

Request for groups interested in setting up a charter school

Legislation:	Official Information Act 1982, sections 6(d), 9(2)(b)(ii), 9(2)(ba), 9(2)(f)(iv), 9(2)(g)(ii), 9(2)(j), 18(d) (see appendix for full text)
Requester	New Zealand Educational Institute
Agency:	Ministry of Education
Request for:	List of those who had submitted an 'Indication of Interest' in setting up a partnership school
Ombudsman:	Professor Ron Paterson
Reference number:	353000
Date:	July 2013

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Summary

On behalf of the New Zealand Educational Institute, Ms Shelley Nixon made a request to the Ministry of Education for a list of the names of the groups that had submitted an 'Indication of Interest' (IOI) in setting up a partnership school. The Ministry of Education refused the request under section 9(2)(j) of the Official Information Act 1982 (OIA) in order to enable a Minister of the Crown or a department holding the information to carry out negotiations without prejudice or disadvantage. The Ministry subsequently invoked section 9(2)(f)(iv) of the OIA, relating to the need to protect the confidentiality of advice tendered by officials to Ministers, as an alternative good reason to withhold the information. The Ministry claimed that section 9(2)(ba)(i) applies in respect of two groups that sought, and received, an assurance of confidentiality for their IOI from the Chair of the Partnership Schools Working Group. It has also relied on section 9(2)(g)(ii), relating to the protection of groups that submitted an IOI from improper pressure or harassment as a potential good reason for withholding. I have also considered the potential application of section 6(d), whereby likely endangerment to the safety of any person is a conclusive reason for withholding. Finally, the Ministry suggested that its planned future publication of information about selecting the sponsors of partnership schools meant that section 18(d) ("the information requested ... will soon be publicly available") might apply.

After consideration of the relevant facts and of the statutory grounds for withholding advanced by the Ministry, I have formed the opinion that no good reason exists to refuse the request.

My role

1. As an Ombudsman, I am authorised to investigate and review, on complaint, any decision by which a Minister or agency subject to the OIA refuses to make official information available when requested. My role in undertaking an investigation is to form an independent opinion as to whether the request was properly refused.

Background

2. The Partnership Schools Working Group was established to provide advice to Ministers about developing a new model of publicly funded school in New Zealand. Its terms of reference make clear that in performing its duties, it will be supported by officials of the Ministry of Education, and that the Official Information Act 1982 will apply to the activities of the Group. The Working Group published a document on 14 December 2012 entitled *Indication of Interest*. This invited "groups interested in establishing a Partnership School | Kura Hourua to provide some initial information about their potential proposals." Those wanting to submit an IOI needed to provide it to the Working Group by 1 February 2013.

3. Prior to the Working Group inviting groups to submit an IOI, the Ministry and the Associate Minister of Education had been receiving unsolicited informal expressions of interest. After the period for submitting an IOI closed, the Ministry invited groups to submit an application to operate a partnership school. In the course of this investigation it has been important to distinguish between an informal expression of interest, a formal IOI, and an application.
4. On 20 February 2013, Ms Shelley Nixon, on behalf of the New Zealand Educational Institute (NZEI), made a request for official information in the form of an email to the Ministry of Education. Her request was expressed in the following terms:

“Could you please send me a list of the names of the 35 groups that have expressed an interest in setting up a charter school.”

5. Although this might have been interpreted by the Ministry as seeking the names of groups that had informally expressed interest in partnership schools, the Ministry understood it as a request for the names of those groups that had submitted an IOI. The Ministry responded to the request on 14 March 2013. It stated:

“The information you requested has been withheld under the following section of the Act:

- *9(2)(j), to enable a Minister of the Crown or any Department to carry out negotiations without prejudice or disadvantage.*

There do not appear to be any overriding public interest reasons that support the release of the information withheld.”

6. On behalf of the NZEI, Ms Nixon made a complaint to the Ombudsman about the refusal of her request. In her complaint, Ms Nixon commented:

“I would like you to review this decision on the following grounds.

1. *There are already several lists of such schools (including one released by the Charter Schools Working Group) in the public domain, and releasing an authoritative list will remove speculation.*
2. *Refusing to release the information under s 9(2)(j) of the Official Information Act pre-empts the provisions of the Education Amendment Bill currently before the Education and Science Select Committee (which is not due to report until 18 April). There can be no final negotiations between the government and prospective sponsors before the Bill has been passed into law.*
3. *The schools will be publicly funded and there is no means under the proposed Act or under the authorisation process for the public to even know, let alone have any input into, whether a charter school is going to open in their neighbourhood.*

4. *Taxpayers have a right to know of foreign organisations wanting to operate these schools - there is evidence of overseas interest in setting up a Partnership School on the Ministry of Education's GETS tendering website ('Request for Application to operate a Partnership School opening in 2014')."*

Investigation

7. This investigation was commenced during the term of office of Ombudsman David McGee. Upon my becoming an Ombudsman on 4 June 2013, I assumed responsibility for investigation of this complaint. I have reviewed the file and material provided, and confirm that I agree with the approach taken by Dr McGee, including the provisional opinion sent to the Ministry of Education on 31 May 2013.
8. On 16 April 2013, the Ministry of Education was notified of the complaint. The letter confirmed that a meeting had been arranged for the following day between the staff assisting Dr McGee with the investigation and the relevant officials in the Ministry. The Ministry was asked to bring a copy of the information at issue to the meeting. At the meeting on 17 April 2013, the Ministry provided a copy of the information at issue, and explained its reasons for withholding the information. Following the meeting, written confirmation was sent to the Ministry of the additional information the Ombudsman required in order to consider whether good reason existed for refusing the request. This information, along with a further reason why the information should not be disclosed, was provided on 3 May 2013.
9. On 13 May 2013, the Ministry provided the Ombudsman with a revised list of groups it said had submitted an IOI. This list contained the names of two further groups. The Ministry advised that these two groups had sought to have their IOI considered in confidence, and had been assured by the Chair of the Partnership Schools Working Group, Ms Catherine Isaac, that this would be the case.
10. Dr McGee met with the Acting Secretary for Education, Mr Peter Hughes, on 14 May 2013 to discuss the complaint.
11. Following this meeting, Dr McGee received further information confirming the reasons for withholding that the Ministry wished the Ombudsman to consider.
12. After considering the information at issue, the Ministry of Education's reasons for withholding, and other relevant material, Dr McGee provided the Ministry of Education with his provisional opinion on the complaint on 31 May 2013.
13. The Ministry of Education provided its comments on the provisional opinion on 18 June 2013.
14. I consulted the two groups that had received assurances of confidentiality from the Chair of the Working Group. The Ministry of Education provided me with a copy of the submissions made by these two groups. I also asked the requester whether, in light of

the Ministry's intended publication date, it wished to pursue the matter. The NZEI confirmed that it did.

15. I have now had an opportunity to consider all comments and relevant material in this case. Having considered all the issues raised, I have now formed the final opinion that there is no good reason to withhold the information, and it should be provided to the requester.

Comments received during investigation

Comments made by the Ministry of Education

16. At the meeting held on 17 April 2013, the Ministry explained that, after the period for groups to submit an IOI had closed, the Ministry had prepared documentation inviting potential sponsors to apply to operate a partnership school. The documentation inviting applications was published on the government's electronic tender service (GETS) on 6 March 2013, and the application period closed on 16 April 2013.
17. The Ministry noted that until the Education Amendment Bill (that was then before the House of Representatives) was enacted, the Ministry could not enter into formal negotiations. At this stage it was only conducting an initial assessment of the applications and seeking clarification from applicants where necessary. The Ministry stressed its intention to publish further information about partnership schools, but 'not yet'.
18. There had been no obligation on potential sponsors of a partnership school to submit an IOI before making an application to the Ministry.
19. The Ministry advised that its concern with regard to the contemplated negotiations was twofold. First, those applicants who had submitted an IOI would be prejudiced if the information at issue were disclosed now. As applicants had not been obliged to submit an IOI, not all of them had done so. Disclosure of the names of applicants who had submitted an IOI would mean that those applicants would be lobbied by those opposed to the creation of partnership schools and receive media enquiries. The Ministry suggested that named applicants might also be subject to harassment or threats. Dealing with media enquiries, lobbying, harassment or threats would mean that named applicants would be at a disadvantage during the negotiations with the Ministry compared to applicants who had not submitted an IOI, and whose names were not publicly available. Secondly, this imbalance between applicants would prejudice the process as a whole.
20. It was pointed out to the Ministry that the names of a number of groups that were apparently interested in sponsoring a partnership school were already in the public domain. The Ministry was asked to provide any evidence of people having their safety

threatened after having been identified as being interested in setting up a partnership school.

21. The Ministry was also asked to provide details of any groups who had submitted an IOI or application and who had publicly identified themselves, or whose name was in the public domain, and with a list of all potential sponsors that had submitted an application.
22. Following the meeting with the Ministry, further information was received by email from the Ministry on 3 May 2013.
23. In its email, the Ministry advised that it was “*not aware of any specific instances of people having their safety threatened in relation to setting up a partnership school*”.
24. The Ministry’s email of 3 May 2013 advanced a second argument for withholding the list of names of groups that had submitted an IOI. It stated:

“The Ministry is concerned that release of the names of groups/proposed sponsors who have submitted an IOI will damage the effectiveness and orderly nature of the overall selection process.

The Ministry is of the view that release at this time will undermine the ability of Ministers to consider advice in an effective, orderly and confidential manner. This concern extends to advice regarding the complete process of both selecting and negotiating with likely Sponsors.

These concerns therefore point to grounds to withhold under both s9(2)(f)(iv) in relation to advice the Minister will wish to consider in confidence and s9(2)(j) in relation to normal processes for commercial or quasi-commercial selection processes. We also note the relevant quote from the Danks Committee quoted in your guidelines:

‘To run the country effectively the government of the day needs nevertheless to be able to take advice and to deliberate on it, in private, and without fear of premature disclosure. If the attempt to open processes of government inhibits the offering of blunt advice or effective consultation and arguments, the net result will be that the quality of decisions will suffer, as will the quality of the record. The processes of government could become less open and, perhaps, more arbitrary.’

We acknowledge the interest of the public and the media in knowing who the groups/proposed sponsors who have submitted an IOI are but we do not believe this necessarily translates into a strong public interest in release of this information at this stage in the process.

We note that once decisions regarding Sponsors have been made, there is likely to be no need for ongoing protection of the advice on which that decision was based. We recognise that the release of relevant information

after decisions are made may have the positive effect of explaining to the public the reasons why certain actions were taken (e.g. short-listing) and decisions made (e.g. the final decisions by the Minister).

We believe that such a staged and orderly approach is consistent with one of the purposes of the Official Information Act.”

25. On 13 May 2013, the Ministry provided the Ombudsman with a revised list of the names of groups it said had submitted an IOI. It said that two additional groups had submitted an IOI. However, these two groups had sought to submit their IOI in confidence, and had received an assurance of confidentiality from the Chair of the Partnership Schools Working Group, Ms Catherine Isaac. The Ministry expressed the view, that in relation to the names of these two groups, section 9(2)(ba)(i) of the OIA (information subject to an obligation of confidence) applied.
26. During Dr McGee’s meeting on 14 May 2013 with the Acting Secretary for Education, Mr Hughes emphasised the Ministry’s intention to publish information relating to the process of selecting groups to sponsor partnership schools, after the process was completed. Dr McGee noted that this appeared to suggest that the Ministry wished to rely upon section 18(d) (information that will soon be publicly available), in which case it would need to provide a reasonably specific date in the near future when publication would occur.
27. The Acting Secretary sent the Ombudsman an email on 23 May 2013 with the Ministry’s comments about intended future publication of information relating to partnership schools. The email also restated the Ministry’s grounds for refusing to release the information at issue, and its reasons in support of those grounds. The reasons were set forth as follows:

“Officials have raised the following points with your Office in support of the grounds for refusal:

- *The release of the names of those organisations which have submitted IOIs will damage the effectiveness and orderly nature of the overall selection process*
- *Release at this time will undermine the ability of Ministers to consider advice (including on the selection of and negotiations with likely sponsors) in an effective, orderly, and confidential manner*
- *There is strong public and media interest in the outcome of the process, and we recognise this. For that reason it has always been our intention to make information available at the conclusion of the process. At this stage, we do not believe that the public interest outweighs the other interests we have identified.*
- *Once decisions on sponsors have been made, there is likely to be no need for ongoing protection of the advice and information on which*

those decisions were based (apart from the two groups who received an undertaking of confidentiality). The release of information relating to the selection process will clarify for the public the reasons for particular actions and decisions. A staged approach to the release of information is consistent with one of the purposes underpinning the Official Information Act 1982 – that of promoting the accountability of Ministers of the Crown and officials.”

28. In relation to the timeframe for the intended future publication of information relating to partnership schools, the Ministry advised:

“The current timeframe for the announcement of successful sponsors for partnership schools is dependent on the passage of the Education Amendment Bill. Current expectations are that the bill is expected to go to Committee of the Whole House in the week of 11 June, with the Third Reading scheduled for the last week of June.

Our negotiations with preferred providers are expected to be and published on GETS by July.”

29. The email also explained that Mr Hughes had consulted the Chair of the Partnership Schools Authorisation Board, Ms Catherine Isaac, about the request¹ and that she was:

“concerned about undue pressure and publicity for organisations which were encouraged to come forward in to the process and who did not proceed further, and organisations which were promised confidentiality by her.”

30. He continued:

“Catherine has very real concerns that there is potential for harassment of parties who expressed only an initial interest, and of others who believed they [were] assured of confidentiality. I believe her concerns have merit and should be considered under section 9(2)(g)(ii) of the Act.”

31. Mr Hughes’ final comment on the Ministry’s position was:

“I believe my undertaking to release information fulsomely at the end of the process will satisfy the availability principles of the Act, and ensure the public interest is met.”

32. On 18 June 2013, the Acting Secretary provided the Ministry’s comments on Dr McGee’s provisional opinion. Mr Hughes stated that *“while I accept some of the conclusions, I do not agree with parts of the provisional view that Dr McGee has expressed.”* He added that *“there are a number of points about which I would like to make some additional comments as set out below.”*

¹ Ms Isaac was appointed to this additional position on 1 March 2013.

33. Mr Hughes commented that he did not believe that it was relevant to the investigation to refer in the provisional opinion to the information previously released publicly about those groups which had informally provided unsolicited expressions of interest in running a partnership school. Mr Hughes stated:

“These information releases occurred before the opening of the formal selection process and were not in relation to the formal process. In my view, this information should not have any bearing in terms of this investigation. While some of the organisations may be the same, the circumstances in which the information was received and considered are entirely different.”

34. Mr Hughes also noted that one of the groups that had submitted an IOI was within the scope of the OIA, and therefore section 9(2)(g)(ii) could be applicable, but stated that *“in all other respects the Ministry agrees with the conclusions reached by Dr McGee about section 9(2)(g)(ii).”*
35. In relation to the two additional groups that submitted an IOI in confidence, Mr Hughes expressed concern at the preliminary finding that section 9(2)(ba)(i) did not apply, and said that the provisional opinion *“appeared to be based on the non-receipt of complete copies of the email correspondence between the Chair of the Working Group and the two organisations.”* Mr Hughes stated that *“It has also been noted by Ms Isaac that the two organisations that sought and received an assurance of confidentiality from her did not proceed to make applications.”*
36. Finally, Mr Hughes provided comments on the possible application of section 18(d) of the OIA, which provides that requests may be refused if the information will soon be publicly available. He noted that the passage of the Education Amendment Bill had made it possible for the Ministry *“to be more definite about timeframes”* and clarified that it would *“make this information available by way of a release on the Ministry’s website, on 31 July 2013. The information released will include the names of those organisations that submitted an Indication of Interest.”*

Comments made by the New Zealand Educational Institute

37. In addition to the comments made by Ms Nixon in the NZEI’s initial complaint to the Ombudsman, the Institute provided further information during the course of this investigation.
38. The NZEI drew attention to a parliamentary question answered by the Associate Minister of Education on 17 July 2012 (which was revised by the Associate Minister on 20 August 2012). Ms Catherine Delahunty MP asked which individuals or organisations had expressed an interest in running or being involved with running a charter school (as they were then described). The Associate Minister’s answer provided a list of 19 organisations and said that four individuals had also expressed an interest to him.

39. Following the Associate Minister's initial answer to the parliamentary question, the *New Zealand Herald* newspaper published an article on 28 July 2012 which reproduced the list of the organisations named by the Associate Minister.
40. The NZEI also provided the Ombudsman with a separate list of 11 organisations that had contacted the Partnership Schools Working Group to express an interest in establishing a partnership school. This list had been disclosed by the Ministry of Education on 26 November 2012 in response to a request for official information made by someone else.
41. When I consulted the NZEI on 20 June 2013 as to whether it wished the investigation to be continued in light of the Ministry's intentions to publish the information at issue, it advised that it did. The NZEI stated that communities ought to be able to know that an IOI had been submitted at the time that matters were still 'live'. Since the government might in future solicit further expressions of interest or applications, the NZEI wanted to have an Ombudsman's views on the merits of withholding the information at the time the request was made.

Analysis and findings

42. Five withholding grounds have been identified by the Ministry as relevant: sections 9(2)(ba)(i), 9(2)(f)(iv), 9(2)(g)(ii), 9(2)(j) and 18(d). In light of the concerns expressed by the two groups that submitted an IOI, I have also briefly considered the possible application of section 9(2)(ba)(ii) in the course of assessing the 9(2)(ba)(i) claim, and section 9(2)(b)(ii). I have also considered the possible application of section 6(d) in the course of assessing the section 9(2)(g)(ii) claim.
43. Obviously, if submitters have already been identified by official sources or have self-identified, it would no longer be 'necessary' to withhold the information, even if a ground under the Act might otherwise be applicable. As noted above, prior to the formal invitation to submit an IOI, both the Associate Minister of Education and the Ministry of Education disclosed the names of groups that had expressed an informal interest in sponsoring a partnership school.
44. The Ministry provided a list of those applicants that had submitted an IOI and whose identity was in the public domain as result of the previous disclosures. This showed that, of the 34 groups that submitted an IOI, eight had earlier been named by the Associate Minister or the Ministry as having expressed an interest in sponsoring a partnership school. Of these, one had subsequently identified themselves as having submitted a formal application. This raised doubt about the necessity to withhold some of the information at issue.
45. However, none of the groups had been identified as having submitted a formal IOI, and it is the names of these groups which is the information at issue in this case. It is therefore necessary for me to consider the claimed withholding grounds, and whether any other ground exists to withhold the information at issue.

Obligation of confidence – section 9(2)(ba)

General approach to this section

46. The full wording of section 9(2)(ba), which provides good reason for the withholding of information in certain circumstances, can be found in the [Appendix](#) to this opinion.
47. Generally speaking, this section may apply where someone has provided the information at issue to the organisation concerned (either under compulsion or on a voluntary basis) in circumstances which give rise to an obligation of confidence owed to the person who supplied the information.
48. When assessing whether the information in question is ‘subject to an obligation of confidence’ the Ombudsman has regard to the considerations set out below.
 - The nature of the information requested. Why is the information believed to be confidential? Does the information have the necessary ‘quality of confidence’ about it?
 - The full circumstances of its supply. What are the circumstances which are claimed to create the obligation of confidence? Do these circumstances suggest there is an obligation of confidence?
49. If an obligation of confidence exists, the test under section 9(2)(ba)(i) is whether making the information available would be likely to prejudice the supply of similar information, or information from the same source. If it would be likely to cause such prejudice, is it in the public interest that such information should continue to be supplied?
50. Alternatively, if it has been established that an obligation of confidence exists, section 9(2)(ba)(ii) may apply. Here, an Ombudsman considers whether making the information available would be likely to damage the public interest in some other way.

Application of section 9(2)(ba) to this case

51. The Ministry had initially advised the Ombudsman that 34 groups had submitted an IOI. However, on 13 May 2013 the Ministry informed the Ombudsman that two additional groups had submitted an IOI, but had sought assurances of confidentiality for their IOI submissions from the Chair of the Partnership Schools Working Group, Ms Catherine Isaac. Ms Isaac appears to have given these two groups the confidentiality assurances they sought. The Ministry claimed that section 9(2)(ba)(i) provided good reason to withhold the names of the two groups that had received an assurance of confidentiality.
52. The document used by groups that submitted an IOI was published by the Partnership Schools Working Group on 14 December 2012. At the beginning of the document, the following statement appears:

“Information supplied in this indication of interest will be subject to the Official Information Act and may be scrutinised by a Select Committee or

external agencies (e.g. Office of the Auditor General). All parties submitting an indication of interest should assume that the full content of their submission will be released in due course.”

53. The fact that 34 of the 36 groups that have submitted an IOI did not seek to supply their IOI in confidence (presumably having read the statement quoted above) means that these groups can have had no realistic expectation of confidentiality in the information they supplied in their submission. Publication of the information they submitted is only a matter of timing, and the statement does not make reference to publication after any fixed point in the process of considering submissions or applications to establish a partnership school. These submitters knew that any or all of the information they provided could be made public at any point.
54. Turning to the two groups that received an assurance of confidentiality from Ms Isaac, it is important to make clear that organisations subject to the OIA can never guarantee complete confidentiality (as the IOI makes clear). A request for information will inevitably fall to be considered in terms of the OIA. References to confidentiality (including in confidentiality agreements) will be relevant, but never conclusive. Otherwise an agency would, in effect, be contracting out of the OIA. This point was thoroughly canvassed in *Wyatt v Queenstown Lakes District Council*.² The disclaimer in the invitation to submit an IOI quoted above reflects the Ministry’s and the Working Group’s understanding of this point.
55. As noted above, to justify withholding under section 9(2)(ba), the OIA requires not only that an obligation of confidence exists, but also that either disclosure would be likely to prejudice the supply of similar information, or information from the same source (and it is in the public interest that the information should continue to be supplied), or that disclosure would be likely to damage the public interest in some other way.
56. Following receipt of the Ministry’s response to the provisional opinion, I obtained copies of the material supplied by the two additional groups to the Chair of the Partnership Schools Working Group, and consulted the two groups (referred to hereafter as school A and school B).

SCHOOL A

57. Consultation with school A established that it believed it had not submitted a formal IOI, only an informal expression of interest. However, it had submitted a completed IOI form, albeit with the following proviso:

“If the Working Group cannot guarantee our confidentiality at this stage we request that our Submission be withdrawn and to be notified immediately.”

² [1991] 2 NZLR 180.

58. My consultation with school A indicated that the Working Group had not informed it that confidentiality could not be guaranteed. The Working Group had evaluated the submission and provided school A with feedback on its IOI.
59. In consulting school A, I asked what its concerns were regarding disclosure. School A expressed concern about the potential effect of disclosure (of the fact that it had submitted an IOI) on the financial viability of its existing operations. This is a factor that might be considered under section 9(2)(b)(ii) of the OIA, which permits the withholding of information where disclosure would unreasonably prejudice the commercial position of the person who supplied it, and I have done so in the next part of this Opinion.
60. In terms of section 9(2)(ba), after considering the views of school A, I am not convinced that disclosure of the information at issue, which is simply the name of the group, would prejudice the supply of similar information, or information from the same source, to the Ministry of Education in future (section 9(2)(ba)(i) refers).
61. In my opinion the nub of the issue under both heads of section 9(2)(ba) is the public interest. If the expression of interest by school A truly had been informal, I might have been persuaded that this ground for withholding its name applied, as I accept that there is a public interest in people being able to informally seek further information from government agencies on a proposal they are interested in, without formally 'putting their hat in the ring'. However, while submission of an IOI was not a commitment to subsequently making an application to operate a partnership school, in this case school A submitted a completed copy of the formal IOI form, and provided the additional information sought by the Working Group. This IOI was evaluated on the same criteria as those applied to other IOIs. It was clearly more than an informal expression of interest. I am not satisfied that either limb of section 9(2)(ba) is made out in this case. In any event, I consider that the public interest in the availability of official information – in the context of public debate about the introduction of partnership schools – outweighs any public interest in maintaining confidentiality in relation to the names of formal submitters of an IOI.³

SCHOOL B

62. My consultation with school B revealed that it had different concerns from school A. The concerns expressed by school B related to fears that existing teaching staff may leave and it may be harder to recruit good teachers to the school if it was revealed that the school had been considering becoming a partnership school, and that it would receive a hostile response from other schools in its area. I have considered these matters in the section below that relates to the possible application of section 9(2)(g)(ii) of the OIA. In relation to section 9(2)(ba) however, my conclusion is the same as that applying to school A; it submitted a formal IOI, and overall it is in the public interest that the names of formal submitters be publicly known. No doubt prospective submitters of IOIs for any future partnership schools will carefully weigh the likely public reception to the inevitable

³ The public interest in partnership schools is discussed further in paragraphs 110-113 below.

publication of the group's name. Similarly, those receiving such IOIs will be aware of the limits of any assurances of confidentiality they provide.

63. Overall, in respect of the two groups that sought and received an assurance of confidentiality, while I agree that an obligation of confidence was created, the remaining elements of section 9(2)(ba) necessary to justify withholding of their identities have not been established.

Unreasonable prejudice to commercial position – section 9(2)(b)(ii)

General approach to this section

64. The full wording of section 9(2)(b)(ii), which provides good reason for the withholding of information in certain circumstances, can be found in the [Appendix](#) to this opinion.
65. In considering whether it is “*necessary*” to withhold the information, the Ombudsman has regard to the considerations set out below:
- whether the information at issue relates to the “*commercial position*” of the person who is the subject of the information or who supplied the information.
 - what is the prejudice to that commercial position that would be likely to result if the requested information were to be made available.
 - how likely it is that the disclosure of the requested information would cause the predicted prejudice to occur; and
 - why that prejudice would be unreasonable.

Application of section 9(2)(b)(ii) to this case

66. I considered this ground for withholding after consulting school A, one of the IOI submitters that had received an assurance of confidentiality from the Chair of Partnership Schools Working Group. The underlying concern of School A was that disclosure of the fact that it had submitted an IOI would potentially have a negative effect on the financial viability of its existing operations.
67. It is not possible for me to provide further detail about these concerns without risking the creation of the prejudice this group was concerned to avoid. However, having considered the reasons for seeking confidentiality that school A outlined to me, I am not persuaded that disclosure of the name of this group meets the threshold of causing an unreasonable degree of prejudice to the commercial position of the school. Section 9(2)(b)(ii) therefore does not provide good reason to withhold the name of the group.

Confidentiality of advice tendered – section 9(2)(f)(iv)

68. The full wording of section 9(2)(f)(iv), which provides good reason for the withholding of information in certain circumstances, can be found in the [Appendix](#) to this opinion.
69. Section 9(2)(f)(iv) serves to maintain the constitutional conventions which protect the confidentiality of “*advice tendered by Ministers of the Crown and officials*”.
70. Ombudsmen have noted that the purpose and effect of section 9(2)(f)(iv) is not to protect from disclosure the whole of any policy process prior to ministerial decisions being taken. Such an approach is inconsistent with one of the purposes of the OIA, which is to enable more effective public participation in the making and administration of laws and policies (section 4(a)(i) refers).
71. Section 9(2)(f)(iv) may apply to advice (when it is tendered) which includes or refers to submissions received by the officials or Ministers from outside of the government, but those submissions themselves are not “*advice tendered by Ministers of the Crown and officials*”. In this case, there had not (at least at the time of the request) been any “*advice*” to which it could apply.
72. In general, Ombudsmen have rejected the argument that premature release of information submitted from outside government would impede the subsequent consideration of policy advice by Ministers. Disclosure of such information does not necessarily pre-empt or prejudice the ability to consider later advice that may in part be based on the information. Officials remain free to advise Ministers, for example, about the merit or lack of merit in particular submissions as they see fit, and to offer such additional advice as they deem appropriate. But in any case, in the absence of advice, I am satisfied that section 9(2)(f)(iv) is not applicable.

Protection from improper pressure or harassment – section 9(2)(g)(ii)

General approach to this section

73. The full wording of section 9(2)(g)(ii), which provides good reason for the withholding of information in certain circumstances, can be found in the [Appendix](#) to this opinion.
74. In considering whether it is “*necessary*” to withhold the information, the Ombudsman has regard to the considerations set out below:
 - whether the release of the information would lead to the improper pressure or harassment of a Minister, member of an organisation (as defined in section 2 as subject to the OIA), or officers or employees of a department.
 - whether the effects of such improper pressure or harassment would have a detrimental impact upon the effective conduct of public affairs; and

- how likely it is that the disclosure of the requested information would cause the predicted prejudice to occur.

Application of section 9(2)(g)(ii) to this case

75. At the meeting with the Ministry on 17 April 2013, it was invited to provide examples of any threats, harassment or improper pressuring of Ministry officials or Ministers or other organisations within the scope of the OIA. No such information has been provided.
76. By email dated 23 May 2013, the Ministry stated that the Chair of the Partnership Schools Working Group *“has very real concerns that there is potential for harassment of parties who expressed only an initial interest, and of others who believed they [were] assured of confidentiality.”* The Acting Secretary stated that, *“I believe her concerns have merit and should be considered under section 9(2)(g)(ii) of the Act.”*
77. Of the 36 groups that submitted an IOI, 34 are not persons to which the OIA applies, and so they do not meet the first element of the test for withholding under section 9(2)(g)(ii). The two remaining groups are state schools that submitted an IOI.
78. The Ministry has provided no information to suggest that the first state school has been, or may be, subject to improper pressure or harassment. My consultation revealed that the second school had concerns about possible negative responses to it having submitted an IOI. These centred on the perception of some employees that their professional peers will shun them for working at a school that had considered becoming a partnership school; that it will be harder to attract high quality teachers to work for the school (or retain them) once it is known that it considered becoming a partnership school; and that the opposition of others in the surrounding community towards the idea of partnership schools would result in harassment of staff and pupils.
79. I accept that the fears expressed by the second school are genuinely held and that staff may be harassed when the fact that the Board of Trustees submitted an IOI becomes public. However, in terms of section 9(2)(g)(ii), I am not convinced that it is *necessary* to withhold the name of the group in order to maintain the effective conduct of public affairs in the education sector.⁴
80. I conclude that section 9(2)(g)(ii) does not provide good reason to withhold the identities of any of the 36 groups that submitted an IOI.

THREATS TO SAFETY — SECTION 6(D)

81. The Ministry expressed concerns about pressure and harassment in stronger terms at the meeting held on 17 April 2013. At that time it suggested that people working for, or associated with, named applicants would be subject not just to harassment, but to threats to their safety. This raised the possibility that section 6(d) of the OIA might apply. The full wording of this section is set out in the [Appendix](#) to this opinion.

⁴ I note that the Ministry has accepted this conclusion in relation to the first school.

82. Two questions must be asked when considering whether section 6(d) applies to a particular request:
- Precisely how would disclosure of the information requested endanger the safety of any person? and
 - Would the predicted endangerment be “likely” to occur?
83. The phrase “*would be likely*” in section 6 requires more than mere possibility that disclosure may have a prejudicial effect. The Court of Appeal has interpreted the phrase “*would be likely*” to mean “*a serious or real and substantial risk to a protected interest, a risk that might well eventuate*”.⁵
84. The Ministry was unable to provide evidence of such threats at the meeting on 17 April 2013, nor in response to subsequent requests for specific information. In its email of 3 May 2013, the Ministry advised that it was “*not aware of any specific instances of people having their safety threatened in relation to setting up a partnership school*”. In these circumstances, there is also no basis to withhold the names of these groups under section 6(d) of the OIA (for which, as a conclusive withholding ground, a relatively high threshold test must be met). Nor did my later consultation with school B convince me that the safety of any person connected with that group was endangered.
85. In reaching this view about the alleged necessity of withholding the names of the groups, and the possibility or actual occurrence of threats to the safety of those involved with these groups, I note that in *Commissioner of Police v Ombudsman*, Justice Casey confirmed that “*In the nature of things he who alleges that good reason exists for withholding information would be expected to bring forward material to support that proposition*”.⁶

Prejudice to negotiations – section 9(2)(j)

General approach to this section

86. The full wording of section 9(2)(j), which provides good reason for the withholding of information in certain circumstances, can be found in the [Appendix](#) to this opinion.
87. Section 9(2)(j) does not provide good reason to withhold all information relating to particular negotiations. It only protects information, disclosure of which would be so likely to prejudice or disadvantage the Minister or agency’s position in, or the integrity of the process of, actual or contemplated negotiations, that it is necessary to withhold that information. Whether such prejudice or disadvantage will occur will depend on:
- the precise nature of the information; and

⁵ *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, 391.

⁶ *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, 411.

- the relevance of that information to the actual issues under negotiation or contemplated negotiation.

Application of section 9(2)(j) to this case

88. The Ministry's decision, on 14 March 2013, to refuse the request made by NZEI cited only this ground as the basis for withholding the information sought.
89. Although the Ministry summarised its concern about disclosure affecting the negotiations by saying that the "*nature of the overall selection process*" needs to be "*orderly*", it did not explain how this concern translates into a belief that section 9(2)(j) provides good reason to withhold the names of IOI submitters.
90. When an agency subject to the OIA makes a claim for withholding under section 9(2)(j), the proximity and the relevance of the information at issue to the contemplated negotiations is a key consideration.
91. Here, when the Ministry refused the request on 14 March 2013, the contemplated negotiations between the Crown and the applicants (not the IOI submitters) were still some way in the future. The subsequent period for groups to submit applications did not close until 16 April 2013, and the Bill enabling the creation of partnership schools had not yet passed (it did so in June 2013). However, I am prepared to accept that the contemplated negotiations were reasonably proximate.
92. Nevertheless, it is clear that the information at issue was not generated for the purposes of the contemplated negotiations, which concern the applications to sponsor a partnership school. Rather, the IOI enabled the Partnership Schools Working Group to provide guidance to groups that had submitted an IOI. Consideration of the IOIs and negotiations on the applications are two distinct processes; there was no obligation on applicants to submit a prior IOI and I understand that around half did not. It is also clear that the issues to be negotiated between applicants and the Ministry will turn on the substance of the applications, not the identity of those previously interested. I do not accept that the mere identity of those who submitted an IOI is sufficiently relevant to the issues to be negotiated with applicants.
93. The Ministry of Education claims that section 9(2)(j) applies because disclosure of the names of IOI submitters will disadvantage some of the groups that have applied to sponsor a partnership school. In the view of the Ministry, the named applicants will be subject to lobbying or media attention, and will need to divert time and energy away from the negotiations over their applications. Conversely, those applicants who did not submit a prior IOI, and who are therefore not to be named, will enjoy an unfair advantage by not having to deal with media enquiries or lobbying.
94. But section 9(2)(j) applies to the Crown's ability to negotiate, and to any prejudice or disadvantage to the Crown's position. In short, prejudice to a partnership school applicant's ability to negotiate is not the harm which section 9(2)(j) addresses.

95. The Ministry is suggesting that an apparent disparity between the groups negotiating with the Crown will damage the integrity of the overall negotiation process, and that the damaged process will disadvantage the Crown.
96. However, the claimed justification for withholding must be weighed against the purposes of the OIA, which includes increasing the availability of official information to people to enable more effective participation in the making and administration of laws and policies (section 4(a)(i) of the OIA refers). Participation can legitimately include lobbying and media attention. The OIA should not be used as a shield in a negotiation process to avoid public pressure.
97. As mentioned above, the Ministry has provided no evidence that other groups which were identified by the Associate Minister of Education or the Ministry prior to commencement of the formal IOI period have been seriously inconvenienced. If, following their identification in Parliament and the media, these groups had found their work significantly hampered by the level of media inquiries or lobbying, the Ministry would doubtless be aware of the situation. The Ministry has provided no evidence of complaints of this nature from the relevant groups.
98. I therefore do not accept the Ministry's claim that disclosure of the names of IOI submitters would disadvantage or prejudice the Crown's ability to carry on the negotiations.
99. I conclude that section 9(2)(j) does not provide a reason for the Ministry to withhold the names of groups that submitted an IOI.

Information that will soon be publicly available – section 18(d)

General approach to this section

100. The full wording of section 18(d), which provides good reason for the withholding of information in certain circumstances, can be found in the [Appendix](#) to this opinion.
101. The Ombudsmen's *Practice Guidelines*, available on the Office website,⁷ explain some of the common issues arising in relation to a claim that information will soon be publicly available:

“What is meant by ‘soon’ in the context of section 18(d) ... is a question of fact to be determined in the circumstances of the case. The section presupposes, however, an element of certainty about when the information will become publicly available. In these circumstances, it is good practice to provide the

⁷ The *Practice Guidelines* can be accessed at:

<http://www.ombudsman.parliament.nz/resources-and-publications/guides/official-information-legislation-guides>

requester with a specific date of release or to explain the perceived difficulty in meeting the request immediately.

Section 18(d) should not be relied upon if to do so would undermine the purposes of the OIA. For example, it should not be used to delay the release of information which is intended to be incorporated in other material which, although to be made public at a later date, may still require the making of other policy decisions.”

Application of section 18(d) to this case

102. At the meeting on 17 April 2013, the Ministry indicated that it intended to publish further information about the selection of sponsors of partnership schools, but was not specific about what information would be published, or when it would do so.

103. In its email of 3 May 2013, the Ministry stated:

“We note that once decisions regarding Sponsors have been made, there is likely to be no need for ongoing protection of the advice on which that decision was based. We recognise that the release of relevant information after decisions are made may have the positive effect of explaining to the public the reasons why certain actions were taken (e.g. short-listing) and decisions made (e.g. the final decisions by the Minister).”

104. At Dr McGee’s meeting with the Acting Secretary for Education, Mr Hughes reiterated that the Ministry would publish further information relating to the selection of sponsors of partnership schools. Dr McGee explained that to substantiate a claim for withholding under section 18(d), the Ministry would need to be reasonably specific about its intentions. Mr Hughes said that he would write with more detail about the Ministry’s publication intentions.

105. In his email of 24 May 2013, Mr Hughes stated that the Ministry had always had the *“intention to make information available at the conclusion of the process”*. He also repeated the advice that *“once decisions on sponsors have been made, there is likely to be no need for ongoing protection of the advice and information on which those decisions were based”*. Mr Hughes added that he was *“undertaking to release information fulsomely at the end of the process”*.

106. In response to the provisional opinion, the Ministry advised on 18 June 2013 that the passage of the Education Amendment Bill had made it possible for the Ministry *“to be more definite about timeframes”*. Specifically, the Acting Secretary for Education stated:

“... the Ministry will make this information available, by way of a release on the Ministry website, on 31 July 2013. The information released will include the names of those organisations that submitted an Indication of Interest.”

107. While I acknowledge the intention to publish further information, and that this date is now imminent, the relevant issue is whether section 18(d) provided a reasonable ground for refusing the request on 14 March 2013.
108. On 14 March 2013, when the Ministry refused the request from NZEI, the 31 July 2013 date for publication was not in prospect, and there was no reasonably proximate date of proposed release. Section 18(d) should not be used to delay the release of information when publication is not imminent. To allow refusal in such cases would be to undermine the availability of official information to the public.
109. For these reasons, my opinion is that section 18(d) did not provide a reason for the Ministry to withhold the names of groups that submitted an Indication of Interest.

Public interest – section 9(1)

110. Having formed the opinion that, in terms of section 9, no good reason exists to withhold the information at issue, it is not necessary for me to consider whether there is a public interest in disclosure that outweighs any such reason. However, it is worth making a brief observation on the public interest issues involved, in light of the Ministry of Education statement that:

“We acknowledge the interest of the public and the media in knowing who the groups/proposed sponsors who have submitted an IOI are but we do not believe this necessarily translates into a strong public interest in release of this information at this stage in the process.”

111. I agree that information that is of interest to the public, or sections of the public such as the media, is not the same, in terms of section 9(1) of the OIA, as information that it is in the public interest to have placed in the public domain.
112. However, as Dr McGee noted in his opinion in case 328421,⁸ the proposal to create of a new type of school within the New Zealand educational system is a significant one. There is a strong public interest in the disclosure of information during the process of establishing such schools.
113. I do not accept the Ministry’s position that later disclosure of the information at issue will satisfy that public interest. Disclosure after the Minister has taken decisions on the applications may serve the public interest in accountability, but it would not satisfy the public interest in the public being informed, and being able to participate in the debate, about the creation of partnership schools prior to those decisions being taken. The partnership schools policy involves substantial public funds and significant changes to the way in which publicly funded education provision is controlled, managed and delivered.

⁸ See

http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/590/original/request_for_advice_received_concerning_partnership_charter_schools.pdf

I consider that a more informed public discourse about the creation of such schools is in the public interest.

Ombudsman's Opinion

114. For the reasons set out above, I have formed the opinion that no good reason exists to withhold the list of names of the 36 groups that submitted an Indication of Interest in sponsoring a partnership school.

Recommendation

115. I recommend that the Ministry of Education provide the requester with the names of the 36 groups that submitted an Indication of Interest in sponsoring a partnership school.
116. Under section 32 of the OIA, a public duty to observe an Ombudsman's recommendation is imposed from the commencement of the 21st working day after the date of that recommendation. This public duty applies unless, before that day, the Governor-General, by Order in Council, otherwise directs.

Appendix — Relevant statutory provisions

Official Information Act 1982

4. Purposes

The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—

- (a) to increase progressively the availability of official information to the people of New Zealand in order—
 - (i) to enable their more effective participation in the making and administration of laws and policies; and
 - (ii) to promote the accountability of Ministers of the Crown and officials,—and thereby to enhance respect for the law and to promote the good government of New Zealand:
- (b) n/a
- (c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

5. Principle of availability

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

6. Conclusive reasons for withholding official information

Good reason for withholding official information exists, for the purpose of section 5, if the making available of that information would be likely—

- (a) n/a
- (b) n/a
- (c) n/a
- (d) to endanger the safety of any person; or
- (e) n/a

9. Other reasons for withholding official information

- (1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.

- (2) Subject to sections 6, 7, 10, and 18, this section applies if, and only if, the withholding of the information is necessary to—
- (a) n/a
 - (b) protect information where the making available of the information—
 - (i) n/a; or
 - (ii) would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; or
 - (ba) 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 from 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; or
 - (c) n/a
 - (d) n/a
 - (e) n/a
 - (f) maintain the constitutional conventions for the time being which protect—
 - (i) n/a
 - (ii) n/a
 - (iii) n/a
 - (iv) the confidentiality of advice tendered by Ministers of the Crown and officials; or
 - (g) maintain the effective conduct of public affairs through—
 - (i) n/a
 - (ii) the protection of such Ministers, members of organisations, officers, and employees from improper pressure or harassment; or
 - (h) n/a
 - (i) n/a
 - (j) 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); or
 - (k) n/a

18 Refusal of requests

A request made in accordance with section 12 may be refused only for 1 or more of the following reasons, namely:

(a) n/a

(b) n/a

(c) n/a

(d) that the information requested is or will soon be publicly available:

...