), but KiwiRail is a state-owned enterprise, not a department.

consult potentially affected third parties (where that is reasonably practicable) before deciding to release official information in response to a request.

## Ministerial involvement in agency OIA decisions

63. We recently published a detailed guide for agencies on [Dealing with OIA requests involving Ministers](#). In that guide, we acknowledge that Ministers may have a legitimate interest in OIA requests received by agencies. This is partly about enabling the convention of ministerial accountability to operate effectively (for Ministers to be accountable for the actions of their agencies, they need to know about them), and partly about ensuring the proper processing of an OIA request. The OIA is about **protecting** official information where necessary, as much as it is about **releasing** official information.<sup>14</sup> Ministers, who collectively represent the executive branch of government, may have different and equally valid perspectives to an agency on whether a harm could potentially arise through the release of official information in response to an OIA request.

## Notification of the request

64. It is reasonable for agencies to notify a Minister of any OIA request involving their interests. This can include requests for information that:

- a. relate to the Minister's functions or activities;
- b. could impact on the Minister's functions or activities;
- c. was generated by or on behalf of the Minister;
- d. is sensitive or controversial; or
- e. is likely to be published in the news media or debated in the House.

65. The purpose of notifying the Minister of an OIA request is to enable discussion to take place about the appropriate mechanism for addressing the Minister's interests, if necessary. There are three key mechanisms:

- a. transferring the request to the Minister;
- b. consulting the Minister on the request before a decision is taken; and
- c. notifying the Minister of the agency's decision on a request.

## Transfer

66. Transfer is mandated where the information at issue is believed to be more closely connected with the Minister's functions.<sup>15</sup> Transfer shifts responsibility for the decision

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<sup>14</sup> See [s 4\(c\) OIA](#).

<sup>15</sup> See [s 14\(b\)\(ii\) OIA](#).

on to the Minister, and the agency has no residual responsibility for the request once this has happened.

## Consultation

67. Consultation allows an agency to seek the Minister's input before making the decision on an OIA request. As noted above, consultation is lawful under the OIA, and is good administrative practice in circumstances where a Minister or other third party may potentially be affected by release of the official information.
68. As noted in our guide on [Dealing with OIA requests involving Ministers](#), it is reasonable for an agency to consult a Minister when it is contemplating release of official information that could be expected to be of concern to the Minister because (for example):
  - a. they supplied the information;
  - b. it is about their functions or activities; or
  - c. release could affect their functions or activities or legitimate interests.
69. Agencies should allow a reasonable period of time for the Minister to provide appropriate input on its decision.
70. Appropriate ministerial input is aimed at helping the agency to make an informed decision on the request for official information. It includes comments and suggestions regarding:
  - a. the proper application of the withholding grounds and the public interest test;
  - b. the release of additional information that the agency may not be aware of, including explanatory material to place the information that is being released in its proper context; and
  - c. the proactive release of the same information to others, provided there is no undue delay in providing that information to the requester.
71. Inappropriate input can include raising irrelevant considerations (like political embarrassment) or asking or instructing others to:
  - a. withhold official information without any proper statutory basis (for example, just because a document is a *'draft'*);
  - b. delay the release of official information without any proper statutory basis; or

- c. act in some other way that is known to be contrary to the requirements of the OIA (for example, releasing information to others before releasing it to the requester).<sup>16</sup>
72. Ministerial consultation on an OIA request is just like any consultation process. According to clearly established legal principles,<sup>17</sup> consultation is the statement of a proposal not yet fully decided on. It involves listening to what others have to say, considering their responses, and then deciding what will be done. Consultation is not *'negotiation'*, which implies that the parties must eventually reach agreement. Consultation can occur without those being consulted agreeing with the outcome.
73. In this context, therefore, an agency must consider the Minister's input on an OIA request in good faith and with an open mind, before deciding whether that input provides a reasonable basis for changing its proposed decision on the request. If there is a disagreement between the agency and the Minister about the proposed decision, this should be handled at a suitably senior level on both sides, but the decision ultimately rests with the agency.

### **Notification of the decision**

74. Notifying the decision means letting the Minister know about the decision an agency has taken on a request and will be communicating to the requester. The purpose of notifying decisions is to enable the Minister to prepare for the possibility of public or political commentary.
75. Notification of the decision is not an appropriate vehicle for facilitating ministerial input into the agency's decision on an OIA request. The practice of notifying decisions is not provided for in the OIA, but has evolved out of the *'no surprises'* principle reflected in the Cabinet Manual.<sup>18</sup>
76. The practice is permissible provided it does not interfere with the agency's ability to comply with its statutory obligations to make and communicate the decision on a request for official information as soon as reasonably practicable and no later than 20 working days after it was received (unless validly extended), and to release official information without undue delay.

### **Application of the law and principles of good administrative practice**

77. I now apply the law and principles of good administrative practice set out above to the facts of this particular case.

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<sup>16</sup> This may constitute *'undue delay'* in release of official information, which is deemed to be a refusal of the request under [s 28\(5\) OIA](#).

<sup>17</sup> See *Wellington International Airport v Air New Zealand* [1993] 1 NZLR 671 at 675.

<sup>18</sup> Cabinet Office. *Cabinet Manual 2017* at paragraph 3.16(a).

78. I consider it was open to KiwiRail to conclude that this particular OIA request involved the Minister's interests, and to notify him of it. As KiwiRail explained in its comments to me:
- a. The business case related to the Minister's functions or activities in that it made the case for an improvement to the rail network which would, if it proceeded, be funded by the Crown.
  - b. The release of the business case could impact on the Minister's functions or activities since it was likely that Ministers would receive questions as to why the initiative was not being funded in Budget 2017.
  - c. The business case was potentially sensitive and could be controversial because of the fact that it dealt with transport in Auckland and was therefore likely to attract public or political commentary to which the Minister may have been required to respond.
  - d. The information was very likely to be published since it had been requested by the Greater Auckland transport blog.
79. Upon notification of the OIA request, the Minister's Private Secretary asked to '*see [the OIA] before [it is] released*'. However, it was unclear whether this meant the Minister should be consulted on the decision before it was taken, or notified of the decision once it was taken. In the end, what took place was consultation, in that the Minister had the opportunity to provide input into the decision before it was taken.
80. I consider it was open to KiwiRail to consult the Minister before reaching the decision on this OIA request. The funding decisions required by the business case would ultimately be taken by the Minister collectively with Cabinet, and in this sense, release of the business case may have affected the Minister's functions, activities or legitimate interests.
81. That the Minister took a different view to Kiwirail on release of the business case, in itself, is of no concern. The purpose of consultation is to explore whether there are any other views on the subject-matter of the consultation. There is also nothing untoward in the Minister's staff seeking to escalate matters to senior management when it became apparent that a disagreement of approach remained. That is what our guide says to do. There is a line between ministerial input into an agency's OIA decision and ministerial interference, but that line was not crossed in this case.
82. The next consideration is how KiwiRail dealt with the input it received from the Minister's Private Secretary on 30 May and 2 June 2017. As noted above, it should have considered that input in good faith and with an open mind, before deciding whether it provided a reasonable basis for changing its proposed decision on the request.
83. KiwiRail did just that with the email it received on 30 May 2017, noting in reply the view of its legal team that KiwiRail would '*struggle to justify non-release*' under section

- 9(2)(j).<sup>19</sup> When KiwiRail was unconvinced that this withholding ground applied, it properly asked the Minister's office whether there were other reasons for withholding.
84. It is concerning, however, that on receipt of the email dated 2 June 2017, KiwiRail appeared to be willing to reverse its earlier position that the business case should be released in full. Here I am referring to the fact that on 6 June 2017, KiwiRail prepared and provided to the Minister a draft letter withholding the business case in full under section 9(2)(j).
85. I expect agencies in a similar position to critically evaluate the input they receive from the Minister or other third party, and to engage with them further to find out the basis for their concerns, and whether those concerns warrant the withholding of official information under the stated ground, or any other withholding ground that may be applicable.
86. This is particularly so in the present case because KiwiRail had such clear indications from senior staff that:
- a. the numbers were already in the public domain;
  - b. there was no concern about any commercial impact of release; and
  - c. it would struggle to say release would prejudice its negotiations.
87. It is possible that KiwiRail would have done just this at its meeting with the Minister on 8 June 2017, and that it drafted the refusal letter on 6 June 2017 simply to be prepared in the event that the Minister provided the necessary information at that meeting to satisfy KiwiRail of the proper basis for withholding the business case.
88. I know from my investigation that the Minister's staff had genuine concerns about release of the information. I am not saying those concerns necessarily justified the withholding of the business case, but it is worth setting them out in full below:

*Noting that the project was highly likely to form a bid for Budget 18, the Minister's Office formed the view that if the Business Case was released, then it would open the project up to undue influence and public debate which would more likely than not prejudice the path the Budget bid takes.*

*As the Budget process is a contestable process, negotiations should be allowed to occur unimpeded without any action that could influence the weighting of one bid over another.*

*This applies to both the future negotiations to be had at a departmental level in the initial stages of the Budget process, and in the subsequent negotiations between Ministers once a bid has progressed to this level.*

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<sup>19</sup> Just because KiwiRail's legal team 'struggle[d] to justify non-release' of the business case at that point in time, does not necessarily mean that opposing views were wholly without basis.

*A bid will be more objective at both stages of the negotiation process if it is on an even footing with other bids (i.e. that haven't been publically debated). Public and media scrutiny could directly or indirectly influence the weighting of bids and decision making during the contestable budget process. This is the same principle that the Ministry of Transport advised the Office it applies when considering whether to release failed Budget bids under the Official Information Act.*

*The Office also considered that while the signal of investment in the Third Main Trunk was provided through ATAP, decisions on exact timing had not yet been made. With a large number of rail investment bids provided for Budget 17 and a large number of them unsuccessful, public release of business cases could influence the future consideration of those bids in Budget 18 or other future budgets. This is another important reason for maintaining objectivity.*

*Given the Business Case has been released in the public domain, and has garnered a large amount of public, political and media coverage as a result, the Office believes the Minister's position (and arguably in turn the Government's) has unquestionably been forced to progress the project in future Budgets sooner rather than later (as signalled above, exact timing of the investment was previously undecided).*

89. Notwithstanding the genuine nature of these concerns, there were some problems with the case for withholding under the OIA as it had been articulated. In particular:
- a. While the project may have led to a potential future budget bid, the business case itself was not a budget bid. It was a business case prepared by an external contractor. Even if it was a budget bid, there is no blanket basis for withholding unsuccessful budget bids under section 9(2)(j), or any other withholding ground. Indeed, I am not aware of any case in which section 9(2)(j) has been accepted by an Ombudsman as having properly applied to unsuccessful budget bids. I am not convinced that the discussions which would occur between Ministers and officials or agency employees in the context of preparing the budget constitute 'negotiations' in the sense that is envisaged in section 9(2)(j). The withholding ground most relevant in this context is section 9(2)(f)(iv) of the OIA (known as one of the 'good government' withholding grounds), which applies where withholding is necessary to maintain the constitutional convention protecting the confidentiality of advice tendered by Ministers and officials. While this may include advice prepared by external consultants if that is incorporated into the advice that is tendered by Ministers or officials, the business case at issue here was never tendered to Ministers.
  - b. Section 9(2)(j) applies where withholding 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'. The protection afforded is for the **agency holding the information**—the one that is making the decision on the request—not other

- Ministers or agencies, even if they also hold the information. No one was better placed than KiwiRail to judge whether disclosure of the business case would have prejudiced its negotiations, and its senior staff appeared to have real doubts that it would.
- c. There is no basis for withholding drafts under the OIA until they are completed and finalised. There are withholding grounds that can apply to protect draft documents, including, most commonly, sections 9(2)(ba) and 9(2)(g)(i) of the OIA. However, their application depends on a close analysis of the information at issue, and the harm that would flow from its release. Not all drafts are the same. It is important to note that this one was in near final form and had been used by KiwiRail in support of a funding bid for the project.
  - d. The concern that the business case created the wrong or misleading impression that it was sanctioned by NZTA and based on close collaboration with that agency is not something that would give rise to a good reason to withhold the business case under the OIA. If an agency's concern is that the information may be misunderstood it should address this by releasing an accompanying statement that places the information in its proper context.
90. In any event, it is apparent that the decision making landscape shifted significantly with the publication of the relevant emails, and the ensuing publicity which brought into question the probity and integrity of KiwiRail and the Minister, and their adherence to the OIA.
91. It was at this stage that KiwiRail decided to pursue disclosure of the redacted business case. This appears to me to have been a genuine and well-intentioned attempt to address both the Minister's concerns and the public interest in release. However, the decision on the redactions was clearly made under pressure of time (no doubt prompted in part by the media coverage and the fact that KiwiRail was by then in breach of statutory timeframe for responding to the OIA request), and there is little documentation to suggest that it was robustly reasoned. As late as 11 June 2017, KiwiRail's Chair was querying the need for any redactions on its part. However, it is not clear whether he ever received a response.
92. It is unfortunate that KiwiRail did not appreciate from its meeting with the Minister and the subsequent telephone discussion between the Minister's staff and its own, that the Minister no longer objected to release of the full business case on the basis that the need to withhold was now outweighed by the public interest in disclosure. It is also unfortunate that the public outcry limited further substantive engagement between KiwiRail and the Minister about KiwiRail's decision to make redactions. Such engagement could have clarified that the need for redactions was, in the Minister's view, now outweighed by the public interest in disclosure. This would have been a good example of how ministerial involvement in an agency's OIA decision making process can result in the release of more official information, not less.



93. KiwiRail should also have realised that releasing the redacted business case only partially satisfied the OIA request. When advising the requester of its decision on the OIA request it should have explained that parts of the soon-to-be-published business case would be redacted under sections 9(2)(ba), 9(2)(g)(i), 9(2)(i) and 9(2)(j) of the OIA.
94. Lastly, I consider that KiwiRail missed an opportunity to promote public understanding and debate, and mitigate some of the concerns with disclosure, through the release of contextual information explaining the background and status of the business case. As noted above, the business case (when first published) appeared at the bottom of the KiwiRail website's corporate publications page, with no explanation as to the provenance, background or status of the document.
95. In conclusion, I would like to note that agencies acting in good faith may nevertheless make the wrong decision on an OIA request. They are applying the law, which often requires the balancing of competing public interest considerations. This is not always a straightforward and easy thing to do. That is why Parliament provided the protection of recourse to the Ombudsman.

## Opinion

96. In my opinion, KiwiRail has not acted in a manner that was wrong, unreasonable or contrary to law in terms of the OA. It was entitled to notify the Minister of the OIA request, and to consult the Minister before reaching a decision on that request. The Minister was entitled to his view on the request, and to escalate the matter to KiwiRail's senior management when agreement was not in prospect.
97. However, there were aspects to the processing of this request that were less than ideal, and could be subject to a level of criticism:
  - a. It would have been desirable if KiwiRail had a clear understanding about the nature of its engagement with the Minister over this OIA request.
  - b. KiwiRail appears to have been ready to concede its position on release of the business case, without properly understanding the Minister's concerns and whether they warranted withholding under the OIA.
  - c. Some of the discussion about the request appears to have been based on a misunderstanding of the withholding grounds in the OIA.
  - d. In the aftermath of the public outcry, proper engagement with the Minister seems to have been limited so that KiwiRail did not understand that the Minister's position on release of the business case had changed.
  - e. KiwiRail's decision to release the business case with redactions, while based on good intentions, was not particularly robust. The Chair's caution that redactions on KiwiRail's part may not have been warranted appears to have gone unheeded.

- f. KiwiRail should have advised the requester that parts of the business case were being withheld.
- g. KiwiRail missed an opportunity to promote public understanding and debate, and mitigate some of the concerns with disclosure, through the release of contextual information explaining the background and status of the business case.

## Suggestions for improvement

- 98. My ability to make recommendations under the OA is dependent on my forming an opinion of deficient conduct by the agency. I have formed no such opinion in this case, although I have detailed some respects in which the processing of this OIA request was not ideal, and indeed might attract a level of criticism. It seems to me that there is still scope to make some suggestions for improvement.
- 99. First, I consider that KiwiRail should review its OIA processes. As part of this it should consider developing, in consultation with the Minister, a protocol around the handling of OIA requests in which he needs to be involved. Any protocol that is developed should be published. I think this would protect against the perception of impropriety in the processing of OIA requests, which can be just as damaging as the reality of it. I have published a [Model protocol on dealing with OIA requests involving Ministers](#) that can help with this.
- 100. Secondly, I consider that KiwiRail should provide OIA training for its staff.
- 101. I have also identified actions that this office can take. These include producing guidance on the good government withholding grounds (addressing in part the issue of budget secrecy), and the negotiations withholding ground (section 9(2)(j) of the OIA). The good government guidance will be published in the very near future.