

## Free and frank opinions

A guide to section 9(2)(g)(i) of the OIA and section 7(2)(f)(i) of the LGOIMA

*One reason for withholding official information is to maintain the effective conduct of public affairs through the free and frank expression of opinions—section 9(2)(g)(i) of the OIA.<sup>1</sup>*

*This section applies where release of the information at issue would inhibit the future exchange of free and frank opinions that are necessary for the effective conduct of public affairs.*

*This guide explains how section 9(2)(g)(i) applies, and includes a step-by-step worksheet and case studies of actual complaints considered by the Ombudsman.*

*There are some related guides that may help as well. Section 9(2)(g)(i) is subject to a **public interest test**. More information about how to apply that test can be found [here](#).*

*If you are concerned about the impact of disclosing **officials' advice to the Government**, see our guide on section 9(2)(f)(iv): [Confidential advice to government](#).*

*If you are concerned about the impact of disclosing information generated in the context of the **public policy making** process, see our guide on [The OIA and the public policy making process](#). It explains how sections 9(2)(f)(iv) **and** 9(2)(g)(i) can apply in that specific context.*

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<sup>1</sup> References to section 9(2)(g)(i) of the OIA should be taken as references to section 7(2)(f)(i) of the LGOIMA, as the wording and effect of these provisions is largely identical.

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## What the Acts say

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>2</sup>

Reasons for refusal fall into three broad categories: conclusive reasons,<sup>3</sup> good reasons,<sup>4</sup> and administrative reasons.<sup>5</sup> Among the ‘good reasons’, section 9(2)(g)(i) of the OIA (section 7(2)(f)(i) of the LGOIMA) applies where the withholding of official information is necessary to maintain the effective conduct of public affairs through the free and frank expression of opinions by, between, or to Ministers (in the case of the OIA) and people who are members, officers or employees of an agency in the course of their duty.<sup>6</sup>

‘Good reasons’ are subject to a ‘public interest test’, meaning that if they apply, agencies must consider the countervailing public interest in release. If the public interest in release outweighs the need to withhold, the information must be released. For more information on how to do the public interest test, see our guide [Public interest—A guide to the public interest test in section 9\(1\) of the OIA and section 7\(1\) of the LGOIMA](#).

## When section 9(2)(g)(i) applies

Section 9(2)(g)(i) is not about protecting free and frank opinions per se. It doesn’t apply just because the information comprises free and frank opinions. Section 9(2)(g)(i) is about **maintaining the effective conduct of public affairs** through the free and frank expression of opinions. It recognises that the effective conduct of public affairs requires the candid and unreserved expression of opinions, and that public exposure of those opinions can sometimes have a chilling effect on people’s willingness to express themselves openly, honestly and completely in future.

As the Committee that recommended the enactment of the OIA noted:<sup>7</sup>

*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*

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<sup>2</sup> See s 5 OIA and LGOIMA.

<sup>3</sup> See ss 6 and 7 OIA and s 6 LGOIMA. ‘Conclusive’ reasons are not subject to a ‘public interest test’, meaning that if they apply, there is no need to consider any countervailing public interest in release.

<sup>4</sup> See s 9 OIA and s 7 LGOIMA. ‘Good’ reasons are subject to a ‘public interest test’, meaning that if they apply, agencies must consider the countervailing public interest in release.

<sup>5</sup> See s 18 OIA and s 17 LGOIMA. ‘Administrative’ reasons for refusal are not subject to a ‘public interest test’, meaning that if they apply, there is no need to consider any countervailing public interest in release.

<sup>6</sup> ‘Agency’ or ‘agencies’ is a catch-all term used in this guide to cover all the Ministers, departments, organisations and local authorities that are subject to the OIA or LGOIMA.

<sup>7</sup> Committee on Official Information. *Towards Open Government: General Report* (December 1980) at 19.

*could become less open and, perhaps, more arbitrary.*

Therefore, section 9(2)(g)(i) applies when:

- release of the information at issue would inhibit the future exchange of free and frank opinions (see [Will release inhibit free and frank opinions in future?](#)); and
- that inhibition would prejudice the effective conduct of public affairs (see [Will inhibition prejudice the effective conduct of public affairs?](#)).

## What kind of information is protected?

The information at issue doesn't have to be *'free and frank opinions'* in order to qualify for protection under section 9(2)(g)(i). The key issue is whether release of the information—whatever its nature and content—would inhibit the exchange of free and frank opinions in future.

However, [the nature and content of the information](#) at issue is one factor to be considered in assessing the likelihood that disclosure would inhibit the future exchange of free and frank opinions. If some or all of the information is not opinion-material, or the opinions are expressed in measured and moderate rather than free and frank terms, disclosure may be less likely to have an inhibiting effect. In such cases, an agency may need to point to other factors, such as [the context in which the information was generated](#), or the [relationship between the opinion holder and their intended audience](#), to establish the likelihood of inhibition arising as a result of disclosure.

## Whose opinions can be protected?

Section 9(2)(g)(i) protects opinions **by, between or to** Ministers (in the case of the OIA) and people who are members, officers or employees of an agency. It therefore protects the exchange of opinions **within** an agency, or the government more generally, and **to** an agency by external parties.

### Advice by officials to Government

Officials are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Under the code of conduct for the state services—*Standards of Integrity and Conduct*—they are required to be professional, and to support their organisation to provide robust and unbiased advice. The guidance underpinning the code of conduct further states that advice must be honest, impartial, comprehensive and objective.<sup>8</sup>

The imperative to provide free and frank advice to Ministers is also reflected in the State Sector Act 1988, which (following amendment in 2013), makes departmental chief executives responsible for tendering free and frank advice to Ministers, and for the overall stewardship of their department, including its capacity to offer free and frank

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<sup>8</sup> To view the code of conduct and supporting guidance visit [www.ssc.govt.nz](http://www.ssc.govt.nz).

advice to successive governments.<sup>9</sup> The State Services Commissioner has issued guidance on free and frank advice under the State Sector Act.<sup>10</sup>

While this context is important, it does not necessarily mean that everything done by an official in the course of their duty should be open to public scrutiny. There may be a need for temporary protection of officials' advice to the government to enable the orderly and effective conduct of government decision making processes (see our [guide on section 9\(2\)\(f\)\(iv\)](#)). There may also be a need to protect some of the early and informal work that goes into developing advice to government. That work is essential to the quality of the advice that is ultimately tendered, and its disclosure may have a chilling effect on how advice is developed in future (see our guide on [the OIA and the public policy making process](#)).

## Will release inhibit free and frank opinions in future?

The following factors should be considered when deciding whether the release of information would inhibit the exchange of free and frank opinions in future.

### The nature and content of the information

- To what extent does the information contain opinion material? An *'opinion'* is the expression of a view or judgment not necessarily based on fact or knowledge. Release of information that is not in the nature of an opinion may be less likely to have an inhibiting effect.
- Are the opinions free and frank, or expressed in moderate and measured terms? *'Free and frank'* means open, forthright, unreserved, outspoken, sincere, honest, straightforward, blunt and undisguised. Release of opinions that are not free and frank in nature may be less likely to have an inhibiting effect.
- What is the subject of the information? What does the content of the information actually reveal? Are there any factors, such as the sensitivity or controversy of the information, that make the future inhibition of opinions more likely?
- Is there any background, factual, statistical or technical material; or information that is already known or otherwise publicly available? Release of such information is unlikely to

<sup>9</sup> See ss 32(1)(c) and (f) State Sector Act.

<sup>10</sup> See *Free and Frank Advice & Policy Stewardship*, available at <https://www.ssc.govt.nz/sites/all/files/free-and-frank-advice-dec2017.pdf>.

	<p>prejudice the future exchange of free and frank opinions. If it is severable from the opinion material that is of concern, there may be a basis for partial release.</p>
<p><b>The context in which the information was generated</b></p>	<ul style="list-style-type: none"> <li>• Was the information part of a considered consultative process, or the early stages of developing drafts?</li> <li>• Was it conveyed formally, or was it informal and ‘off-the-cuff’ advice conveyed under pressure of time (see case <a href="#">304314</a>)?</li> <li>• Early and informal drafts and working papers, and advice conveyed under pressure of time, may be more ‘<i>free and frank</i>’ in nature, and more likely to require protection. In contrast, agencies may be expected to stand by their best and most-considered final advice on the matter (see cases <a href="#">437269</a> and <a href="#">334056</a>).</li> <li>• Sometimes the type of communication can reflect the relative formality of the context. For example, recollections or handwritten notes of discussions may raise different considerations to final and agreed minutes. Emails are often (but not always) of a more informal and hurried nature than formal correspondence and reports.</li> <li>• Simply calling something a ‘<i>draft</i>’ does not invoke the protection of section 9(2)(g)(i). An objective assessment must be made in the circumstances as to whether a document really is a ‘<i>draft</i>’, and if so, what the impact will be on the future exchange of free and frank opinions if it is disclosed. See cases <a href="#">387942</a> and <a href="#">175782</a>.</li> </ul>
<p><b>Who generated or supplied the information</b></p>	<ul style="list-style-type: none"> <li>• Who generated or supplied the information? What is the likelihood that disclosure would make that person or class of persons less likely to generate similar information in future?</li> <li>• Is the source of the information attributed or identifiable? If not, disclosure may be less likely to inhibit them or those in a similar situation from expressing free and frank opinions in future (see cases <a href="#">437269</a>, <a href="#">346787</a> and <a href="#">398302</a>).</li> <li>• Does the person who generated the information think they would feel inhibited in future if the information is disclosed? Consider consulting them to find out their views. Others in a similar situation in future may feel assured by knowing disclosure only occurred previously after the person who generated the information gave their consent.</li> <li>• Individuals expressing their personal opinions may feel more</li> </ul>

	<p>inhibited than collectives expressing an organisational view (for example, agencies, unions, special interest groups, companies).</p> <ul style="list-style-type: none"> <li>• Junior people may feel more inhibited than senior and experienced people. Senior people can be expected to stand by their opinions, and to continue to express themselves freely and frankly in future (see cases <a href="#">334056</a>, <a href="#">357948</a>, <a href="#">177320</a> and <a href="#">W49874</a>).</li> <li>• As noted above (see <a href="#">Advice by officials to Government</a>), officials are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure.</li> <li>• Consultants that have been commissioned because of their skill and professional expertise in a particular area are unlikely to be deterred from providing free and frank opinions in future. This would be detrimental to the conduct of their business (see cases <a href="#">346787</a> and <a href="#">175782</a>).</li> <li>• Lobbyists, who are seeking to further the aims and agenda of those they represent by influencing policy and decision making processes, are also unlikely to be deterred from future involvement (see case <a href="#">302561</a> and <a href="#">302600</a>).</li> </ul>
<p><b>The relationship between the opinion holder and their intended audience</b></p>	<ul style="list-style-type: none"> <li>• Is advice or opinion usually conveyed between these parties in a formal manner, or is it often expressed in an informal and frank fashion?</li> <li>• If advice is usually conveyed informally, will release of the information at issue damage such an informal and frank relationship in the future? In other words, is the concern to protect the channel of communication that exists between the parties to the exchange?</li> </ul>

### The timing of the request

- Is the issue to which the information relates still live or has it been concluded? Release of information about a live issue may be more likely to prejudice the free and frank exchange of opinions in the course of dealing with that issue.
- If the issue to which the information relates has concluded, how much time has passed since it was concluded? The older the information, the less likely it is to have an inhibiting effect if disclosed.
- Case [177320](#) discusses the effect of the passage of time and change of circumstances on the need for withholding under section 9(2)(g)(i).

## Will inhibition prejudice the effective conduct of public affairs?

The effective conduct of ‘public affairs’<sup>11</sup> requires that:

- Ministers and agencies are able to do their jobs, and make decisions based on the best information and advice possible;
- the reasons for decisions, including the information and advice on which they were based, are adequately recorded.

The effective conduct of public affairs can be prejudiced if:

- Ministers and agencies don’t get the information and advice they need to do their jobs and make good decisions;
- Ministers and agencies get some information and advice, but it’s not as open, honest or complete as it could be, making it harder for them to do their jobs and make good decisions; or
- the information and advice is received orally rather than in writing—again making it harder for agencies to do their jobs and make good decisions, and to hold them to account for the decisions they have made.

Agencies must be able to explain why they need the information, and how not receiving it, or not receiving the complete and unreserved version of it, or not receiving it in writing, will impact on their ability to do their jobs and make good decisions.

The information itself must be **necessary** for the effective conduct of public affairs not **detrimental** to it. An example of a case where the Ombudsman considered the information at

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<sup>11</sup> The term ‘public affairs’ should be interpreted widely. It can be assumed that all agencies subject to the OIA and LGOIMA are to some extent involved in public affairs.



issue was not necessary for the effective conduct of public affairs is case [173243](#), which concerned the withholding of transcripts of Police communications in relation to emergency calls.

### Oral versus written opinions

The provision of information and advice orally rather than in writing is not always to the detriment of the effective conduct of public affairs. In some cases, it is to the benefit of the effective and efficient conduct of public affairs, being the quickest and most direct means of conveying the information and advice.

Provision of information and advice orally is also no means of circumventing the application of the OIA or LGOIMA, which apply to **any information held** by an agency, regardless of whether it has been reduced to writing.<sup>12</sup> An agency that receives a request for unrecorded information is still required to provide that information, usually by reducing it to writing, unless there is ‘*good reason*’ under the Act for withholding it (see case [276248](#)).

There are situations, however, where a reluctance to reduce information and advice to writing can be expected to prejudice the effective conduct of public affairs. For example, when decision makers are dealing with complex situations, and there is a risk that they could misunderstand or misinterpret information and advice provided orally, and where time for reflection and the ability to return to the advice before reaching a decision is warranted.

Arguments that information and advice will not be reduced to writing if information is disclosed in response to an OIA or LGOIMA request will be carefully scrutinised, given the statutory requirement for agencies to create and maintain full and accurate records of their affairs in accordance with normal, prudent business practice.<sup>13</sup>

## Common situations where section 9(2)(g)(i) has applied

The following are some common situations where section 9(2)(g)(i) has been found to apply.

- Information generated in the early stages of policy development, such as exploratory (‘*blue skies*’) thinking or discussions—for more information, see [The OIA and the public policy making process](#)
- Discussions between Ministers on business before Cabinet—see case [175624](#)
- Discussions between Ministers and Chief Executives—see cases [276248](#) & [365853](#)

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<sup>12</sup> See s 2 definition of ‘*official information*’ OIA and LGOIMA.

<sup>13</sup> See s 17(1) Public Records Act 2005.

- Records of meetings convened to coordinate the response to a crisis situation—see case [178451](#)
- Opinion material contained in working papers and drafts generated by auditors—see cases [174281](#) and [176579](#) (note, protection has not generally extended to final audit reports—see cases [387942](#) and [437269](#))
- Communications strategies and media lines—see case [310983](#)
- Draft briefings to the incoming government—see case [173358](#)
- Draft ministerial correspondence—see case [407773](#)
- Communications between Ministers and the Cabinet Office regarding conflicts of interest—see case [282242](#)
- Comments generated during the OIA decision making process—see case [313287](#)

## Mitigating the harm in release

Before refusing a request under section 9(2)(g)(i) agencies should consider whether there are any ways of mitigating the harm in release. These same ways may enable an agency to address the public interest in release (see our guide to the [public interest test](#) for more information).

For example:

- Partial release of the information requested. Can some of the information be released without harm because it is not opinion material; or is not expressed in free and frank terms; or is background, factual, statistical or technical material; or is information that is already known or otherwise publicly available? Would redacting information that identifies the supplier of the information ensure that it continues to be supplied in full, free and frank terms in future?
- Release of summary information. If the concern is the way in which the information is expressed, or to protect the context in which the information was generated, can a summary of that information be released?
- Release of final documents. If the concern is to protect the ability of people to generate and express opinions while drafting documents, can final documents be released?

## Further information

[Appendix 1](#) of this guide has a step-by-step worksheet on the application of section 9(2)(g)(i).

[Appendix 2](#) has case studies illustrating the application of section 9(2)(g)(i).

Related guides include:

- [The OIA for Ministers and agencies](#) and [The LGOIMA for local government agencies](#)
- [Public interest](#)
- [Confidential advice to Government](#)
- [The OIA and the public policy making process](#)

Our website contains searchable case notes, opinions and other material, relating to past cases considered by the Ombudsmen: [www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz).

You can also contact our staff with any queries about the application of section 9(2)(g)(i) by email [info@ombudsman.parliament.nz](mailto:info@ombudsman.parliament.nz) or freephone 0800 802 602. Do so as early as possible to ensure we can answer your queries without delaying your response to a request for official information.

## Appendix 1. Step-by-step worksheet

<p><b>1. Would release inhibit the future exchange of free and frank opinions?</b></p> <p>Relevant part of guide: <a href="#">Will release inhibit free and frank opinions in future?</a></p>	<ul style="list-style-type: none"> <li>• Consider: <ul style="list-style-type: none"> <li>- The <a href="#">nature and content of the information</a></li> <li>- The <a href="#">context in which it was generated</a></li> <li>- <a href="#">Who generated or supplied the information</a></li> <li>- The <a href="#">relationship between the opinion holder and their intended audience</a></li> <li>- The <a href="#">timing of the request</a></li> </ul> </li> </ul>
<p><b>2. Would that inhibition prejudice the effective conduct of public affairs?</b></p> <p>Relevant part of guide: <a href="#">Will inhibition prejudice the effective conduct of public affairs?</a></p>	<ul style="list-style-type: none"> <li>• Will release mean: <ul style="list-style-type: none"> <li>- the agency doesn't get this information in future?</li> <li>- the agency doesn't get complete and unreserved information in future?</li> <li>- the information is provided orally rather than in writing?</li> </ul> </li> <li>• Why does the agency need the information?</li> <li>• What will be the impact on the agency's ability to do its job or make good decisions?</li> </ul>
<p><b>3. Apply the public interest test</b></p>	<ul style="list-style-type: none"> <li>• See <a href="#">Public interest—A guide to the public interest test in section 9(1) of the OIA and section 7(1) of the LGOIMA</a>.</li> </ul>
<p><b>4. Consider ways of mitigating the harm in release</b></p> <p>Relevant part of guide: <a href="#">Mitigating the harm in release</a></p>	<ul style="list-style-type: none"> <li>• Can the information be released in part?</li> <li>• Can a summary of the information be released?</li> <li>• Can other information be released, eg key documents and final papers?</li> <li>• This may help to minimise the potential harm and/or address the public interest in release.</li> </ul>
<p><b>5. Consider whether to refuse the request</b></p>	<ul style="list-style-type: none"> <li>• If withholding is necessary to maintain the effective conduct of public affairs through the free and frank expression of opinions, and the need to withhold is not outweighed by the public interest, then it is open to the agency to refuse the request.</li> <li>• See our template <a href="#">Letter communicating the decision on a request</a></li> </ul>

## Appendix 2. Case studies

These case studies are published under the authority of the [Ombudsmen Rules 1989](#). They set out an Ombudsman's view on the facts of a particular case. They should not be taken as establishing any legal precedent that would bind an Ombudsman in future.

### Index

Cases illustrating when section 9(2)(g)(i) applied		
Case number	Year	Subject
407773	2016	<a href="#">Draft ministerial correspondence</a> <i>Disclosure of draft ministerial correspondence and associated emails between officials would inhibit future expression of free and frank opinions</i>
368244	2014	<a href="#">Pre-Cabinet précis briefings</a> <i>Disclosure of short and incisive pre-Cabinet briefings and risk assessments would inhibit future expression of free and frank opinions</i>
276248 & 365853	2007 & 2014	<a href="#">Minister/Chief Executive discussions</a> <i>Disclosure of recollections of discussions between Ministers and their Chief Executives would inhibit future expression of free and frank opinions—summary disclosed in one case</i>
338921	2013	<a href="#">Draft document on Starting Price Adjustment Input Methodology</a> <i>Disclosure of draft document would inhibit future expression of free and frank opinions between Commerce Commissioners and staff</i>
329595	2012	<a href="#">Email communications between councillors relating to industrial dispute (LGOIMA)</a> <i>Disclosure of informal emails between councillors in highly sensitive context would inhibit future expression of free and frank opinions</i>
313287	2012	<a href="#">Comments generated during the OIA decision making process</a> <i>Disclosure would inhibit advisors or officials from expressing or recording free and frank advice on OIA requests in the future</i>

310983	2012	<p><a href="#">Communications strategy relating to legal aid reforms</a></p> <p><i>Background/factual information released—disclosure of opinion material would cause communications staff to become unduly cautious and conservative in their advice, which would be detrimental to the effectiveness of such advice</i></p>
282242	2012	<p><a href="#">Information about ministerial conflicts of interest</a></p> <p><i>Disclosure of ministerial declarations of interest and correspondence between Ministers and Cabinet Office would inhibit future expression of free and frank opinions between Ministers and the Cabinet Office, and undermine the effectiveness of the system for managing conflicts of interest</i></p>
306037	2011	<p><a href="#">Internal complaint assessment memorandum</a></p> <p><i>Disclosure of preliminary complaint assessment memo would make complaints assessment staff reluctant in future to fully express their views in writing</i></p>
293216	2011	<p><a href="#">Internal discussion paper on privatisation</a></p> <p><i>Disclosure of early internal discussion paper on sensitive issue would inhibit future expression of free and frank opinions by officials</i></p>
178451	2011	<p><a href="#">Crisis group reports and working material regarding review of response to hostage taking</a></p> <p><i>Disclosure of crisis group reports prepared under pressure of time in sensitive context, and working material regarding review of response to hostage taking, would inhibit future expression of free and frank opinions by officials—Final review report released</i></p>
304314	2011	<p><a href="#">Ministerial briefing on Auckland CBD rail loop</a></p> <p><i>Disclosure of ministerial briefing conveyed under pressure of time would inhibit future expression of free and frank opinions by officials</i></p>
312348 & 313008	2011	<p><a href="#">Draft documents, internal emails, handwritten meeting notes regarding the Government's response to a Law Commission discussion paper</a></p> <p><i>Disclosure of draft documents, internal emails and handwritten meeting notes would inhibit future expression of free and frank opinions by officials</i></p>

176579	2010	<p><a href="#">Audit staff notes</a></p> <p><i>Disclosure of early and informal working papers would make auditors more circumspect in what they record, and when and how they record it—compare with <a href="#">387942</a>, evaluation and audit reports regarding extended supervision orders, and <a href="#">437269</a>, final audit/operational review in relation to Spring Hill prisoner riot</i></p>
174281	2010	<p><a href="#">Auditor's working papers</a></p> <p><i>Disclosure of auditor's scoping discussions and working papers would make auditors more circumspect in what they record, and when and how they record it—compare with <a href="#">387942</a>, evaluation and audit reports regarding extended supervision orders, and <a href="#">437269</a>, final audit/operational review in relation to Spring Hill prisoner riot</i></p>
177320	2009	<p><a href="#">Report on DHB governance issues</a></p> <p><i>Disclosure of report at time of request would have inhibited expression of free and frank opinions by officials—but passage of time and change in circumstances had diminished the likelihood of such prejudice—senior public servants would not be inhibited from expressing free and frank opinions in future</i></p>
175624	2008	<p><a href="#">Discussions between Ministers on business before Cabinet</a></p> <p><i>Discussions between Ministers on business before Cabinet imbued with a presumption of confidentiality</i></p>
173358	2006	<p><a href="#">Draft briefings to the incoming government</a></p> <p><i>Disclosure of draft briefings to the incoming government would make officials reluctant to be so free and frank in expressing their initial and untested views and cause them to prefer less efficient and transparent verbal exchanges</i></p>
W48162	2003	<p><a href="#">Comments on early draft Cabinet papers</a></p> <p><i>Disclosure of informal inter-agency consultation under pressure of time would inhibit future expression of free and frank opinions by officials</i></p>

Cases illustrating when section 9(2)(g)(i) did not apply		
Case number	Year	Subject
437269	2017	<p><a href="#">Final audit/operational review in relation to Spring Hill prisoner riot</a></p> <p><i>Disclosure of final audit report, in which the sources of information were not attributed or identifiable, would not inhibit future expression of free and frank opinions—compare with <a href="#">176579</a>, audit staff notes and <a href="#">174281</a>, auditor’s working papers</i></p>
416215	2017	<p><a href="#">Police tactical operations report</a></p> <p><i>Disclosure of thorough and professionally written tactical operations report would not inhibit future expression of free and frank opinions</i></p>
398302	2016	<p><a href="#">Staff survey results</a> (LGOIMA)</p> <p><i>Disclosure of staff survey results, in which the sources of information were not attributed or identifiable, would not inhibit future staff participation</i></p>
387942	2016	<p><a href="#">Evaluation and audit reports regarding extended supervision orders</a></p> <p><i>Document labelled ‘draft’ really a final—information not in the nature of free and frank opinions—disclosure would not inhibit future expression of free and frank opinions—compare with <a href="#">176579</a>, audit staff notes and <a href="#">174281</a>, auditor’s working papers</i></p>
334056	2015	<p><a href="#">Final advice to Ministers on applications under the Overseas Investment Act</a></p> <p><i>Disclosure of measured and moderate final advice to Ministers by senior public servant would not inhibit future expression of free and frank opinions</i></p>
346787	2015	<p><a href="#">Final report prepared by consultant in relation to MOTAT</a> (LGOIMA)</p> <p><i>Disclosure of final report prepared by external consultants, in which the sources of information were not attributed or identifiable, would not inhibit future expression of free and frank opinions</i></p>
357948	2014	<p><a href="#">Minutes of Council workshops</a> (LGOIMA)</p> <p><i>Partial disclosure of minutes of Council workshop would not inhibit elected representatives from expressing free and frank opinions in future</i></p>



302561 & 302600	2013	<p><a href="#">Submissions and comments to Ministers by film industry third parties in relation to film production, and <i>The Hobbit</i></a></p> <p><i>Lobbyists would not be deterred from expressing opinions for their own benefit in future</i></p>
179363	2009	<p><a href="#">Public submissions on draft standard</a></p> <p><i>Members of the public with a vested interest in developing standards would not be deterred from expressing their opinions in future</i></p>
175782	2007	<p><a href="#">‘Draft’ report prepared by consultant</a></p> <p><i>Document labelled ‘draft’ really a final—author was a consultant who would not be deterred from expressing free and frank opinions in future</i></p>
173243	2007	<p><a href="#">Transcripts of Police communications in relation to emergency calls by Iraena Asher</a></p> <p><i>Information detrimental to, not necessary for, the effective conduct of public affairs</i></p>
W49874	2003	<p><a href="#">Names and email addresses of people consulted on draft speech</a></p> <p><i>Disclosure would not inhibit senior public servants from expressing free and frank opinions in future</i></p>

## Cases illustrating when section 9(2)(g)(i) applied

### Case 407773—Draft ministerial correspondence

The requesters sought information held by the Ministry of Justice about their request to the Minister of Justice to establish a Commission of Inquiry into the Peter Ellis case. The Ministry released some information, but withheld drafts of a letter sent to the requesters by the Minister, and emails about the draft. The requesters complained to the Ombudsman, suggesting they were entitled to see the draft of a letter to them.

The Ministry explained the rationale for withholding was *‘to allow a safe forum for officials to debate and put forward various ideas on topical issues for the Minister to consider, thereby ensuring the Minister receives robust and frank advice from officials’*.

The Chief Ombudsman observed that the emails showed officials going about their work in an open and frank way, ultimately settling on the form of the wording to be sent to the requesters, reflecting the Minister’s opinion that there was no justification for a Commission of Inquiry. The Chief Ombudsman was satisfied that the release of the information would inhibit the future free and frank expression of opinions by officials to Ministers. You can read the full opinion [here](#).

The Chief Ombudsman’s approach in this case reflects a well-established line on draft ministerial correspondence. It is a proper and everyday function of public servants to draft ministerial correspondence, and it is important that officials do not feel constrained in the provision of such advice, and that Ministers continue to seek the advice of their departments. Releasing such advice would be likely to prejudice the freedom of Ministers to determine the manner in which their correspondence should be answered. Primary accountability for the correspondence rests with the Minister.

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### Case 368244 (2014)—Pre-Cabinet précis briefings

A requester sought information about the Tukituki catchment and Ruataniwha Dam, and complained about the Minister for Primary Industries’ decision to withhold four pre-Cabinet précis briefings. These were short briefings prepared for the Minister in advance of Cabinet meetings on agenda items relevant to the Minister’s portfolio. The requester complained to the Ombudsman.

The Ombudsman characterised the information as *‘short and incisive documents conveying a full range of advice, including risk assessments’*, in a direct and unvarnished manner. The advice conveyed a clear message, without the careful wording officials would generally adopt if aware of the possibility that the advice would be disclosed. The need to withhold the précis arose not so much from the content, but from the purpose and the context in which they were generated.

In the Ombudsman’s opinion, if documents of this nature were disclosed, advisors or officials in a similar position in the future would feel constrained in their advice and

would either opt to convey their advice in an informal and undocumented way or would couch it in a much less frank and incisive manner. The Ombudsman was persuaded that disclosure of the information would inhibit officials from communicating with the Minister in a free and frank manner in the future, and that such a result would prejudice the effective conduct of public affairs by affecting both the quality of decisions made and also the quality of the public record.

The Ombudsman acknowledged that the Tukituki catchment proposal had generated a significant amount of public and political interest. However, having reviewed the information at issue, he did not consider that the public interest in disclosure outweighed the need to withhold.

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### Cases 276248 (2007) & 365853 (2014)—Minister/Chief Executive discussions

#### **276248—Recollection of discussion between MSD Chief Executive and Minister of Social Development**

In 2009, the Minister of Social Development released the benefit details of two beneficiaries who had criticised the Government’s policy of abolishing the Training Incentive Allowance. She was questioned in Parliament about the advice she had received from her Chief Executive in relation to that decision. She stated *‘he certainly acknowledged that I had made that judgment call and that he backed me on that’*. An OIA request was made for the Chief Executive’s recollection of that discussion. The requester complained to the Chief Ombudsman when that request was refused under section 9(2)(g)(i).

The Chief Ombudsman commented:

*It is in the interests of the effective conduct of public affairs that a Minister has confidence that he or she is able to initiate discussions with his or her departmental chief executive on sensitive topical issues and that they are able to exchange ideas and make comments in a robust and frank way.*

She considered that disclosure of the full record of the Chief Executive’s recollection of his discussion with the Minister would impede the free and frank exchange of opinions between these parties.

However, she put to the Chief Executive that a summary of the recollection could be disclosed. This would protect the channel of communication between the Chief Executive and Minister, whilst also promoting the accountability of the Minister. The Chief Executive accepted this and a summary was disclosed. The Chief Ombudsman formed the final opinion that there was good reason under section 9(2)(g)(i) of the OIA to withhold the full record.

### **365853—Handwritten notes of discussion between MFAT Chief Executive and Minister of Foreign Affairs**

In 2012 the State Services Commission commenced an inquiry under the State Sector Act into the unauthorised disclosure of information related to the Ministry of Foreign Affairs and Trade (MFAT). A lawyer for one of the parties implicated in that investigation sought information about the MFAT Chief Executive's discussions with the Minister of Foreign Affairs about the inquiry. He complained to the Ombudsman when that request was refused under section 9(2)(g)(i).

The information at issue comprised handwritten notes of the Chief Executive's discussions with the Minister. The discussions took place in the context of the Chief Executive's routine, informal discussions with the Minister on matters affecting the Ministry's business.

The Chief Ombudsman accepted that for a relationship to function effectively between a Minister and Chief Executive there must be an expectation that, for the most part, and barring situations giving rise to strong public interest considerations, these one-on-one discussions can be conducted in private. In her opinion, disclosure of the information at issue had the potential to undermine the Minister/Chief Executive relationship, as neither party would have absolute confidence that they could raise issues during these conversations in an open and direct manner. The parties would be reticent about whether they should even raise particular issues, in case a record of the conversation might become public. Furthermore, the practice of note-taking would likely be abandoned or curtailed and this would not be conducive to the effective conduct of public affairs. The application of section 9(2)(g)(i) did not turn on the content of these discussions. Often the discussion may not be particularly contentious but that is not an essential requirement of section 9(2)(g)(i). The fundamental rationale for the application of this provision to this type of discussion between Ministers and their chief executives was an acceptance that confidentiality is necessary to protect the ongoing effectiveness and conduct of the relationship.

The Chief Ombudsman distinguished the earlier case ([276248](#)), in which a summary of the discussion was disclosed in order to promote the accountability of the Minister. The circumstances were different in this case, and the Chief Ombudsman did not consider that there was a public interest in disclosure sufficient to outweigh the damage it would cause to the section 9(2)(g)(i) interest made out in this case. She concluded that section 9(2)(g)(i) provided good reason to withhold the notes.

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### **Case 338921 (2013)—Draft document on Starting Price Adjustment Input Methodology**

The Electricity Networks Association (ENA) requested the Commerce Commission's draft methodology for adjusting the starting price for electricity lines and gas pipeline services. The ENA complained to the Ombudsman when this request was refused under section

9(2)(g)(i).

The Ombudsman noted that the document at issue was still in draft form, containing over 400 annotations, some of which related to formatting and typographical errors, and some of which were more significant, reflecting the annotators' differences of opinion about whether the draft was appropriately or correctly expressed. It was clear from the annotations that Commission staff members were freely and frankly expressing their opinions to each other on the draft. They were still in the process of refining that document. Such refinement was necessary for the effective conduct of public affairs. It enabled better drafting of documents, and could reasonably be expected to lead to better decisions by the Commission on matters of very significant public interest.

The Ombudsman was satisfied that the release of the information at issue would have an inhibiting effect on the free and frank expression of opinions by and between members of the Commission and staff in the course of their duties. The Ombudsman acknowledged the public interest in the ENA and gas and electricity consumers being able to participate in the Commission's decision making process. However, he was not persuaded that this outweighed the need to withhold the information because:

- the draft had not been approved by the Commission; it represented expressions of opinion by staff members, not the Commission's own opinion;
- Commission staff should be able to exchange views among themselves on draft documents and contribute without inhibition to the final document that emerges after Commission consideration; and
- the information was still very much in a draft form and would have required considerable refinement before it was in a form suitable for approval by the Commission.

The Ombudsman formed the final opinion that section 9(2)(g)(i) of the OIA provided good reason to withhold the draft. You can read the full opinion [here](#).

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### Case 313287 (2012)—Comments generated during the OIA decision making process

The former Child, Youth and Family Service withheld five case note entries containing discussion of the decision to be taken on an OIA request, and the requester complained to the Ombudsman.

The Chief Ombudsman explained that a general principle had emerged from a line of cases that comments during the decision making process on OIA requests may be withheld under section 9(2)(g)(i). Disclosure would be likely to inhibit advisors or officials from expressing or recording free and frank advice on OIA requests in the future. It is in the interests of the effective conduct of public affairs for there to be no constraint in either the discussion or recording of the reasons or recommendations for making

decisions on OIA requests.

Regarding the question of countervailing public interest considerations favouring disclosure of the material at issue, one might suggest that disclosure would serve a public interest in ensuring decision makers are accountable for the decisions they make on OIA requests. However, this interest is served because the mechanism exists for an Ombudsman's independent investigation and review of such decisions.

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### Case 329595 (2012)—Email communications between councillors relating to industrial dispute

A requester complained to the Chief Ombudsman when their request for communications between Auckland City Councillors in relation to the industrial dispute between Council-owned company Ports of New Zealand and the Maritime Union was refused. Part of the industrial dispute related to redundancies that would be occasioned as a result of the company's decision to contract out its services to casual workers.

The Chief Ombudsman described the information at issue as relatively informal emails exchanged between councillors following the contracting-out decision. The emails did not represent the considered view of Council but the *'sharing of free and frank opinion about the redundancies'*.

The Chief Ombudsman formed the opinion that section 7(2)(f)(i) of the LGOIMA provided good reason to withhold the emails. There was a real and substantial risk that disclosure would make councillors more reluctant in future to express their views openly in this manner, which would prejudice the effective conduct of public affairs. The need for confidentiality was heightened by the highly sensitive context in which the communications took place. The public interest in disclosure did not outweigh the need to withhold the information in order to protect the free and frank exchange of opinions between councillors. The public interest was met by the disclosure of relatively detailed media releases about the progress of the dispute.

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### Case 310983 (2012)—Communications strategy relating to legal aid reform

A requester sought information about the Ministry of Justice's communications strategy for the announcement of legal aid reforms, and complained to the Ombudsman when that request was refused under section 9(2)(g)(i). The information at issue included a draft communications plan, a run sheet and an email relating to implementation of the run sheet.

The Ombudsman noted that while section 9(2)(g)(i) can provide good reason for withholding a communications strategy, it is still necessary to consider the information at issue in each case. He asked the Ministry to consider:

- which passages constituted free and frank opinions, and why disclosure would be likely to inhibit the free and frank expression of such opinions in future;
- whether any of the information at issue could be considered to be background and/or factual information that could be separated from the expressions of opinion and made available; and
- whether any of that background and/or factual information was already in the public arena.

After further consideration, the Ministry agreed to release everything barring two sentences. It said that disclosure of these sentences could cause communications staff to become unduly cautious and conservative in their advice, which would be detrimental to the effectiveness of such advice.

The Ombudsman agreed that withholding of the two sentences was justified. It is appropriate for government to adopt the communications strategy that it considers most desirable in any particular context. If disclosure of the reason or reasons for that strategy is likely to undermine it, even if disclosure is made after the planned announcements have occurred, this would prejudice *‘the effective conduct of public affairs’* within the meaning of section 9(2)(g)(i). Such disclosure would inhibit officials and others in forming views related to communications strategies and, this in turn, would affect their ability to handle sensitive issues effectively, as any efforts could be negated at a later stage.

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### Case 282242 etc (2012)—Information about ministerial conflicts of interest

A number of requesters sought information from the Department of the Prime Minister and Cabinet (DPMC) about ministerial conflicts of interest. The requests were refused on numerous grounds and the requesters complained to the Chief Ombudsman. The Chief Ombudsman formed the opinion that section 9(2)(g)(i) applied to the following types of information:

- declarations of interest made by Ministers at Cabinet and Cabinet Committee meetings; and
- correspondence between Ministers and the Cabinet Office about actual or potential conflicts of interest.

#### **Declarations of interest made by Ministers**

The Chief Ombudsman accepted that disclosure of the requested declarations would be likely to result in a diminution of candour and an increased risk that items would not be brought to Cabinet but discussed elsewhere, so that the preparation for decisions, discussion at Cabinet and consequently the quality of decision making would be impaired. In the Chief Ombudsman’s opinion, there was a public interest in Cabinet considering as a whole how to deal with an interested Minister, including whether the

interest is of such gravity as to require recusal or not.

The Chief Ombudsman acknowledged the countervailing public interest in disclosure to promote the accountability of Ministers. While the competing considerations in favour of withholding and disclosure were *'finely balanced'*, the public interest in disclosure did not outweigh the *'harm that would be done to the Cabinet decision-making system in New Zealand'*. In coming to this view, she took into account that Ministers are already subject to a range of accountability mechanisms, including the Ombudsman (under the OIA), the Auditor-General, the courts and Parliament, as well as through the routine release of Cabinet minutes, and through the Register of Pecuniary Interests of Members of Parliament.

### **Correspondence between Ministers and the Cabinet Office**

The Chief Ombudsman accepted that disclosure of the requested correspondence would inhibit Ministers from placing on the record concerns about potential conflicts. It is important that Ministers have the confidence to raise concerns about potential conflicts of interest in a free and frank manner so that the Cabinet Office is in a position to support Ministers in identifying and managing conflicts of interest. The records which the Cabinet Office collects during this process are essential to the effective functioning of the conflict management system, which in turn is necessary to protect the integrity of the decision making process of executive government.

The Chief Ombudsman did not consider that the public interest in release of the correspondence outweighed the need to withhold it in order to protect the effective conduct of public affairs through the proper functioning of the Cabinet decision making and conflict of interest management systems. However, she left open the possibility that the public interest could outweigh the need to withhold, for instance, if the requested information indicated a misrepresentation, intentional impropriety, improper use of influence or corruption on the part of a Minister. You can read the full opinion [here](#).

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### **Case 306037 (2011)—Internal complaint assessment memorandum**

The Health and Disability Commissioner (HDC) refused a request for an internal memorandum from a complainant's HDC complaint file, and the requester complained to the Ombudsman.

The memo represented a preliminary stage in the collaborative assessment of the complaint. It was written to assist the Commissioner to decide what action to take on the complaint. The memo was the means by which the complaints assessor conveyed her interpretation of the facts and her opinion about these facts in light of the statutory role of the Commissioner and the legislative framework of the HDC. While the tone of the memo was not informal, it conveyed open and straightforward opinions about the doctor's care. These opinions were not the considered view of the Commissioner but represented an early sharing of ideas subject to further scrutiny. It seemed likely that the



complaints assessor would have had an expectation that her input into the decision-making processes at that stage would have been confidential.

The Ombudsman considered that disclosure of the memo would make complaints assessment staff reluctant in future to fully express their views in writing. The Ombudsman formed the opinion that releasing the memo would constrain the ability of the HDC to engage in the early sharing of ideas which would prejudice the effective conduct of public affairs. The Ombudsman did not consider any public interest in release existed which outweighed the need to withhold the information.

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### Case 293216 (2011)—Internal discussion paper on privatisation

In 2010, the Treasury Secretary appeared on Q+A. In reply to a question about internal papers prepared by the Treasury on privatisation of state assets, he replied:

*Well one of the things I asked my staff some time ago, is to really think about what are some of the arguments that people advance against privatisation, because New Zealand's a bit unusual. Most countries overseas that's not particularly controversial nowadays, it is here, and we want to get a better understanding of what it is that people are worried about in privatisation.*

A request was made for “the reports produced by The Treasury on “the arguments that people advance against privatisation””. The requester complained to the Chief Ombudsman when it was refused under section 9(2)(g)(i) of the OIA.

The information at issue was two drafts of an internal discussion paper commissioned by the Treasury’s Executive Leadership Team. The drafts were discussed at an internal policy forum and no further work was undertaken. The Treasury clarified that the Government had sought no advice on this issue, and none had been provided. It argued that disclosing this kind of background work would prejudice its ability to undertake self-initiated internal dialogues, especially in the case of sensitive policy issues. It said it was critical for the Treasury to be able to do background work on a range of topics before Ministers ask for advice. This enables it to ensure the advice ultimately tendered is robust, and that it can respond to requests for advice quickly and efficiently.

The Chief Ombudsman accepted that section 9(2)(g)(i) of the OIA applied to the information. In her words:

*This provision recognises that some processes will need to be carried out without public scrutiny with the rationale being that the opportunity to express opinions in a free and frank manner will ultimately result in better decisions.*

It was important that the Treasury had the confidence to explore its initial thinking on the important issue of privatisation in a candid way. Confidentiality was needed to induce the degree of free and frank opinion required during this process to place the Treasury in a position to best advise the Government if and when it decided to have such

a discussion.

The Chief Ombudsman concluded that the public interest in disclosure of this early work did not outweigh the need to withhold it. However, if and when the Government actually sought advice on privatisation, the balance between the public interest favouring disclosure and the need to withhold under 9(2)(g)(i) may change, and a fresh assessment would be necessary.

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### Case 178451 (2011)—Crisis group reports and working material regarding review of response to hostage taking

A requester sought information about the New Zealand Government's response to the kidnapping of New Zealand resident Harmeet Sooden in Baghdad in 2005. The requester complained to the Chief Ombudsman when that request was partially refused. For the reasons set out in greater detail below, the Chief Ombudsman accepted that section 9(2)(g)(i) of the OIA provided good reason to withhold:

- crisis group reports and associated ministerial briefings; and
- working material related to the Government's review of the hostage-taking.

She was not convinced of the need to withhold in full the final review of the hostage-taking. That review was *'prepared in a careful and considered fashion at time and distance from the events at issue'* and its partial disclosure would promote government accountability for its handling of crisis situations. DPMC reconsidered its decision, and disclosed the final review, with minor redactions to protect New Zealand's international relations and ability to obtain information in confidence from other governments and international organisations (see sections 6(a) and (b) OIA).

#### **Crisis group reports and associated ministerial briefings**

The Government established an ad hoc working group known as a *'watch group'* to help coordinate its response to the hostage taking crisis. The information at issue included the reports of the watch group, and updates to Ministers based on those reports. The Chief Ombudsman commented that the watch group system and associated ministerial briefings are an essential part of effective governmental responses to crisis situations.

Crises inevitably involve high-pressure, time-sensitive environments in which officials must collate and process information derived from a range of sources. The sources may or may not be accurate, confidential, attributed, or attributable. The information may raise diplomatic sensitivities, intelligence or security issues, or have implications for the safety of individuals.

Some of the information was protected by sections 6(a) and (b) of the OIA (international relations and information sharing). However, there was a broader need for confidentiality in this context to ensure that officials are not constrained from sharing

and recording such information, and Ministers thereby derive the benefit of officials' full, free and frank advice.

The Chief Ombudsman considered that disclosure of the Watch Group reports and associated briefings would have a chilling effect on interagency sharing and recording of confidential and sensitive information. It would introduce an undesirable degree of formality, caution and reticence, which would undermine the Government's ability to respond effectively to hostage-taking and other crisis situations. This would clearly be detrimental to the effective conduct of public affairs, and possibly other interests warranting protection, like the safety of individuals.

The Chief Ombudsman acknowledged the public interest in disclosure of information to promote government accountability for its handling of crisis situations, but felt this could be addressed by disclosure of the Government's final review of its response to the hostage-taking.

### **Working material relating to the review of the hostage-taking**

The information at issue included a small number of emails in which individual officials gave their free and frank opinions to inform the Government's review of its response to the hostage-taking.

The review was an important evaluative exercise designed to appraise the Government's handling of the situation and identify areas for improvement. Individual officials would be less inclined to express their opinions in such forthright terms in similar evaluative exercises if this information was disclosed. This is an important part of making ongoing and iterative improvements to government processes.

The Chief Ombudsman acknowledged again the public interest in disclosure of information to promote accountability for the Government's response to the hostage-taking, but did not believe that interest required disclosure of individual officials' opinions. The public interest could be met by disclosure of the final review, with some redactions.

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### **Cases 312348 & 313008 (2011)—Draft documents, internal emails, handwritten meeting notes regarding the Government's response to a Law Commission discussion paper**

These cases concerned the Minister of Veterans' Affairs' decision to withhold information relating to the development of the Government's response to a Law Commission discussion paper on a review of the War Pensions Act 1954. The information at issue comprised draft documents and emails between Veterans' Affairs New Zealand (VANZ) and the Treasury, and handwritten notes in respect of a meeting between the Minister and the RSA.

The Ombudsman formed the provisional opinion that section 9(2)(g)(i) applied. Release

of VANZ's early working papers would affect the future willingness and ability of officials to canvass and test the full range of options and ideas that are crucial to ensuring that the best and most considered advice is ultimately tendered to Cabinet.

The Ombudsman described the handwritten meeting notes as *'the informal jottings of a VANZ official'* regarding matters to be followed up as a result of the meeting. Disclosure of these notes would have an inhibitory impact on the future exchange of opinions between the Minister and the RSA or the recording of such discussions. Any reduction in the frankness of discussion between the parties or the recording of the discussion would adversely impact on the ability of the Government to meet its obligations to veterans.

The Ombudsman commented that in assessing the countervailing public interest in disclosure, it must be remembered that decision-makers are accountable for the advice that is tendered to them and that they act upon. Early working papers generated in preparation of that advice will often not have been seen by them. Usually, it would only be in circumstances where disclosure of such papers would reveal some impropriety in process or practice that the public interest in release would outweigh valid interests in protecting information under the OIA. The Ombudsman could not identify any impropriety in this case.

The Ombudsman noted:

*...the policy process relating to the Law Commission Review is still underway and in my view exploratory discussions warrant a higher degree of protection than discussions involving proposals which are at a more advanced stage. The interest protected by section 9(2)(g)(i) creates the space for measured decision-making to take place.*

In response to the Ombudsman's provisional opinion, the requester noted that it had been 18 months since the Law Commission reported, and the public was entitled to have some information about the progress of the Government's response.

The Ombudsman agreed that the public interest in disclosure of information pertaining to a policy process increases as time goes by without a decision being made. He commented that if the information at issue had been Cabinet papers relating to the progress of the review or to decisions taken on it, then the public interest in the disclosure of some information would likely be strong. However, the information was not of this nature. The Ombudsman formed the final opinion that section 9(2)(g)(i) of the OIA provided good reason to withhold the information at issue.

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### Case 304314 (2011)—Ministerial briefing on Auckland CBD rail loop

A requester sought information about the Auckland CBD rail loop and complained to the Ombudsman when one ministerial briefing was withheld under section 9(2)(g)(i). The Ministry of Transport explained that:

- The briefing was created for the Minister in a very short timeframe (around a day) to enable the Minister to give an initial response to the Auckland Council's business

case.

- The initial draft was prepared by the Minister’s media advisor, who passed it on to the Ministry of Transport representative in the Minister’s office. The document was then considered by the relevant people within the Ministry who provided comments in the form of tracked changes, and provided the document back to the media advisor.
- The Ministry and Minister’s office were unsure whether the Minister actually considered the document itself. It appeared that at a minimum the Minister was briefed on its contents.
- The document was superseded by a more thorough briefing to the Minister within a week, which was provided to the requester in response to his request.

The Ministry was concerned that release of the quickly developed document would be likely to inhibit officials from providing quick and off the cuff advice in future.

The Ombudsman formed the opinion that release of the briefing would be likely to inhibit the ability of officials to communicate with the Minister in a free and frank manner in time sensitive situations. It is essential to the effective conduct of public affairs that Ministers receive urgent advice quickly.

The Ombudsman acknowledged a high public interest in the availability of advice based on which Ministerial decisions are made. However, in these circumstances (especially as it was unclear whether the Minister even saw the document), he considered the public interest was met by disclosure of the more considered and thorough briefing that was released to the requester.

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### Case 176579 (2010)—Audit staff notes

The Ministry of Social Development withheld information about the audit of a wage subsidy scheme, and the requester complained to the Ombudsman. During the investigation the Ministry released most of the information at issue, but continued to withhold audit staff notes under section 9(2)(g)(i).

The Ombudsman formed the opinion that section 9(2)(g)(i) provided good reason to withhold the audit staff notes. The information at issue was a collation of the auditor’s comments regarding certain tests applied to 20 randomly selected sample files. The comments formed part of the auditor’s informal and early working papers, and reflected their initial observations and tentative conclusions. They reflected the auditor’s views on the adequacy or appropriateness of certain actions, and on whether to accept or reject explanations advanced by other employees. As such, they were in the nature of *‘free and frank opinion’*.

Given that the comments reflected the early observations and preliminary conclusions of

the auditor, it was possible that they could be wrong or misleading if taken out of context. This could be unfair to individuals who participated in or were the subject of the audit process.

The disclosure of early and informal working papers would make auditors more circumspect in what they record, and when and how they record it. Inhibition of this nature would prejudice the effective conduct of public affairs. Quality audits contribute to sound management and financial practices, and act to prevent or remedy irregularities and undesirable practices, and as such they are an essential part of *'maintaining the effective conduct of public affairs'*.

The Ombudsman acknowledged clear and compelling countervailing public interest considerations favouring disclosure of information about audits. However, the public interest was in disclosure of information about the outcome of the audit, rather than the early investigative phases.

Compare this case with [387942](#), evaluation and audit reports and [437269](#), final audit/operational review in relation to Spring Hill prisoner riot.

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### Case 174281 (2010)—Auditor's working papers

Allegations against a staff member prompted the Ministry of Social Development to commence an internal audit of its contracts with a particular trust. An MP requested information about the audit, and complained to the Ombudsman when only a summary was released.

The Ombudsman formed the opinion that section 9(2)(g)(i) was applicable to the auditor's various scoping discussions and working papers. In the early and formative phases of an investigation, auditors and officials need to feel free to discuss and debate, and accept or reject, ideas, approaches and tentative conclusions.

The requester in effect sought the entire audit file. If the entire audit file was disclosed, then in the future auditors and officials would feel inhibited in what they say, how they say it, and how they record what they say. Inhibition of this nature would prejudice the effective conduct of public affairs.

Whilst the Ombudsman recognised *'clear and compelling countervailing public interest considerations favouring disclosure of information about audits'*, she commented that generally speaking these could be addressed by disclosure of final audit reports, provided they are a full and fair reflection of the conclusions reached by the audits.

Compare this case with [387942](#), evaluation and audit reports and [437269](#), final audit/operational review in relation to Spring Hill prisoner riot.

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### Case 177320 (2009)—Report on DHB governance issues

In early February 2008, a complaint was made about the Ministry of Health’s September 2007 decision to withhold parts of a 2006 report on governance issues at the Hawkes Bay District Health Board under section 9(2)(g)(i). In late February 2008, concerns about the governance of the DHB prompted the Minister of Health to remove the board and appoint a Commissioner to run its affairs.

The Ombudsman formed the opinion that section 9(2)(g)(i) provided good reason to withhold the report at the time that decision was taken in September 2007. He noted the sensitivity of the governance issues discussed in the report, and that the report was produced in the early stages of collecting information about those issues. The report contained the kind of free and frank, but measured, advice the Minister of Health could expect to receive in these circumstances. The Ombudsman commented:

*I am willing to accept, given the context in which the September 2007 decision was made (5 months before the Minister removed the board) that it would be likely that disclosure then would have had an inhibiting effect in future on the willingness of officials, even at the level of seniority of the Deputy Director-General of Health as was the case here, to give such advice. Such inhibition would be prejudicial to the effective conduct of public affairs.*

The public interest in disclosure of the report did not outweigh the need to withhold it at that time:

*While there is undoubtedly a public interest in disclosure of information relating to the governance of a Crown entity such as a district health board, the overall public interest would not have been served by disclosing, on 6 September 2007, information of a contextually sensitive nature that would have likely had the effect of inhibiting Ministry officials in future from providing the Minister of Health with timely advice in the free and frank manner that they considered necessary.*

However, the Ombudsman also noted—for the Ministry’s consideration only—that circumstances had changed since the decision was made on the request.<sup>14</sup> The report was now nearly two years old, and the board had been removed. He observed that should a fresh request be made, section 9(2)(g)(i) may no longer apply. Even if it did, there was a strong public interest in disclosure of the report. It was important to ‘*make more transparent the circumstances that appear to have led to the removal of the board and the accountability of the Minister for that removal and of the officials who advised him*’.

The Ministry queried the Ombudsman’s position that the need to withhold under section 9(2)(g)(i) might diminish over time and with the change of circumstances. It maintained

<sup>14</sup> Note, the Ombudsman’s role is to form an opinion on whether the request ‘*should have been refused*’ (s 30(1)(a) OIA). The Ombudsman therefore focuses on the decision at the time it was made. Subsequent events that affect either the need to withhold the information, or the countervailing public interest in its release, are technically irrelevant to any opinion that must be formed.

that section 9(2)(g)(i) protects information because it is of a certain nature.

The Ombudsman explained that section 9(2)(g)(i) does not protect the nature of the information itself, but the maintenance of the effective conduct of public affairs. The question to be considered is the consequence of disclosure on that interest, and that can alter with the passage of time and change of circumstances.

The Ombudsman commented *'I would be loathe to accept that there is any information for which it is necessary to maintain confidentiality in perpetuity'*. As an extreme example, he referenced the New Zealand Security Intelligence Service's disclosure of information about the waterfront strike 60 years later, the point being that even classified security records lose their sensitivity over time.

The Ombudsman accepted that it will sometimes be necessary to protect information even when the relevant circumstances no longer apply in order to encourage others in a similar position in future to express themselves freely and frankly. However, not all information needs that ongoing protection.

*In this case, the advice given to the then Minister in May 2006 consisted of a considered briefing on governance issues at the DHB. Responsibility for giving it was assumed at a senior level in the Ministry (a Deputy Director-General). It was entirely appropriate (as it itself stated) that it remain confidential at the time to allow the Minister to consider the issues it raised and to formulate a response to them.*

*But it is not so clear to me why, once action has been taken to address the issues it raised, it is still necessary to withhold it. In my view, officials, particularly senior officials, can be expected to generate advice for Ministers in such circumstances in the future that is of similar quality and frankness to this, knowing that the OIA will protect the confidentiality of that advice while the identified issue is being addressed but not necessarily indefinitely afterwards.*

*Whether it is possible to release such advice without contravening the interest protected by section 9(2)(g)(i) will, of course, always be a matter of judgment and different opinions can be held about it. I am inclined to the view in this case that the interval of confidentiality to allow the effective conduct of public affairs can be relatively short without damaging that interest given the nature of the advice and the changed circumstances.*

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### Case 175624 (2008)—Discussions between Ministers on business before Cabinet

The requester sought information about discussions between the Deputy Prime Minister and the Minister of Justice regarding potential changes to electoral law. He complained to the Ombudsman when his request was refused under section 9(2)(f)(iv) of the OIA. Part of the information at issue comprised undocumented discussions between Ministers on business that was before Cabinet. The Chief Ombudsman formed the opinion that section 9(2)(g)(i) provided good reason to withhold details of the undocumented



discussions. She stated:

*I regard discussions between ministers on business that is before Cabinet as imbued with a presumption of confidentiality.*

*Moreover, I regard the public interest in the protection of such discussions to be a core constitutional requirement and therefore very strong. This means that in order to outweigh that interest, the public interest in disclosure must be correspondingly stronger.*

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### Case 173358 (2006)—Draft briefings to the incoming government

The Treasury proactively published its 2005 post-election briefing to the incoming government. This prompted a request for draft versions of the document, which the Treasury refused under section 9(2)(g)(i) of the OIA. The requester complained to the Chief Ombudsman.

The Chief Ombudsman formed the opinion that section 9(2)(g)(i) provided good reason to withhold the draft versions. He was in no doubt that if the drafts were disclosed this would be foremost in the minds of officials when they came to draft the next post-election briefing. There was a real and substantial risk that this would:

- make officials reluctant to be so free and frank in expressing their initial and untested views, particularly where those views had an element of sensitivity or controversy; and
- cause officials to prefer less efficient and transparent verbal exchanges (at least in the initial stages), and to thereby delay the formal drafting process until consensus had been reached on the overall direction and content of the briefing.

Disclosure would have an unacceptably chilling effect on the process of drafting future post-election briefings to incoming Ministers.

It is in the interests of the effective conduct of public affairs for the process of drafting briefings to incoming Ministers to be as robust as possible. Post-election briefings to incoming Ministers provide a valuable opportunity for government departments. It is generally accepted that they represent the one time in the three-yearly electoral cycle where departments are able to express their opinions independently of requests for advice from Ministers, and across the entire sphere of their policy and legislative influence. It is important that officials feel able to debate and accept or reject particular approaches in a free and frank manner, without being concerned that their early and untested opinions and draft briefings could be made publicly available. If officials feel inhibited in this process, then ultimately the quality of the end product and the quality of the record will suffer. This would prejudice the effective conduct of public affairs. The Chief Ombudsman accepted that a degree of confidentiality in the drafting process was necessary to protect the willingness and ability of officials to canvass and rigorously test the full range of options and ideas, and then to work through these in order to produce

their best and most considered advice for the incoming Minister.

There was nothing in the drafts or the progression of the drafting process that gave rise to a public interest in disclosure sufficient to outweigh the need to withhold.

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### Case W48162 (2003)—Comments on early draft Cabinet papers

DPMC withheld Treasury comments on draft climate change Cabinet papers under section 9(2)(g)(i), and the requester complained to the Ombudsman. The Ombudsman considered the nature and content of the information and the context in which it was generated.

The information comprised an email from a Treasury official commenting on the draft Cabinet papers, and a draft Cabinet paper with the suggested amendments tracked. DPMC explained that the issues surrounding the ratification of the Kyoto Protocol were complex and had potentially wide-reaching implications for many sectors of the economy and society. As a result, the development of policy advice on these issues required collaboration with a number of agencies across government in a relatively short time-frame. DPMC's role in this process included facilitating early sharing and 'sounding' of ideas between officials within the relevant departments and then bringing together the multiple strands of expertise and knowledge into a single collective piece of advice for Cabinet within a short time frame.

DPMC explained that it adopted a relatively informal process for departmental consultation and provided departments with very early drafts of material for initial comment and thoughts, so that any major issues could be identified early and solutions quickly developed. Swift and vigorous debate ensued as ideas were floated, challenged and discussed before being refined into coherent pieces of analysis and proposals. DPMC advised the Ombudsman that officials were given very little time to comment on the early drafts, therefore any feedback was largely an initial reaction or '*off the top of the head thoughts*'. The information at issue represented the initial comments that were provided by Treasury officials on these early draft versions of the final Cabinet papers.

DPMC was concerned that if the free and frank opinions were disclosed, the processes adopted in this case for developing policy advice would need to be revisited and the level of formality would necessarily increase, hindering the effective conduct of public affairs.

The Ombudsman accepted that release of the information would inhibit future free and frank expression of opinions by or between officials through a greater level of formality being introduced into the early stages of the policy development process. In his view, where a collaborative approach has been adopted for the development of policy advice, the early sharing of ideas between the agencies involved in the policy development process was essential to the effective conduct of public affairs.

The Ombudsman acknowledged that there was undoubtedly a public interest in the disclosure of information relating to the workings of government to promote

accountability and participation. However, the overall public interest in this case would not be served by disclosing information that would undermine the ability of the government to function effectively and in an orderly manner. You can read the full case note on our website.<sup>15</sup>

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## Cases illustrating when section 9(2)(g)(i) did not apply

### Case 437269 (2017)—Final audit/operational review in relation to Spring Hill prisoner riot

A requester sought a copy of the Department of Corrections' report into the Spring Hill prisoner riot of 2013. He complained to the Chief Ombudsman when the Department released summary information and withheld the full report under sections 6(c) and 9(2)(ba)(i) of the OIA. Because the Department's concerns related to the need to preserve the flow of *'free and frank'* information during internal audits and operational reviews, the Chief Ombudsman also considered the application of section 9(2)(g)(i).

The Department's concern was that release of the full report would have a chilling effect on the willingness of individuals involved in an operational review to be forthcoming about what might have gone wrong. The purpose of an operational review is to learn from what happened in order to improve responses to similar incidents in the future, and it is in the public interest that this process is as robust as possible.

The Chief Ombudsman formed the provisional opinion that section 6(c) of the OIA justified some redactions to the report. However, there was no good reason—including under section 9(2)(g)(i)—to withhold the report in full.

He accepted that **if** release of information had the effect of inhibiting individuals from free and frank expression of opinions or imparting crucial information, then that would be detrimental to the effectiveness of an operational review process. That would be more likely to occur if the information disclosed included copies of working material and source information. However, in a final report which summarised an internal review process, the information was not generally attributable to particular individuals, and represented the considered conclusions and advice of the authors of the review.

The Chief Ombudsman stated:

*Participants in an operational review exercise should be aware that they are working in an environment where the OIA applies. In that environment there are no absolute guarantees of confidentiality. Moreover, where the incident in question is as serious as a prison riot, they should be aware that the public interest may nevertheless require the*

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<sup>15</sup> Search for 'W48162' using our online library [Liberty](#).

*release of information.*

The report identified a number of organisational and systemic issues. There was nothing in the report that singled out any individual for blame, nor was it possible to identify any particular individual as a source of information for the review. He was therefore not persuaded that disclosure of the report would have a chilling effect on the efficacy of future operational reviews.

Even if section 9(2)(g)(i) applied, the need to withhold the full report was outweighed by the public interest in release. The Chief Ombudsman refuted the suggestion that the public interest in release had diminished because the riot occurred three years ago. He also rejected the argument that the small number of OIA requests received for the report was indicative of the low level of public interest in release. He commented:

*A prison riot is one of the most serious events that can occur in any custodial system. It indicates a breakdown in the core responsibilities to manage offenders safely and humanely. The potential for harm to prison staff, emergency services and inmates cannot be understated. In this case, a number of staff and prisoners were injured, some seriously, and there was clearly a potential for loss of life, especially once the fires took hold.*

In his provisional opinion, there was a strong public interest in release of information that set out the Department's analysis of how the riot occurred, the quality of the response, and the lessons learned from the operational review. That public interest had not been addressed by the release of summary information.

The Department accepted the Chief Ombudsman's provisional opinion in relation to section 9(2)(g)(i). It agreed to publish the report with some redactions under section 6(c) of the OIA in order to maintain operational security. The Chief Ombudsman formed the final opinion that the redactions were justified under that provision.

Compare this case with [176579](#), audit staff notes and [174281](#), auditor's working papers.

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### Case 416215 (2017)—Police tactical operations report

A requester sought the Police tactical operations report (TOR) relating to an incident where a man was tasered following a vehicle collision. The Police refused this request under a number of grounds, including section 9(2)(g)(i). The Chief Ombudsman formed the opinion that section 9(2)(g)(i) did not apply. He acknowledged the Police wish to preserve a climate conducive to officers expressing themselves freely and frankly in these reports. He agreed it was important that officers feel able to be forthcoming about the use of force in a particular instance and not to feel inhibited about doing so. The effective conduct of public affairs requires Police to have a robust accountability framework for recording and reporting on the use of force.

However, these reports are already being written in the knowledge that there is a potential for them to be used in court proceedings, professional conduct processes or IPCA investigations. The Chief Ombudsman was sceptical of general claims that release of

TORs under the OIA would have the overall inhibiting effect that Police feared.

The Chief Ombudsman was not persuaded that section 9(2)(g)(i) would be a basis for withholding TORs in general. However, he accepted that it may apply in some cases where an officer's account had been particularly forthcoming, and it was clear that release of the report, or those specific comments, would impact on the willingness of officers to report with the same freedom and openness in the future.

The TOR at issue in this case was an example of a thorough and professionally written report by the officer involved. There was nothing contained in that report that would justify withholding under section 9(2)(g)(i). You can read the Chief Ombudsman's full opinion [here](#).

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### Case 398302 (2016)—Staff survey results

A council refused a request for its 2014 staff survey results and the requester complained to the Ombudsman. The Ombudsman noted that these kinds of complaints are quite common, and set out some general principles applying to requests for staff survey information.

First, he noted that the official information legislation does not provide blanket protection for all information relating to internal staff surveys as an exempt 'class' or 'category' of information. Not all information generated within this process can be properly withheld.

Where a staff survey asks open-ended questions, and individual comments are provided in response, section 7(2)(c)(i) of the LGOIMA (prejudice to the ongoing supply of information subject to an obligation of confidence) will often protect that information. This is because the disclosure of personalised comment, where potentially attributable to known individuals, would likely diminish the willingness of individuals to respond candidly to requests for such feedback in the future. It is accepted that it is generally in the public interest for public organisations to engage in a process of seeking and receiving feedback from staff members.

However, aggregate information can generally be disclosed without prejudice to interests protected under LGOIMA. In relation to section 7(2)(f)(i) of the LGOIMA, the Ombudsman stated:

*...section 7(2)(f)(i) will generally not apply to aggregate information where responses cannot be attributed to identifiable individuals. This is because section 7(2)(f)(i) requires that disclosure of the information would be likely to prejudice the expression of free and frank opinion. It is unlikely that such a deterrent effect would arise from the disclosure of unattributed information.*

Agencies should also be mindful that, even if there are grounds for withholding aggregate information, there are countervailing public interest factors that may favour disclosing this type of information. Staff surveys provide insight into staff perceptions of leadership values, the level of engagement and confidence amongst staff, and are one

indicator of the health of an organisation. Councils are accountable to ratepayers for the use of public funds, and for the effective operation of their organisation.

The Ombudsman also noted that where there are concerns about the results of a staff survey, and the perceptions that may be created by raw aggregated data, it remains open to agencies to provide a contextual or explanatory statement outlining particular events or circumstances relevant to the results.

In this case, the Ombudsman accepted there was good reason to withhold individual staff members' comments in the second part of the survey. However, there was no good reason to withhold the aggregated results or general statements on the council's performance. Disclosure of such information would not enable the identification of survey respondents, and therefore it was not likely to inhibit the free and frank expression of opinions in future similar circumstances.

The council accepted the Ombudsman's opinion and disclosed the aggregated information. You can read the full case note [here](#).

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### Case 387942 (2016)—Evaluation and audit reports regarding extended supervision orders

The Department of Corrections refused a request for information about extended supervision orders (ESOs) and the requester complained to the Ombudsman. The Chief Ombudsman considered whether section 9(2)(g)(i) provided good reason to withhold the following documents:

- *Review of the Extended Supervision: Implementing and evaluating the 2004 legislation* (the evaluation report); and
- *Individual Residential Reintegration Programme: Offender Management Review* (the audit report).

#### **Evaluation report**

The Chief Ombudsman noted that the evaluation report comprised largely academic material and statistical analysis. It was not in the nature of opinion or recommendations. While this is not required by section 9(2)(g)(i), the inclusion of such content will often indicate a greater need to protect the interests contemplated by that provision.

The Chief Ombudsman was not satisfied that disclosure of this information would be likely to prejudice the future exchange of free and frank opinions. It seemed unlikely that disclosure of a paper largely focused on academic studies and statistical analysis, without controversial findings, would deter staff from supplying this type of analysis in the future.

The Department noted that the evaluation report was out of date and not intended to be publicly circulated. However, this was not sufficient to engage section 9(2)(g)(i). If anything, the fact that the report was no longer current or applicable to present

legislation reduced the need to withhold. The Chief Ombudsman noted that the Department was free to provide any explanation it considered necessary when disclosing the evaluation report.

### **Audit report**

This report summarised an internal audit carried out in respect of the Department's Individual Residential Reintegration Programme (IRRP) contract management services. The fact that the document stated that it was a draft was insufficient alone to invoke section 9(2)(g)(i). It was clear from the material that the audit report had been submitted to senior management, who accepted its findings and recommendations; and reference was made elsewhere to the implementation of those recommendations.

The Chief Ombudsman was not satisfied that disclosure of the majority of the audit report was likely to prejudice the future exchange of free and frank opinions. It is the purpose of Internal Audit to conduct such activities and generate this information, and there is significant motivation for the Department to ensure that service providers are delivering the services for which they are contracted, and in the manner contracted. It was a reasonably high-level report, the content of which had been accepted by management, and it was over one year old at the time of the request. The Department had taken corrective steps for the deficiencies identified.

The Chief Ombudsman also concluded that even if section 9(2)(g)(i) applied, there were significant public interest considerations in favour of disclosure. Failure to adequately manage the IRRP posed a very real risk to public safety, and the Department must be held accountable to the public for its management of those functions, and the compliance of service providers. It was also important that the public be made aware of the corrective steps taken in such circumstances.

However, the Chief Ombudsman did accept that reference to the particular agencies reviewed, and the specific details of findings in respect of them, would be likely to prejudice the willingness of staff to detail such concerns and findings, for fear that disclosure (without the accompanying comment of those affected parties) would cause difficulties in the relationship between the Department and service providers, and reduce the willingness of those parties to discuss their conduct with officials. The free and frank discussion of matters was necessary to the effective conduct of public affairs in that it was a crucial aspect of the audit process and the ability of the Department to question the adequacy of its programmes.

The Ombudsman recommended the release of the evaluation report in full, and the audit report with deletions to the names and detailed findings in respect of individual service providers.

Compare this case with [176579](#), audit staff notes and [174281](#), auditor's working papers.

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### Case 334056 (2015)—Final advice to Ministers on applications under the Overseas Investment Act

The Campaign Against Foreign Control of Aotearoa (CAFCA) requested information including the Overseas Investment Office's (OIO's) advice to Ministers on Kim Dotcom's applications for consent to invest in New Zealand. Parts of the advice were withheld under sections 9(2)(h) and 9(2)(g)(i) of the OIA, and CAFCA complained to the Ombudsman.

The OIO argued that disclosing excerpts from two memoranda to Ministers would inhibit its future expression of opinions on statutory interpretation, and result in Ministers making decisions under the Overseas Investment Act without the advantage of receiving advice on these sometimes complex statutory provisions.

The Ombudsman accepted that there may be situations where the opinions exchanged between Ministers and the OIO require protection; where, for instance, the pressure of time, or the controversial nature of the issues, mean that the OIO needs to express itself in a particularly blunt manner, and such frankness is required for the effective conduct of public affairs. However, the Ombudsman was not persuaded that the opinions at issue here warranted such protection.

The information at issue was in the nature of opinion, but it was not particularly free or frank. It was fully reasoned and expressed in measured and moderate terms. It was not a preliminary draft, but the final report, containing the regulator's best and most-considered advice to the Minister on how the applications should be determined. It was authored by the Manager of the OIO, a senior and experienced public servant. In this instance, she appeared to have been conveying the regulator's opinions, rather than her own personal opinions.

The Ombudsman noted that pressure of time may have been a factor with the second memorandum to Ministers. However, the information redacted from that memorandum did not strike the Ombudsman as the kind of information that required protection under section 9(2)(g)(i). It appeared to draw on the OIO's established approach to the interpretation of legislative provisions, as opposed to being new material generated under pressure of time. Once again, it was expressed in careful, measured, and moderate terms, and it was communicated by its most senior official, the Manager of the OIO.

These factors led the Ombudsman to question the assertion that release would prejudice the future free and frank expression of opinions. This would be tantamount to suggesting that the OIO would not do its job as regulator. It is obliged to *'consider each application and advise the relevant Minister or Ministers on how the application should be determined'* (section 31(a) of the Overseas Investment Act). The Ombudsman saw no reason to believe that release of the information at issue would cause the OIO not to continue to do to the best of its ability what it is obliged to do as regulator.

After considering the Ombudsman's comments, the OIO decided to release the relevant



excerpts from its advice to Ministers. You can read the full case note [here](#).

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### Case 346787 (2015)—Final report prepared by consultant in relation to MOTAT

A requester sought a copy of an organisational review carried out by consultants in respect of the Museum of Transport and Technology (MOTAT). The review considered whether MOTAT was being run successfully, and made recommendations for change. The MOTAT board refused the request on a number of grounds, including section 7(2)(f)(i) of the LGOIMA. The requester complained to the Ombudsman, noting he would be happy to receive *'summary and concluding information'*. In line with the requester's wishes, the Chief Ombudsman considered whether there was good reason to withhold the executive summary and recommendations of the report.

The Chief Ombudsman formed the provisional opinion that section 7(2)(f)(i) of the LGOIMA did not apply. She considered the perspective of the reviewers, concluding that disclosure would not inhibit them or any similar professional reviewer or consultant from expressing free and frank opinions in future where those had been commissioned. She also considered the perspective of the participants in the review. While the review may have been based on their opinions, it did not reveal them, or attribute them to particular individuals. For that reason, the Ombudsman was not persuaded that participants in similar reviews in the future would be inhibited from sharing their opinions with reviewers.

The Chief Ombudsman also noted that the report had been commissioned in the wake of concerns about the organisation. The review considered whether it was run successfully and made recommendations for improvement. From that perspective, there was a significant accountability interest in the contents of the report. Even if section 7(2)(f)(i) applied, there was a public interest in disclosure of the information that would outweigh the need to withhold.

MOTAT reconsidered its decision on receipt of the Chief Ombudsman's provisional opinion and disclosed the executive summary and recommendations. The Chief Ombudsman discontinued her investigation. You can read the full case note [here](#).

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### Case 357948 (2014)—Minutes of Council workshops

A requester sought minutes of the Auckland Unitary Plan Political Working Party (PWP), and complained to the Ombudsman when these were refused under section 7(2)(f)(i) of the LGOIMA.

The Council explained that the minutes related to Council *'workshops'*. In Council's view, there was *'a real and substantial risk'* that participants would be reluctant to have free and frank discussions in future workshops if the minutes were disclosed to the public. The Council referred to case [W48162](#), which it considered to be analogous, in that

*'release of the information at issue would be likely to inhibit future free and frank expression of opinions by or between officials through a greater level of formality being introduced into the early stages of the policy development process'.*

The Chief Ombudsman disagreed that W48162 was directly analogous, as it involved *'top of the head thoughts'* on draft policy advice, rather than formal and considered meeting minutes.

The Chief Ombudsman accepted that section 7(2)(f)(i) applied to some of the information at issue. The effective conduct of public affairs is promoted when officials can discuss, accept and/or reject particular approaches in a free and frank manner, without being concerned that their preliminary opinions and ideas could be made publicly available.

However, section 7(2)(f)(i) did not apply to the summaries of actions and directions which appeared at the end of the minutes. The workshops had a certain level of formality, and members expected their votes and views to be recorded. The participants were predominantly Councillors and Board Chairs who, by virtue of their positions as elected representatives, would generally be expected to stand behind their opinions and be accountable for their actions. The Chief Ombudsman also noted that information about the outcomes of the PWP's discussions was publicly available through reports of the Auckland Planning Committee. She therefore concluded that the minutes could be disclosed in part without inhibiting people from contributing to workshops in future. The Council agreed to release the relevant parts of the minutes.

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### Cases 302561 and 302600 (2013)—Submissions and comments to Ministers by film industry third parties in relation to film production and *The Hobbit*

In 2010 the Government announced that it had reached an agreement with Warner Bros for *The Hobbit* film to be made in New Zealand.<sup>16</sup> As part of this agreement, it introduced an urgent amendment to the Employment Relations Act 2000 to make film industry workers independent contractors rather than employees. A number of requesters sought information from Ministers about film production and the production of *The Hobbit*. They complained to the Ombudsman when their requests were partly refused on a number of grounds.

Section 9(2)(g)(i) of the OIA was used to withhold submissions and comments to Ministers from film industry third parties. Ministers explained that they rely on the free and frank views of the wider community, including business leaders, and if this information was released *'our ability to acquire such information in future would be seriously compromised'*, resulting in Government not having the full set of information it needs to make decisions.

The Ombudsman accepted that there will be circumstances in which persons may feel

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<sup>16</sup> See <https://www.beehive.govt.nz/release/hobbit-movies-be-made-new-zealand>, accessed 22 February 2017.

inhibited from making submissions by the prospect of those submissions being made public. However, he was not convinced that this was so in this case. The submissions and comments that were made to Ministers by these parties were made in their own direct interests with a view to persuading the Government to a policy stance that advantaged them in their commercial dealings. The Ombudsman did not accept that persons who have a commercial interest in making submissions to Ministers would be likely to be deterred from doing so by the prospect of release. They might prefer non-release, but release is a consequence that has to be, and is likely to be, borne with.

The Ombudsman also noted that similar opinions and information had already been shared in the public domain by the submission makers. He accepted that anticipation that one's views on an issue might be released under the OIA may change the way in which views are expressed. But he did not consider that release would stop third parties from approaching the Government if they considered it was in their commercial interests to do so. He also accepted that sometimes the way in which information is expressed can be an important means of communicating the significance of issues and said he had considered this too, but having done so he did not consider that there was justification to withhold information on the ground of the particular language used. It did not seem to him that release would discourage or inhibit the free and frank expression of opinions that occurred in this case or that the prospect of release if this had been appreciated would have materially altered its mode of expression.

The Ombudsman recommended release of the submissions and comments. You can read the full opinion [here](#).

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### Case 179363 (2009)—Public submissions on draft standard

A requester sought public submissions received by Standards New Zealand (SNZ) in relation to a draft standard. SNZ refused the request under section 9(2)(g)(i) and the requester complained to the Ombudsman. SNZ argued that disclosure before the Standards Committee had completed its analysis of the public submissions would:

- prejudice the free and frank consensus-decision making process;
- inhibit people from making submissions in the future; and
- inhibit individuals from volunteering to serve on standards committees.

The Ombudsman did not accept these arguments.

#### **Disclosure would prejudice the free and frank consensus-decision making process**

The Ombudsman noted that standards committee members are usually experts on the topic, drawn from a range of professional groups, industry bodies, central and local government agencies and community groups, and are either experienced practitioners or academics, or have other relevant expertise or knowledge. People of this calibre are not

likely to be easily swayed or inhibited by public discussion or debate about the accuracy or otherwise of various submissions. In addition, the terms of reference for standards committees recognise that discussion at committees is confidential. Given the relative seniority and levels of experience and expertise of the Committee members and the protection afforded by the committees' terms of reference, the Ombudsman was not persuaded that disclosure of the public submissions would be likely to pressure, or inhibit, Committee members from representing their nominating organisations and expressing their opinions in a free and frank manner during committee meetings if required.

### **Disclosure would inhibit people from making submissions in the future**

The Ombudsman accepted that section 9(2)(a) of the OIA could apply to the names, addresses and contact details of individuals who made submissions on a personal basis. However, he saw no evidence that disclosure of the submissions would inhibit members of the general public from making submissions in the future. It is a requirement of the Standards Act 1988 for SNZ to seek public comment as part of the process of approving a standard. It seems likely that people who make submissions on a draft standard do so because the draft standard has implications for some aspect of their professional or personal life. A number of the submissions at issue were made by energy companies, those involved in wind farm developments and groups that oppose wind farms. These individuals all had a vested interest in alerting the standards committee to any concerns they may have with the draft standard to ensure that, as far as possible, the standard met their needs. It did not appear that any of the submissions were provided to SNZ under an obligation of confidence, and SNZ's general practice is to disclose the public submissions once the committee has concluded its deliberations. In these circumstances, the Ombudsman was not persuaded that disclosure of the submissions would inhibit people from making a submission in the future on an issue that affects them. The Ombudsman suggested that in future SNZ consider releasing such submissions proactively on its website (having warned submitters in advance that this is its practice and thus giving them an opportunity to raise any confidentiality concerns they have).

### **Disclosure would inhibit individuals from volunteering to serve on standards committees**

The Ombudsman noted again that members of standards committees are experts who have presumably reached levels of some seniority or experience in their particular fields. He reiterated that people of this calibre are unlikely to be easily swayed, or inhibited, by public discussion or debate about the accuracy or otherwise of various submissions. For the most part, committee members appear to represent organisations that have an interest in ensuring standards are technically and scientifically robust and meet the needs of those who will be using them. The members of the committees who work for central or local government bodies will be familiar with the application of the official information legislation and the requirement that information must be disclosed unless there is good reason to withhold it. Bearing these factors in mind, the Ombudsman was not convinced that disclosure of the public submissions would be likely to inhibit such

people from volunteering to serve on standards committees in the future.

The Ombudsman formed the final opinion that section 9(2)(g)(i) did not provide good reason to withhold the public submissions and recommended their disclosure.

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### Case 175782 (2007)—‘Draft’ report prepared by consultant

The former Department of Labour’s 2005/06 annual report noted that:

*An external review of internal controls was commissioned and completed in 2005/06. The results contributed to the development of an internal assurance and risk management framework.*

A requester sought a copy of the ‘external review’, and complained to the Ombudsman when it was withheld under section 9(2)(g)(i). The Department described the information as a draft report prepared by KPMG in 2006. It said the report was expressed in blunt terms, identifying gaps and recommendations for improvement.

The Ombudsman noted the document was indeed marked ‘draft’, but this characterisation was inconsistent with the entry in the Department’s annual report which referred it as a ‘commissioned and completed’ report that had been acted upon by the end of the 2005/06 year.

The Ombudsman ascertained that the report was completed by KPMG more than a year before. As far as KPMG was concerned it was finished. To that extent, the annual report was correct when it described the report as having been ‘completed’.

Even if the report was a ‘draft’, that was not what this case turned on: ‘No special status is given under the [OIA] to “draft” documents in terms of ability to withhold’. Nor is it sufficient that the report was expressed in ‘blunt’ terms: ‘the test for the application of section 9(2)(g)(i) ... is not whether the information itself consists of “free and frank expression of opinions”, but whether disclosure would inhibit such expression in the future’.

In this case, KPMG was commissioned and prepared the report under contract. The Ombudsman did not consider that disclosure of the report would prevent KPMG (or any similar contractor) from preparing a similar report in the future if one was commissioned. Professional persons are expected to be frank and robust in their work, and state their opinions to the best of their ability. While the report contained some comments that were critical of the Department, ‘the fact that the release of certain information may give rise to criticism or embarrassment of the government is not an adequate reason for withholding it from the public’.<sup>17</sup>

The Ombudsman formed the provisional opinion that section 9(2)(g)(i) did not apply to the report. The Department agreed to release the report and the complaint was

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<sup>17</sup> See note [7](#) at 19.

resolved.

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### Case 173243 (2007)—Transcripts of Police communications in relation to emergency calls by Iraena Asher

Prior to her disappearance in October 2004 from a West Auckland beach, Iraena Asher contacted the New Zealand Police using the 111 emergency telephone number. Police dispatched a taxi, but it went to the wrong address. Investigations commenced into the disappearance of Ms Asher, and the Police response to her emergency calls.

The investigation of the Police response to Ms Asher's emergency calls found that Police had used *'inappropriate and unprofessional language'* (report of the then Police Complaints Authority, 2006). However, the precise nature of that language was not disclosed, and Ms Asher's parents requested (amongst other things), a transcript of the Police communications. They complained to the Chief Ombudsman when that request was refused under sections 6(c) and 9(2)(g)(i) of the OIA.

The Police argued that disclosing the transcripts would inhibit free and frank exchanges between members of the Police, and this would not only prejudice the effective conduct of public affairs, but also the maintenance of the law.

The Chief Ombudsman formed the provisional opinion that there was no good reason to withhold the transcripts. He refused to accept that the OIA could provide blanket protection for operational discussions between Police officers, and insisted that the need for withholding had to be assessed with regard to the content of the actual communications at issue.

The communications at issue involved the exchange of facts, questions and opinions. The Chief Ombudsman could see no harm in disclosure of facts or questions. In regard to the opinions, the Police were understandably concerned about the content of those opinions, and the way in which they had been expressed. There was no doubt, the Chief Ombudsman said, that the opinions were *'free and frank'* in nature. However, free and frank opinions are not protected as a matter of course by the Act; withholding the information must be necessary for the effective conduct of public affairs. The opinions expressed in this case were not *'necessary'* for the effective conduct of public affairs because they were acknowledged by both the Police and the Police Complaints Authority to be *'undignified'*, *'unprofessional'*, *'trivialising'*, *'disrespectful'* and *'inappropriate'*.

The Chief Ombudsman also considered that the prospect of harm from release was diminished by the public availability of information about the nature of the communications. Information about the Police investigation had already been released to the parents, and the Police Complaints Authority report, which included considerable detail about the communications, was publicly available.

Finally, the Chief Ombudsman found that even if section 9(2)(g)(i) applied, it was outweighed by the *'strong public interest in the release of the transcripts concerning the*

*Asher matter*'.

In response to the Chief Ombudsman's provisional opinion, the Police accepted that partial disclosure of the transcripts was warranted, but argued that the 'pejorative' language in the transcripts should continue to be withheld. The Chief Ombudsman rejected this argument in his final opinion, stating:

*... although the information is 'free and frank', I am not satisfied that the effective conduct of public affairs requires free and frank opinions to be expressed in the manner evident in this case. Clearly in the future, the way officers express themselves may be affected, but this will be a positive outcome because as the Police Complaints Authority emphasised there is a 'need for members of the Police to consider their language and to remain professional, at all times'.*

The Police accepted the Chief Ombudsman's final opinion on the matter, and released the transcripts to Ms Asher's parents.

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### Case W49874 (2003)—Names and email addresses of people consulted on draft speech

A requester sought information about the preparation of a speech delivered by the Race Relations Commissioner. The information was released, but the names and emails of people consulted on the draft speech were withheld under section 9(2)(g)(i). The requester complained to the Ombudsman, who considered whether disclosure of the names and email addresses would be likely to inhibit the free and frank expression of opinions in future.

The Ombudsman asked the Human Rights Commission to consult the people involved. The Ombudsman found it was not necessary to withhold the names and email addresses of those who consented to release.

The Ombudsman then considered the role and seniority of those who did not consent to release. He noted that many of them were senior managers or advisers in government departments. He was not persuaded that disclosure of their names and email addresses would inhibit them from expressing free and frank opinions in future. Such people would be expected to *'continue to express their opinions freely and frankly in similar circumstances in the future by virtue of the senior positions they held'*, and to be *'more robust about their opinions than junior employees or third parties from outside the public service who volunteered their opinions'*.

The Ombudsman did accept that section 9(2)(g)(i) applied where the persons concerned were not senior managers or advisers within the public service, or were providing free and frank opinions as personal friends of the Race Relations Commissioner rather than in their official capacities as public servants. After considering their comments, the Ombudsman was satisfied that they would be likely to be inhibited in expressing such free and frank opinions in similar circumstances in the future if the information was

released. There were no public interest considerations strong enough to outweigh the interests requiring protection under section 9(2)(g)(i).

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