

Confidential advice to Government

A guide to section 9(2)(f)(iv) of the OIA

One reason for withholding official information is to ‘maintain the constitutional convention protecting the confidentiality of advice tendered by Ministers and officials’—section 9(2)(f)(iv) of the OIA.

This section usually applies where the release of confidential advice given to Ministers or Cabinet would prejudice the orderly and effective conduct of government decision making processes.

This guide explains how section 9(2)(f)(iv) 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)(f)(iv) 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 inhibiting effect disclosure will have on the future exchange of free and frank opinions, see our guide on section 9(2)(g)(i): [Free and frank opinions](#).

*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) apply in that specific context.*

Contents

What the Act says	3
When section 9(2)(f)(iv) applies	3
Executive government decision making	4
Advice tendered	4
By Ministers and officials	4
Harm in release	5
Temporary protection	5
Budget secrecy	6
Assessing the need to withhold under section 9(2)(f)(iv)	7
The content of the information	7
The context of the information	8
The public interest in release	9
Planning advisory and decision making processes	9
Dealing with OIA requests	10
Further information	11
Appendix 1. Step-by-step work sheet	12
Appendix 2. Case studies	14
Index	14
Cases illustrating when section 9(2)(f)(iv) applied	17
Cases illustrating when section 9(2)(f)(iv) did not apply	33

What the Act says

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.¹

Reasons for refusal fall into three broad categories: conclusive reasons,² good reasons,³ and administrative reasons.⁴ Among the ‘good reasons’, section 9(2)(f)(iv) applies where withholding is necessary to maintain the [constitutional convention](#) which protects the confidentiality of advice tendered by Ministers and officials.

‘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)(f)(iv) applies

The primary purpose of section 9(2)(f)(iv) is to protect the orderly and effective conduct of executive government decision making processes. Official information regimes across the world recognise that sometimes governments need some private time and space in which to be able to deliberate and decide on the advice they receive. As the Committee that recommended the enactment of the OIA noted, ‘to run the country effectively the government of the day needs ... to be able to take advice and to deliberate on it, in private, and without fear of premature disclosure’.⁵ In line with this, section 9(2)(f)(iv) usually applies:

- to advice related to [executive government decision making](#) processes;
- that has or will be [tendered](#) to Ministers or Cabinet;
- by [Ministers or officials](#);
- where disclosure would [harm](#) the orderly and effective conduct of the relevant decision making process; and

¹ See s 5 OIA and LGOIMA.

² 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.

³ 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.

⁴ 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.

⁵ Committee on Official Information. *Towards Open Government: General Report* (December 1980) at 19.

- most often on a [temporary](#) basis—while the advice remains under active consideration.

Executive government decision making

Section 9(2)(f)(iv) protects advice related to executive government decision making processes. This means decisions made by Ministers of the Crown, either individually or collectively through the Cabinet process. The decision making process may relate to the formulation of public policy, but it doesn't have to.⁶

Section 9(2)(f)(iv) does not protect advice related to internal decision making processes within a government agency, or decision making processes within some other kind of body (see case [382375](#)). There may be legitimate reasons why, in the circumstances of a particular case, such information needs to be withheld, but they do not relate to the maintenance of [constitutional conventions](#).

Advice tendered

Section 9(2)(f)(iv) applies to advice that has or will be tendered. 'Advice' means opinions or recommendations as to the course of action to be adopted. 'Tendered' means offered or presented formally to Ministers or Cabinet. This will often be in the form of briefings and papers to Ministers or Cabinet.

Section 9(2)(f)(iv) can also apply to information generated in preparation for the tendering of advice to Ministers or Cabinet, for example internal discussion documents. However, there must be a clear **connection** between the subject matter of the internal discussion documents and the advice that will be tendered to Ministers or Cabinet, such that disclosure of the documents could reasonably be expected to prejudice the ability of Ministers or Cabinet to consider the advice. Section 9(2)(g)(i) of the OIA may also be relevant if the concern is that release of the internal discussion documents will inhibit the future exchange of free and frank opinions (see our guide to [free and frank opinions](#)).

By Ministers and officials

Section 9(2)(f)(iv) applies to advice tendered by Ministers and officials. 'Ministers' means Ministers of the Crown, including Associate Ministers and Parliamentary Under-Secretaries.⁷ 'Officials' means members of the public service, employed in public service departments.

Section 9(2)(f)(iv) does not apply to information provided by:

- agencies other than the public service departments;
- members of the public (for example, public submissions—see case [331383](#));

⁶ For guidance on the application of the OIA to information generated in the context of the public policy making process see our guide: [The OIA and the public policy making process](#).

⁷ See s 2 OIA.

- external consultants or lobbyists (see case [174587](#)); or
- external advisory groups or taskforces (see cases [285265](#) and [177919](#)).

There may be legitimate reasons why, in the circumstances of a particular case, such advice needs to be withheld, at least temporarily (see, for example, case [285265](#)), but they do not relate to the maintenance of [constitutional conventions](#).

Harm in release

Section 9(2)(f)(iv) does not mean that all advice can be withheld until Ministers or Cabinet make a decision. It does not give Ministers and Cabinet a right to ‘*undisturbed consideration*’ of advice in all cases. It must be demonstrated in each case that there would be a harm in release of the information—that release of the **specific** information requested would in the circumstances of the **particular** case prejudice the ability of the Minister or Cabinet to consider and decide on the advice tendered. Agencies should consider the following:

- What is the executive government decision making process to which the information relates?
- How would release of the requested information undermine the orderly and effective conduct of that process?

Temporary protection

Section 9(2)(f)(iv) generally provides temporary protection for advice related to ministerial or Cabinet decision making. Once the relevant decisions have been taken and any necessary political consultations or negotiations concluded, there is usually no need for ongoing protection of the advice under this section. Also at this point the public interest in disclosure to promote the accountability of the decision maker comes into play, which may outweigh any residual need to withhold information.

It is important to note that some government policy and decision making processes are complex and involve multiple stages. It may be necessary to withhold advice that has already been considered if it is directly connected to, and would tend to reveal, advice that is yet to be tendered, and in so doing, would prejudice the ability of the Minister and/or Cabinet to consider and decide upon the advice that is yet to be tendered. This argument was accepted in cases [313823](#) and [369357](#), but not in cases [176459](#) and [309664](#).

In exceptional circumstances, that go to the heart of the effective operation of executive government policy and decision making processes, the Ombudsman has accepted that the convention of confidentiality may endure even after the advice is no longer under consideration, although not in perpetuity. For example, see:

- case [401501](#) in relation to Policy Advisory Group briefings to the Prime Minister;
- case [282242](#) in relation to Cabinet Office advice to Ministers on ethics and probity;
- case [175076](#) in relation to draft answers to parliamentary questions; and

- case [174448](#) in relation to political consultation recorded on CAB 100 forms.

Budget secrecy

The OIA does not explicitly recognise the convention of budget secrecy. However, budget-related advice to Ministers and Cabinet may be protected by section 9(2)(f)(iv). The Ombudsman has noted that *‘the general constitutional convention which protects the confidentiality of advice tendered by Ministers and officials is heightened during Budget preparation’* (see case [176434](#)).

In relation to budget-related advice to Ministers and Cabinet, the questions to consider are:

- whether release would undermine the ability of Ministers and/or Cabinet to consider expenditure and revenue options and thereby prejudice the orderly and effective preparation of the budget; and
- whether the need to withhold the information is outweighed by the public interest in release.

As above, the protection afforded by section 9(2)(f)(iv) to budget-related advice is generally temporary. Once budget decisions have been made and announced there is usually no ongoing need to protect the information. This is so even if the decision is to abandon the initiative.

However, the Ombudsman has recognised that unsuccessful initiatives that are intended to be re-submitted in the next budget may require ongoing protection until they have been considered (see case [176434](#)). There may also be other reasons to withhold budget-related information, for example, if release would prejudice commercial interests (see [Commercial information](#) for more guidance).

Cases [172541](#) and [176434](#) illustrate the application of section 9(2)(f)(iv) to budget information.

What are constitutional conventions?

Constitutional conventions are customs and practices relating to issues of constitutional or political importance. Section 9(2)(f) of the OIA is about *‘maintaining constitutional conventions’*, but the Act doesn’t say what those specific conventions are. Instead it lists certain interests and relationships that the unspecified constitutional conventions are intended to protect, including the confidentiality of advice tendered by Ministers and officials—section 9(2)(f)(iv).

While the conventions aren’t specified, the purpose of section 9(2)(f)(iv) is to enable the orderly and effective conduct of government decision making processes. Sometimes the Government needs some private time and space in which to be able to deliberate and decide on the advice it has received. If the release of advice that is still under consideration would prejudice the orderly and effective conduct of executive government decision making processes, then its withholding will be necessary in order to *‘maintain’* the constitutional conventions.

Assessing the need to withhold under section 9(2)(f)(iv)

The following factors are relevant in assessing the need to withhold information under section 9(2)(f)(iv).

The content of the information

- Is the information of an advisory nature ie, opinions or recommendations as to the course of action to be adopted? Release of information that is not of an advisory nature, for example, information provided for information or noting purposes only, may be less likely to impact on the orderly and effective conduct of government decision making processes.
- Is the information of a confidential nature, ie unknown outside the parties to the exchange? Information that is already known or otherwise publicly available will not be confidential. If such information is severable from the relevant confidential material, there may be a basis for partial release.
- Is there any background material, or information that is purely factual or comprises bare options (as opposed to the analysis or evaluation of options)? Such material can often be released without any impact on the relevant decision making process. If it is severable from the remaining advisory material, there may be a basis for partial release. As the Committee that recommended the enactment of the OIA noted, *'it is by no means now the case – if it ever was – that the canvassing of options within government administration must always be protected by confidentiality'*.⁸
- What is the subject of the information? What does the content of the information actually reveal? Are there any factors, such as sensitivity or controversy of the information, that heighten the risk of prejudice to the orderly and effective conduct of decision making processes?

⁸ Note 5 at 17.

The context of the information

- What is the executive government decision making process to which the information relates? How does the specific information at issue relate to that process? What stage is that process at? What will the impact be if the information is released at this stage?
- Has the relevant decision maker seen the advice? Disclosure of advice to others before it has been tendered to the relevant decision maker may prejudice the orderly and effective conduct of the decision making process.
- Has the relevant decision making process concluded? If not, when will it be concluded? What will the impact be if it is released at this time? Once a decision has been made there is usually no need for ongoing protection of the advice on which it was based. This can be so even if the decision is to abandon the options that were under consideration (see case [176675](#)). Generally speaking, the more time that passes, the less sensitive the information is likely to become.
- What political consultations or negotiations are required as part of the decision making process? What stage are those consultations or negotiations at? What will the impact be on those consultations or negotiations if the information is released at this time? Release of information before political consultations and negotiations have concluded may prejudice the ability of the parties to reach agreement (see cases [174609](#) and [W44732](#)).
- How much time has passed since the advice was tendered? Is it still under genuine consideration, or has it been overtaken by events such that a decision is no longer likely to be required or taken? The legitimate expectation of confidentiality may diminish over time, where the decision maker has had a reasonable opportunity to consider and deliberate on the advice. The countervailing public interest in release of at least some information may also be higher if the decision making process has become excessively long and protracted. See cases [177645](#) and [172541](#).

The public interest in release

As noted above, section 9(2)(f)(iv) is subject to a ‘*public interest test*’ meaning that if it applies, 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. Detailed guidance on the application of the public interest test is available here: [Public interest—A guide to the public interest test in section 9\(1\) of the OIA and section 7\(1\) of the LGOIMA](#).

Public interest considerations that are particularly relevant in this context are:

- promoting the accountability of Ministers and officials for the advice provided to executive government, and promoting the accountability of executive government for the decisions made in respect of that advice; and
- enabling public participation in the making and administration of laws and policies.

Both of these considerations are directly reflected in one of the purposes of the OIA.⁹

The relevance and strength of these considerations will vary depending on the stage that the decision making process is at. Accountability considerations are usually strongest **after** a decision has been made. Public participation considerations are usually strongest **before** a decision has been made, but equally, the likelihood of risk to the orderly and effective conduct of the decision making process is higher at this time. Determining the correct balance between these competing interests can be tricky. However, agencies are encouraged to give **meaningful** consideration to how informed public participation can be achieved where that is warranted. This applies at the outset, in planning how the advisory and decision making processes will be carried out, and in the event of receiving the often inevitable OIA requests.

Planning advisory and decision making processes

At the project planning stage, agencies should consider the following.

- Whether people should be able to participate in the process, and if so, when and how; what information needs to be disclosed and when, to ensure that participation can be on an informed basis.
- What information will be generated during the advisory and decision making process; what information will need to be protected, and for how long; what information can be released, preferably proactively but otherwise in response to an OIA request, and when.
- How the advice to executive government should be structured—for example, clear distinctions between the following components of the advice will help if it is requested under the OIA:
 - the background, facts, and principles involved (usually capable of release);

⁹ See s 4(a) OIA.

- the range of options (usually capable of release);
- analysis and evaluation of the options (may be necessary to withhold on a temporary basis while under active consideration, subject to the application of the public interest test);
- the advice or recommendation(s) (may be necessary to withhold on a temporary basis while under active consideration, subject to the application of the public interest test); and
- information that may be sensitive for other reasons, for example, because it is legally privileged.

It is now common practice to proactively release advice once decisions have been made, and any potential harm to executive government deliberative and decision making processes has abated. The Cabinet Manual specifically states *'[i]t is generally expected that Cabinet material (Cabinet and Cabinet committee papers and minutes) on significant policy decisions will be released proactively once decisions have been taken, most often by publication online'* (paragraph 8.17).

Information on public participation is available in the Department of the Prime Minister and Cabinet's [Policy methods toolbox](#).

Dealing with OIA requests

The following should be considered when dealing with an OIA request that is likely to be refused to protect the orderly and effective conduct of executive government decision making processes.

- Partial release of the information requested. For example, information that is not of a confidential nature or that would be unlikely to prejudice the decision making process, such as background or factual information, or bare options under consideration. This may help to address the public interest in accountability and participation.
- Release of summary information or other information (some of which may already be publicly available), for example, background or discussion papers, research papers, options papers, or descriptive information about the issues under consideration and the process by which decisions will be taken. This may help to address the public interest in accountability and participation.
- Explaining how the agency has applied the public interest test in this case, providing proper recognition for the public interest in accountability and participation. Say what information will be provided and when in order to address these interests. Detail any opportunities for public participation, and how the agency will ensure that this will take place on an informed basis.
- If the requested information can't be released now, consider releasing it proactively later, and give an indication of when that is likely to be.

Further information

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

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

Related guides include:

- [*The OIA for Ministers and agencies*](#)
- [*Public interest*](#)
- [*Free and frank opinions*](#)
- [*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.

You can also contact our staff with any queries about the application of section 9(2)(f)(iv) by email 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 work sheet

<p>1. Does section 9(2)(f)(iv) apply to the information?</p> <p>Relevant part of guide: When section 9(2)(f)(iv) applies</p>	<ul style="list-style-type: none"> • What has been requested? • Does it comprise: <ul style="list-style-type: none"> - advice related to executive government decision making processes; - that has or will be tendered to Ministers or Cabinet; - by Ministers or officials; - where disclosure would harm the orderly and effective conduct of the relevant decision making process?
<p>2. Assess the need to withhold</p> <p>Relevant part of guide: Assessing the need to withhold under section 9(2)(f)(iv)</p>	<ul style="list-style-type: none"> • Consider the content of the information: <ul style="list-style-type: none"> - Is it of an advisory nature? Does it contain any 'FYI' or noting information that can be released without harm? - Is it of a confidential nature? Does it contain any information that is already known or publicly available that can be released without harm? - Does it contain any factual or background material, or information about bare options that can be released without harm? - Are there any other factors, like the sensitivity or controversy of the subject matter, that heighten the risk of prejudice to the orderly and effective conduct of the relevant decision making process? • Consider the context of the information: <ul style="list-style-type: none"> - What is the relevant decision making process and how does the information relate to that process? - What stage is that process at: <ul style="list-style-type: none"> › Has the decision maker seen the advice? › Has the decision making process concluded? › Are political consultations or negotiations required, and if so, what stage are those consultations or negotiations at? - What will be the impact on that process if the information is released at this time?

3. Consider partial release	<ul style="list-style-type: none"> • Can some of the information be disclosed eg, information that is already known or publicly available, background or factual material, information about bare options?
4. Apply the public interest test Relevant part of guide: Public interest	<ul style="list-style-type: none"> • See Public interest—A guide to the public interest test in section 9(1) of the OIA and section 7(1) of the LGOIMA. • Can other information be released in order to address the public interest in accountability and transparency eg, background or discussion papers, research papers, options papers? • Can the requester be referred to other publicly available information that will address the public interest in accountability or transparency?
5. Consider later release	<ul style="list-style-type: none"> • If the information can't be released now, consider releasing it proactively later and giving an indication of when that might be.
6. Consider whether to refuse the request	<ul style="list-style-type: none"> • If withholding is necessary to protect the orderly and effective conduct of the relevant decision making process, and the need to withhold is not outweighed by the public interest in release, then it is open to the agency to refuse the request. • Explain how the agency has applied the public interest test in this case. Say what information will be provided and when in order to address the public interest in accountability and participation. Detail any opportunities for public participation, and how the agency will ensure this will take place on an informed basis. • See our template Letter communicating the decision on a request

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)(f)(iv) applied		
Case number	Year	Subject
401501	2015	Confidentiality of Policy Advisory Group briefings to the Prime Minister
385479	2015	Information regarding rental housing warrants of fitness <i>Disclosure would prejudice orderly and effective conduct of ongoing advisory and decision making process</i>
369357	2014	Ministerial briefings and Cabinet papers on telecommunications and ultra-fast broadband <i>While some decisions had been made, others were still required, and disclosure would prejudice the orderly and effective conduct of ongoing advisory and decision making processes</i>
313823	2012	Report on application to enter negotiations to integrate school <i>While the report itself had been considered, it was part of a longer term process of advice—disclosure would prejudice the orderly and effective conduct of ongoing advisory and decision making processes</i>
282242	2012	Confidentiality of Cabinet Office advice to the Ministers on ethics and probity
318858	2011	Information about the Government’s proposed mixed ownership programme <i>Disclosure would prejudice orderly and effective conduct of ongoing advisory and decision making processes</i>
285135	2010	Cabinet paper relating to review of the Overseas Investment Act <i>Disclosure would prejudice orderly and effective conduct of ongoing advisory and decision making processes</i>
285265	2010	Information relating to Whānau Ora <i>Section 9(2)(f)(iv) applied to advice tendered by officials but not external taskforce</i>

176434	2008	Budget initiative Resource Teachers: Vision <i>Budget secrecy</i>
174448 176590	2007 2008	Confidentiality of details of political consultation recorded on CAB 100 forms
175799	2007	Advice on electoral finance <i>Disclosure would prejudice orderly and effective conduct of ongoing advisory and decision making processes—compare with 176459, advice on electoral finance, after the introduction of the Electoral Finance Bill</i>
175628	2007	Advice on emissions trading scheme <i>Disclosure would prejudice orderly and effective conduct of ongoing advisory and decision making processes</i>
175076	2007	Confidentiality of draft answers to parliamentary questions
174609	2007	Advice relating to Amendment Bill <i>Disclosure would prejudice orderly and effective conduct of political negotiations</i>
W44732 W44790	2000	Advice relating to pre-funding of New Zealand Superannuation <i>Disclosure would prejudice orderly and effective conduct of political negotiations</i>

Cases illustrating when section 9(2)(f)(iv) did not apply

Case number	Year	Subject
458197	2017	Advice regarding the effectiveness of benefit reductions <i>Some information not advice as to action—Some information publicly available—Minister had the opportunity to consider the information and publicly announced her intentions—Strong public interest in disclosure to promote public participation</i>
382375	2014	Advice to the Local Government Commission <i>Advice tendered to another organisation not executive government</i>
328421	2013	Advice concerning partnership schools <i>Decisions had been made</i>
342796	2012	Advice regarding proposals for the future of Christchurch education <i>Decisions had been made</i>
309664	2012	Cabinet paper on decision to retain newborn blood spot cards <i>Decisions had been made—Information did not reveal advice that would subsequently be tendered</i>

331383	2012	Public submissions on Green Paper for Vulnerable Children <i>Public submissions not advice tendered by Ministers or officials</i>
177919	2009	Review of schools' operational funding <i>Information not of an advisory nature—information tendered by an external advisory group, not Ministers or officials—disclosure would not prejudice ability of Ministers to consider advice eventually tendered by officials</i>
172541	2008	Options and analysis in the review of New Zealand Superannuation Portability <i>Options released, analysis withheld—budget secrecy</i>
176459	2008	Advice on electoral finance, after the introduction of the Electoral Finance Bill <i>Introduction of Bill constituted discrete end-point in the policy development process—disclosure would not prejudice ability of Ministers to consider advice eventually tendered by officials—compare with 175799, advice on electoral finance</i>
176675	2008	Abandoned options, South Auckland primary teacher supply <i>Decisions had been made—disclosure of abandoned options posed no risk</i>
177645	2008	Information relating to appointment of an honorary consul in Monaco <i>Confidentiality can diminish over time</i>
174609	2007	Ministerial briefing on citizenship review <i>Information not of an advisory nature—information not related to executive government decision making process</i>
175435	2007	Advice on daylight savings and the 2011 Rugby World Cup <i>Advice about the decision making process, rather than the decision to be taken—disclosure would not prejudice Cabinet's ability to reach a decision on advice eventually tendered</i>
174587	2007	Stock take report on the Crime Reduction Strategy <i>Report by external consultant not advice tendered by Ministers or officials</i>
173160	2005	Treasury costings of student free loan policy <i>Advice tendered to political party, not executive government—decisions had been made</i>

Cases illustrating when section 9(2)(f)(iv) applied

Case 401501 (2015)—Confidentiality of Policy Advisory Group briefings to the Prime Minister

A requester sought briefings to the Prime Minister about the 1080 infant formula threat. He complained to the Ombudsman when his request was refused under section 9(2)(f)(iv). The information at issue comprised briefings prepared for the Prime Minister by the Policy Advisory Group (PAG) of the Department of the Prime Minister and Cabinet (DPMC).

The Chief Ombudsman confirmed the principle established in a line of cases beginning in 2001 that, subject to the application of the public interest test in section 9(1) of the OIA, section 9(2)(f)(iv) applies to protect PAG briefings to the Prime Minister.

Successive Ombudsmen have noted that the relationship between PAG and the Prime Minister, in his or her constitutional role as leader of the Government, is unique. This relationship is characterised by the following factors:

- it is personal and relies on trust;
- it involves communication of information gathered from many sources, some of them confidential;
- it often requires the free and frank expression of opinions in assessing the views of other departments; and
- it often requires memoranda or briefings to be written under time pressure so that, while the advice gives a clear message, there is no time for the more careful drafting advisors would prefer if the advice were to be disclosed out of context.

These characteristics will often be relevant to the consideration of requests for advice from PAG to the Prime Minister.

In order for the Prime Minister to carry out the role effectively, the incumbent must be able to receive and rely on, with confidence, free and frank opinions and advice from his or her advisors. In this regard, the Ombudsmen have noted that as leader of the Government and chair of Cabinet, and having coordinating responsibility across all areas of government, the role of Prime Minister is unparalleled in the organisational structure of the Government.

In addition, the context in which PAG generates advice for the Prime Minister of the day is different from the context in which departmental advice is ordinarily generated. DPMC plays a key role in coordinating the work of core public service departments and ministries and managing overall public sector performance.

In these circumstances the Ombudsmen have accepted that there is a convention that PAG advice to the Prime Minister should remain confidential.

The need for confidentiality arises out of the context in which the advice is generated

and the nature of the relationship between PAG advisers and the Prime Minister. The application of section 9(2)(f)(iv) does not turn on the content of the advice. Often the advice may not be particularly contentious but that is not an essential requirement of section 9(2)(f)(iv). The fundamental rationale for the application of this provision to PAG advice to the Prime Minister is an acceptance that complete confidentiality in interactions with his or her closest advisers is required to support the Prime Minister in carrying out that role.

The Chief Ombudsman was persuaded that section 9(2)(f)(iv) applied to the briefings at issue. Having regard to the content and context of those briefings, she concluded that the overall public interest was not served by the disclosure of information that would undermine the ability of the Prime Minister to receive the advice he requires from advisers to effectively carry out his role.

Back to [index](#).

Case 385479 (2015)—Information regarding rental housing warrants of fitness

A requester sought information regarding rental housing warrants of fitness. The Minister for Building and Housing released 38 documents but withheld five under section 9(2)(f)(iv). The requester complained to the Ombudsman.

The Minister explained the following with regard to the content and context of the information at issue:

- The advice was preliminary in nature and was tendered to seek Ministers' direction and test Ministers' appetites for a range of policy options. This was demonstrated by the fact that Cabinet papers were primarily noting papers, with the only decision sought and made until then being to undertake a trial of the housing warrant of fitness on Housing New Zealand properties.
- Cabinet had not yet weighed and balanced all of the specific information to come to a decision on the broad policy idea. Cabinet and the Minister needed to be able to measure that specific information without the risk of adverse publicity, which could prevent them from making a balanced, effective and efficient decision on the course of action to take.
- To release the information and remove confidentiality would result in such publicity to the information that it would impede the Cabinet and Minister from making a balanced, efficient and effective decision on this policy. This would risk, over time, eroding the constitutional convention of confidentiality of ministerial and officials' advice, which in turn would negatively impact on the ability of Cabinet, Ministers and officials to discharge the advisory, government and decision-making functions effectively.

The Minister also noted that to assist and inform public debate he had released a large amount of factual information and the broad policy parameters. He argued it would not be desirable to release information that related to matters Cabinet had not made

decisions on, in particular preliminary and opinion-based advice on whether the Government should apply a housing warrant of fitness to other parts of the rental market, and the technical legal mechanisms that might be employed should the Government decide to do so. Cabinet wished to consider these matters following the Housing New Zealand housing warrant of fitness trial, which was designed to collect more factual information on the policy options and would inform further cost/benefit analysis.

The Ombudsman confirmed that the information at issue comprised advice which had either been tendered by officials to the Minister or the Minister to Cabinet. It was clearly of a preliminary nature, designed to seek broad Ministerial and Cabinet direction. The Ombudsman accepted that premature release of the information would likely impede the Minister's and Cabinet's ability to consider the advice and to make balanced, efficient and effective decisions on this matter. The Ombudsman also agreed that the Minister had addressed the public interest in participation and accountability through disclosure of the bulk of the information at issue. However, he noted that *'once the Minister and Cabinet have had an opportunity to consider the advice and the relevant decisions have been made, it is likely that there will no longer be a need for ongoing protection of the advice'*. Therefore it was open to the requester to seek access to the information in future.

Back to [index](#).

Case 369357 (2014)—Ministerial briefings and Cabinet papers on telecommunications and ultra-fast broadband

A request for information about telecommunications and ultra-fast broadband was refused under a number of grounds, and the requester complained to the Chief Ombudsman.

The information at issue included partially redacted ministerial briefings and Cabinet papers. Although these papers had been considered, and a decision made to bring forward a review of the regulatory framework, the Chief Ombudsman accepted it was still necessary to withhold parts of them under section 9(2)(f)(iv). The decision to bring forward a review of the regulatory framework was not the culmination of a discrete policy process that had been completed. The review of the regulatory framework had yet to be completed, and the Commerce Commission was also yet to report back on related matters. These ongoing processes may have given rise to a need to revisit the advice that had been tendered previously. It was therefore necessary to withhold the parts of the papers in respect of which additional work was underway, and further advice would be tendered. Disclosure of the earlier advice would prejudice the ability of Ministers and Cabinet to consider the related advice that would be tendered in future.

Back to [index](#).

Case 313823 (2012)—Report on application to enter negotiations to integrate school

A requester sought the Ministry of Education's report to the Minister on the application by Wanganui Collegiate to enter negotiations to become a state integrated school. He complained to the Ombudsman when that request was partially refused under section 9(2)(f)(iv).

The relevant context was that although the Minister had considered the report, final decisions on the school's application had been deferred. The Ministry was to provide a further report to the Minister about the application once additional information relevant to the decision had been collected and considered by the Ministry. That advice would have added to or may have changed the advice which was tendered previously.

The report was therefore part of a longer term process of advice and the Minister had yet to receive all the advice intended for that process. The Ombudsman accepted that disclosure of the advice at that stage would be likely to pre-empt the ability of the Minister to deliberate on the next round of advice.

The Ombudsman agreed that there was a public interest in the disclosure of information relating to a decision which *'concerns the use of public money and which will affect secondary schools in Wanganui and the lower North Island'*. However, that interest did not outweigh the need for temporary confidentiality at that particular time.

The Ombudsman formed the opinion that the process of advice, its consideration and the following decision-making under section 7(2) of the Private Schools Conditional Integration Act 1975 would be compromised if the information was disclosed at that time.

Back to [index](#).

Case 282242 (2012)—Confidentiality of Cabinet Office advice to Ministers on ethics and probity

Case 282242 established a line that has been applied consistently in a number of subsequent cases. That case related to requests for information about ministerial conflicts of interest, including communications between the Cabinet Office and Ministers regarding actual or potential conflicts of interest. The communications were withheld under a number of grounds, and the requesters complained to the Ombudsman.

The Chief Ombudsman formed the opinion that this information was protected by section 9(2)(f)(iv) (and section 9(2)(g)(i)). She accepted that Cabinet Office advice to the Prime Minister and Ministers regarding ethics and probity is inherently confidential. Confidentiality is required for the effective functioning of the conflict of interest management system, which in turn is necessary to protect the integrity of the decision-making process of executive government.

The Chief Ombudsman considered that recognising the confidentiality of the interchange

between the Prime Minister or Ministers and the Cabinet Office (which is subject to override in the public interest if warranted in a particular case) is consistent with the broadly stated objects of the OIA (section 4). It avoids providing a disincentive for Ministers to engage with the Cabinet Office, while at the same time maintaining an ultimate right to have access to the information if the public interest impels it.

The Chief Ombudsman noted that the inherent confidentiality can be destroyed (in effect, waived) by prior disclosure, but not by a simple reference to the existence and effect of the advice. There may also be circumstances where the need to maintain confidentiality is outweighed by the public interest in disclosure, for instance, where impropriety or illegality is identified, or where the Cabinet Office advice has been referred to in a way that is misleading or exaggerated. You can read the full opinion [here](#).

Back to [index](#).

Cases 318858, 319224 and 319684 (2011)—Information about the Government's proposed mixed ownership programme

In the run-up to the 2011 general election the National Government announced its commitment to pursue a 'mixed ownership model' in relation to certain state-owned assets. In essence, this meant partial privatisation of four state-owned energy companies, and a reduction in the Crown's holdings in Air New Zealand. The Treasury was tasked with undertaking some preliminary work. The media and opposition MPs sought information about this work, and complained to the Chief Ombudsman when their requests were partially refused under sections 9(2)(f)(iv) and 9(2)(g)(i). The information at issue included ministerial reports and discussion papers.

The Chief Ombudsman considered the content and context of the information at issue:

It comprises early advice on two of the many aspects under consideration: encouraging New Zealand participation and limiting foreign ownership. It is in the nature of possible options for consideration, rather than detailed advice and recommendations as to action. Any detailed advice and recommendations as to action will come after the election, once the preparatory work, including detailed scoping studies, is complete. Seen in this context, the information at issue may be characterised as limited in scope, as well as partial and incomplete. Treasury submitted that release would create pressure to design and structure a sales programme based on one or two narrow aspects, rather than what would be the best design and structure for the Crown and investors taking into account all relevant aspects.

She accepted that release of the information at issue at this stage of the process would be premature and undermine the orderly and effective conduct of that process.

The risk was heightened by the 'complicated and dynamic' nature of the advisory process:

There are a number of aspects to the potential sales programme that need to be considered (e.g. sequencing, estimated proceeds, offer instrument, offer structure,

governance, ownership, scale of sell-down, selling syndicate structure, maximising investor participation, marketing and communications, programme management and risk monitoring). These aspects are interrelated, so that advice developed on one aspect may cause earlier advice on another aspect to be reconsidered. Advice may also need to be revisited to take account of changing market conditions.

It was also heightened by the potentially adverse economic impact of premature release of the information:

...there is a genuine and valid concern that release of information that commits Ministers too early in the process to particular design elements, or creates expectations about the use of such elements, will detrimentally affect investor participation, and therefore the level of return to the Crown. Given that the estimated level of return is between \$5 and \$7 billion, the potential economic impact could be significant.

The Chief Ombudsman concluded that the information at issue needed to remain confidential at that particular stage of the policy development process in order to protect the interests specified in section 9(2)(f)(iv) (and section 9(2)(g)(i)). The need to withhold was not outweighed by the public interest in release (this case is also discussed in our [public interest guide](#)). You can read the full opinion [here](#).

Back to [index](#).

Case 285135 (2010)—Cabinet paper relating to review of the Overseas Investment Act

The Minister of Finance refused a request for all recent Cabinet papers on a review of the Overseas Investment Act, and the requester complained to the Chief Ombudsman.

The information at issue was a paper and attached draft policy document that had been considered by the Cabinet Economic Growth and Infrastructure Committee. Following consideration of the papers, the Cabinet Committee decided that further analysis of the overseas investment regime and any proposed amendments to that regime was required. The Treasury was engaged in further policy work, at the completion of which a further paper would be referred to Cabinet.

The Chief Ombudsman was satisfied, given the contentious nature of the issue of overseas investment in New Zealand, that disclosure of the information at issue would have prejudiced the ability of Cabinet to give undisturbed consideration to the advice tendered. Not all relevant advice was completed and to hand, which would have put Ministers at an unfair disadvantage in terms of adequately explaining publicly the issues that would likely stem from any disclosure.

The Chief Ombudsman acknowledged the public interest in disclosure of information related to the review of the Overseas Investment Act, but concluded the overall public interest would not be served by the disclosure of information that would undermine the ability of the Cabinet to receive and consider, in confidence, advice relating to the review. In coming to this view, she had regard to the expectation that the policy advice

relating to the review would be disclosed once decisions had been made, and that the public would have an opportunity to make submissions on any changes requiring legislative amendment through the Select Committee process.

Back to [index](#).

Case 285265 (2010)—Information relating to Whānau Ora

A requester sought information relating to Whānau Ora, and complained when Ministers refused to supply it on a number of grounds. The Chief Ombudsman formed the opinion that section 9(2)(f)(iv) applied to advice by officials to Ministers on Whānau Ora. She did not accept that section 9(2)(f)(iv) applied to the draft Whānau Ora Taskforce Report. However, section 9(2)(ba)(ii) of the OIA was accepted in the alternative.

Advice to Ministers on Whānau Ora

The Chief Ombudsman noted that Whānau Ora was a significant policy development process, involving a number of Ministers and a range of different government agencies. The policy development process involved a number of different streams of advice from government agencies regarding the finer details and shape of the policy. When the request was refused, decisions regarding certain aspects of the policy had been made but a number of further decisions regarding fairly fundamental aspects of the final shape of the policy still had to be made.

Given the scale of the policy development process; the range of policy options to be considered; and the fact that decisions regarding certain elements of the policy had not been made, the Chief Ombudsman was satisfied that it was necessary to withhold the information at issue in order to allow undisturbed ministerial consideration of the different options available before decisions were made on the final shape of the policy. She was not persuaded that the public interest considerations favouring the disclosure of this information outweighed the interests in favour of withholding it. In her opinion, disclosure of the information, in a piece-meal fashion, prior to decisions being taken on the final shape of the policy, would not have served to promote the overall public interest.

The Chief Ombudsman noted that the Taskforce's final report had since been disclosed and said this seemed to substantially address the public interest by illustrating the type of proposals and recommendations that were under consideration.

Draft Whānau Ora Taskforce report

The draft Whānau Ora taskforce report was also withheld. However, the Taskforce comprised external experts, and the report was therefore not advice '*tendered by Ministers or officials*'. On this basis, section 9(2)(f)(iv) could not apply. However, the Chief Ombudsman considered that section 9(2)(ba)(ii) of the OIA—which applies where disclosure of confidential information would damage the public interest—applied in the alternative.

The draft report was provided to the Minister by the Taskforce in confidence. Given the scale of the Whānau Ora policy development process and the range of advice and recommendations offered by the Taskforce, it was in the wider public interest for Ministers to have a period to consider that report, in confidence, before it was disclosed publicly. Premature release of the report, or draft versions of the report, would have prejudiced the ability of Ministers to give undisturbed consideration to the advice before them and to make whatever decisions they considered necessary. The Chief Ombudsman was of the opinion that disclosure of the draft report would have been likely to damage the public interest.

Back to [index](#).

Case 176434 (2008)—Budget initiative Resource Teachers: Vision

A requester sought information about the funding of Resource Teachers: Vision (these are resource teachers to support children and students who are blind or have low vision). The request was refused under section 9(2)(f)(iv), and the requester complained to the Ombudsman.

The Ombudsman ascertained that the advice in question was provided in the context of Budget 2007. The bid in relation to Resource Teachers: Vision was unsuccessful. However, the Minister asked the Ministry of Education to resubmit the bid in Budget 2008.

The Ombudsman confirmed that *‘the general constitutional convention which protects the confidentiality of advice tendered by Ministers and officials is heightened during Budget preparation’*. However, this did not justify the *‘broad brush’* approach that had been taken to withholding information relating to the unsuccessful bid. The fact that the bid would be resubmitted in Budget 2008 meant that section 9(2)(f)(iv) was applicable to much of the information at issue, but not all of it. He asked the Minister to reconsider the information at issue and provide additional explanation of the predicted prejudice should it be released.

After further consideration, the Minister decided to release information about the budget strategy and priorities, general descriptive information about the bid, and progress updates on the budget process. However, he continued to withhold information about the scaling and costing of the initiative, and detailed analysis by officials.

The Ombudsman formed the opinion that the remaining information could be withheld under section 9(2)(f)(iv). He noted that once decisions have been made and announced as part of a particular Budget, information about those decisions does not normally require protection from disclosure. However, because the Budget process occurs over multiple years, and because in this case the Minister had given an assurance that this particular funding proposal was under active consideration as part of Budget 2008, he was of the view that to disclose information specific to the 2007 Budget bid would undermine the convention protecting the confidentiality of advice tendered by officials.

The Ombudsman stated:

In these circumstances, where a proposal is being recycled, it seems to me that, at this stage at least, the desirability of disclosing the information in the public interest does not outweigh the interest in withholding. The overall public interest will not be served by the disclosure of advice that may undermine the effective preparation of Budget 2008.

However, once Budget 2008 has been delivered, there is less need for ongoing protection of this particular advice and the balance between the public interest considerations and any considerations protected by section 9(2)(f)(iv) ... will change.

Back to [index](#).

Cases 174448 (2007) and 176590 (2008)—Confidentiality of details of political consultation recorded on CAB 100 forms

All Cabinet and Cabinet Committee submissions must be accompanied by a CAB 100 form. The form records the departmental and political consultation that has occurred or is needed on the submission. The particular concern of the requester in cases 174448 and 176590 was the information about political consultation recorded on the CAB 100 forms.

In 174448, he asked the Prime Minister for all CAB 100 forms since the 2005 general election, and complained to the Ombudsman when that request was refused.

The Prime Minister explained that the process of obtaining political support has always been confidential. Under first past the post, it occurred behind the closed doors of caucus. With the advent of coalition and minority governments under MMP, the process has become more complex to manage. To aid the smooth management of that process, consultation is recorded on the CAB 100 form. Nonetheless, the confidentiality of advice about that process remains a very important constitutional convention. This confidentiality ensures that government policies can be advanced and promotes stable and effective government.

The Chief Ombudsman accepted that there was a convention of confidentiality surrounding the Government's political consultation processes. The need for such confidentiality is heightened in the MMP / coalition and minority government environment, in which the Government of the day is reliant on negotiating sufficient political support in order to further its initiatives.

It will not always be necessary to withhold particular CAB 100 forms in order to maintain the convention of confidentiality surrounding the Government's political consultation processes. The Chief Ombudsman noted that these forms had been disclosed on an ad hoc basis previously. In addition, the Government or the parties it chooses to consult on a particular initiative may disclose the fact or timing of that consultation publicly.

However, the request for all CAB 100 forms would have effectively opened up the entire political consultation process. Disclosure, in such a systematic and wide-ranging fashion,

of who the government had chosen to talk to, about what, and when, was likely to have a negative effect on its relationships with the various support parties, and therefore undermine stable and effective government. In the Chief Ombudsman's opinion, section 9(2)(f)(iv) applied.

In relation to the public interest in disclosure, the Chief Ombudsman noted that the forms were likely to be instructive about the way the coalition minority government was working. However, that consideration was not sufficiently compelling to outweigh the need to withhold the forms. While leaving open the possibility of a strong public interest arising in disclosure of information about a particular initiative, the Chief Ombudsman was not convinced that, in a global sense, there was a strong public interest in disclosure of all CAB 100 forms.

In 176590, the same requester sought CAB 100 forms associated with papers to the Cabinet Legislation Committee seeking approval for introduction of various pieces of legislation. By so doing, he sought to distinguish between CAB 100 forms in respect of a policy proposal or piece of legislation that had yet to be determined, and ones over issues that had effectively been resolved (through approval of the relevant legislative proposals).

The Prime Minister submitted that the need for confidentiality extended beyond the resolution of particular issues. Confidentiality of the political consultation process was *'essential to the maintenance of trusting relationships between political parties'*. Undermining that confidentiality would have *'potential consequences for the continuing relationships that support government durability and stability'*.

The Chief Ombudsman accepted that the need for confidentiality extended beyond the resolution of particular issues. It would not last *'in perpetuity'*, but:

Given that it applies to inter-party consultations as part of particular governmental arrangements, it does not seem unreasonable to regard it as applying for at least as long as those arrangements endure.

For the reasons outlined in the previous case, the Chief Ombudsman again formed the opinion that section 9(2)(f)(iv) applied to the CAB 100 forms at issue, and was not outweighed by the countervailing public interest in disclosure.

Back to [index](#).

Case 175799 (2007)—Advice on electoral finance

A requester sought information about the Government's proposals for electoral finance and complained to the Ombudsman when that request was refused under section 9(2)(f)(iv).

The information at issue comprised a relatively large amount of advice tendered by Ministers to Cabinet or Cabinet committee, along with advice from officials to Ministers or to staff in the Minister's Office. Other information comprised officials' internal discussion papers/communications that were clearly connected with the overall process

of the tendering of advice to Cabinet or Cabinet committee.

The Chief Ombudsman formed the opinion that it was necessary to withhold the advice at that time to maintain the constitutional convention protecting the confidentiality of advice tendered.

The advice formed part of an ongoing process, and no decisions had been made as to whether the proposals would become government policy. Disclosure of the information at that stage would have been likely to cause public confusion and would have placed Ministers, who had yet to consider the completed advice in Cabinet, in a difficult and unfair public position given the inherent sensitivity and complexity of the overall topic. It would thus be likely to have prejudiced what would otherwise be an orderly process for the development of sound policy development and decision-making. The Chief Ombudsman was unable to find any discrete background or options papers that could have been released without prejudicing section 9(2)(f)(iv) interests.

The Chief Ombudsman agreed that there was a high public interest in the disclosure of information related to such an important topic. However, he did not consider that the overall public interest would be served in this case by disclosing information that would be likely to prejudice the ability of the Government to consider in an orderly fashion some quite complex issues. The policy development process would benefit more by waiting for its completion before any disclosure. In the Chief Ombudsman's view, any public debate that focused on the information that was available at that stage of the process would be counter-productive, and such debate would have been better conducted once the Bill had been introduced. In contrast, see case [176459](#), advice on electoral finance, after the introduction of the Electoral Finance Bill.

Back to [index](#).

Case 175628 (2007)—Advice on emissions trading scheme

In 2007 the Dominion Post reported that the Treasury estimated there would be a negligible impact on the economy from adopting an emissions trading scheme. A requester sought the relevant Treasury analysis, and complained to the Ombudsman when this was refused under section 9(2)(f)(iv).

The information at issue comprised two very small pieces of information contained within a larger batch of information that was itself *'compact'*. It was clear that this information was part of an ongoing stream of work related to the emissions trading project. Treasury explained that it was neither practicable nor logical to attempt to undertake detailed modelling or analysis of macroeconomic impacts until a clearer picture of the proposed emissions trading scheme had emerged, most likely some months away. Indeed, for all practical purposes, modelling was not feasible until the parameters of the proposed scheme were known.

Treasury argued that the information in question would be of little real value to the requester without broader contextual information, but release, with or without the

context, would compromise the policy development process. While this entailed an intensive and high output work programme with officials meeting regularly with Ministers, Cabinet had yet to consider the matter.

The Ombudsman accepted that it was critical that the policy development process was managed in a coherent and orderly manner given the complex and technical nature of the policy work, with a high degree of interconnectedness between different issues. Piecemeal release of preliminary work without full context while the matter was still under very active consideration was likely to be highly disruptive. It would not inform stakeholders or the public at large, and would lead to Ministers being unfairly examined publicly on detailed aspects of proposals still in the formative stages on which they could not be adequately briefed at the time.

While there was undoubtedly a public interest in disclosure of information related to the development of policy, the overall public interest was not served by disclosure of information that undermined the processes in which that development occurred.

The Government recognised that emissions trading proposals were controversial and contentious and that the outcome of the work would be material to both the government and business. It was also accepted that parties potentially affected by the introduction of a trading scheme had a legitimate interest at stake, and that it was in the public interest for such parties to have the opportunity to make a contribution to the policy development process.

The Ombudsman noted that submissions on related policy discussion papers released in 2005 and 2006 were one input to the current stream of work. He also understood that relevant officials had met informally with representatives of business organisations to hear their views on cost/benefit issues. Discussions with other stakeholders had and would continue to occur throughout the policy development process. Furthermore, it was the Government's intention to engage with stakeholders once a framework document had been prepared and issued.

In the light of the above and the Ombudsman's understanding that most advice to Ministers would be released proactively at the time of the framework document, he considered that the public interest in disclosure of the requested information did not outweigh the interests in withholding.

Back to [index](#).

Case 175076 (2007)—Confidentiality of draft answers to parliamentary questions

A requester sought information about the Minister of Immigration's *'review of the immigration issues contained in the Ingram Report'* (an investigation into the conduct of former Minister Taito Phillip Field). The Minister withheld draft answers to parliamentary questions (among other things) under section 9(2)(f)(iv), and the requester complained to the Ombudsman.

The Ombudsman confirmed the principle established in a line of cases beginning in 2001

that, subject to the application of the public interest test in section 9(1) of the OIA, section 9(2)(f)(iv) applies to protect draft answers to parliamentary questions.¹⁰

The process of asking and answering parliamentary questions takes place in the House of Representatives, where only Members of Parliament may ask questions and only Ministers may answer. In such circumstances, it is the Minister who is ultimately accountable for the response he or she decides to give (or not to give, as the case may be).

In making the decision as to how to answer a particular question, a Minister is free to seek advice from whatever quarter he or she chooses. The most usual form of assistance is for departmental officials to provide a Minister with the relevant information and advice necessary to enable the Minister to provide an answer to Parliament. Such advice is frequently tendered in the form of a draft answer to the particular parliamentary question.

As it is the Minister who must answer the question in Parliament, the Minister makes the final decision as to the content of that answer. Accordingly, draft answers to parliamentary questions clearly constitute advice tendered in confidence by officials to a Minister as to how the Minister might wish to answer the parliamentary questions at issue. Draft answers, like any other advice tendered in confidence to Ministers by officials, are subject to the constitutional convention which protects such confidentiality.

The Ombudsman considered that the argument for withholding the draft answers in this case in order to maintain the convention was persuasive. It was likely that Ministers would forego the support available from departments if they were required under the OIA to release draft answers to parliamentary questions as well as providing the actual answers pursuant to the procedures of the House. The effect would likely be to diminish the quality of answers to parliamentary questions and the corresponding degree of accountability to the House.

The Ombudsman was satisfied that the prejudice which would be caused by release of the draft answer was such that its withholding was necessary to maintain the constitutional convention protecting the confidentiality of advice tendered by officials to Ministers. It was therefore his view that section 9(2)(f)(iv) of the Act applied to the information at issue.

The Ombudsman considered the countervailing public interest in disclosure. He reviewed carefully both the content of the information at issue and the parliamentary process to which it related. The Minister of Immigration was accountable to Parliament for his response to questions asked pursuant to parliamentary procedures. If a reply was deemed unsatisfactory, parliamentarians could ask further questions or call for a debate on the answer given. The Ombudsman was satisfied that the parliamentary process

¹⁰ Search case note W45495 using our online library [Liberty](#). See also *Ombudsman's Quarterly Review* 8(3) September 2002, available at http://www.ombudsman.parliament.nz/ckeditor_assets/attachments/73/8-3.pdf.

sufficiently held the Minister to account for the answers he gave without disclosure of the draft answers being necessary to satisfy the public interest. He was therefore of the view that the public interest in release did not outweigh the need to withhold.

Back to [index](#).

Case 174609 (2007)—Advice relating to Amendment Bill

A requester sought information relating to the Births, Deaths and Marriages Registration Amendment Bill (the Amendment Bill), and complained to the Ombudsman when that request was refused under section 9(2)(f)(iv). The information at issue included ministerial briefings and Cabinet papers on the Amendment Bill.

The request was made at the time that Cabinet had approved the legislative proposals in principle. However, there were still key steps to be taken before the Bill could be introduced to the House, including drafting, approval by the Cabinet Legislation Committee and Cabinet of the draft Bill for introduction, and consultation within caucus and with coalition and support parties. The proposed legislation remained subject to negotiation and potential change, and any change required as a result of that process may have necessitated further consideration and approval by the Cabinet Legislation Committee, Cabinet, and caucus.

The Ombudsman concluded that withholding was necessary in this context in order to maintain the constitutional convention protecting the confidentiality of advice. Confidentiality was required in order to protect the executive government's ability to develop and negotiate political support for the draft legislation, in a timely and orderly fashion.

The Ombudsman accepted that there was a convention that draft legislation and associated advice would remain confidential until that legislation was introduced to the House, subject of course to an assessment of the countervailing public interest considerations favouring disclosure of such information under section 9(1) of the OIA. This was supported by paragraph 7.44 of the Cabinet Manual, which states:

At every stage of its development, draft legislation is confidential and must not be disclosed to individuals or organisations outside government, except in accordance with the Official Information Act or Cabinet approved consultation procedures. Any such release or disclosure must first have the approval of the Minister concerned. Premature disclosure of the contents of a draft Bill could embarrass the Minister, and imply that the prerogative of Parliament is being usurped. Cabinet, government caucus(es) and Parliament must always retain the freedom to amend, delay or reject a Bill.

The Ombudsman made clear that she was not concerned about the potential for Ministerial embarrassment. Her view was based on the fact that *'the Government of the day must assume responsibility for assessing changes in the political, economic and social environment and for determining whether adjustments to the law are needed in response*

to those changes'.¹¹ The process of developing and negotiating political support for draft legislation may, in the circumstances of a particular case, be unduly impeded by premature disclosure of advice concerning the proposed content and operation of that legislation. Ministers would be called upon to justify and debate legislative proposals that were still in development and subject to change. This in turn would divert ministerial attention from the core process of developing the legislation to the stage where it was fit for introduction to the House, and had sufficient political support to proceed.

For these reasons, the Ombudsman accepted the Minister's submission that *'releasing information on the development of the Bill at this stage could potentially undermine the policy and legislative development process'*.

The Ombudsman acknowledged the public interest in enabling public participation in the making and administration of laws. However, she was not persuaded that this consideration outweighed the need to withhold the information at the time that decision was taken.

There are opportunities for public participation in the legislative process once draft legislation has been introduced to Parliament. Select committee consideration allows members of the House, interest groups, and the general public to examine and have input into draft legislation before it passes into law. Select committees may recommend amendments to the House that are relevant to the subject matter and consistent with the principles and objects of the Bill as introduced. The Ombudsman also noted that papers relating to the Amendment Bill were to be published on the Department of Internal Affairs' website following the Bill's introduction.

Back to [index](#).

Cases W44732 & W44790 (2000)—Advice relating to pre-funding of New Zealand Superannuation

As part of its election manifesto, the Labour Party promised to pre-fund New Zealand Superannuation. Although the Coalition Government had not yet agreed to the policy, certain assumptions were made regarding the pre-funding of superannuation for the purposes of the annual budget.

After the budget announcement the Minister of Finance received requests for the advice provided to the government regarding the pre-funding of superannuation. The Minister refused these requests in reliance upon section 9(2)(f)(iv).

The information at issue was generated in order to develop the government's policy regarding the future of New Zealand Superannuation and when viewed in isolation, was fairly innocuous. The decision to withhold the information was taken to protect the

¹¹ Legislation Advisory Committee Guidelines on Process and Content of Legislation, 2001 Edition (now superseded by 2014 Edition), page 9.

political process as opposed to the information itself.

At the time the request was made, the Labour and Alliance parties were in the middle of sensitive negotiations. The Labour Party was concerned that release of the information would jeopardise the ability of the Coalition to reach agreement as to government policy. The Minister was also concerned that the public debate generated by release of the information would compromise the Coalition's ability to work through the issues.

It was accepted that release of the information before the Coalition partners had concluded their negotiations might undermine a convention that section 9(2)(f)(iv) is designed to protect. To this end, and despite the relatively innocuous nature of the information at issue, the Ombudsman concluded that the Minister was entitled to rely section 9(2)(f)(iv) in order to protect the confidentiality of advice tendered by officials.

The Ombudsman acknowledged a strong public interest in the development of superannuation policy. However, there was a greater public interest in allowing the Coalition partners to negotiate the government policy on superannuation. The Ombudsman concluded that the public interest in release did not outweigh the need to withhold. You can read the full case note on our website.¹²

Back to [index](#).

¹² Search for 'W44732' using our online library [Liberty](#).

Cases illustrating when section 9(2)(f)(iv) did not apply

Case 458197 (2017)—Advice regarding the effectiveness of benefit reductions

A journalist asked the Ministry of Social Development for copies of any advice or reports to the Minister on the effectiveness of benefit reductions under section 70A of the Social Security Act 1964. The Ministry withheld four documents on the basis that they were still under active consideration, and disclosure would prejudice the government's ability to consider and deliberate on the advice. The requester complained to the Ombudsman.

The four documents at issue were three versions of the same paper to the Minister on section 70A, and an accompanying A3 information sheet. At the time the Social Security Legislation Rewrite Bill was being considered by Parliament, and the Select Committee had received a number of submissions opposing section 70A. A Supplementary Order Paper was introduced that advocated the removal of equivalent clauses from the Bill.

The papers presented three options to the Minister, retaining section 70A, repealing section 70A, and doing more research to inform future policy decisions. They set out the Ministry's view on the effectiveness of section 70A, including factual information, commentary on how section 70A functions, and findings from studies on its effectiveness.

The Ombudsman noted that much of the information was not in the form of advice as to future action, and that some of it was publicly available. He also noted the most recent paper was eight months old, and therefore the Minister appeared to have had some time to consider its contents. That paper was also at least the third iteration of advice on this issue to the Minister, and there had been further public discussion and comment by the Minister on the issue. In particular, she had publicly stated that the Government had no intention of changing section 70A, but that she had asked the Ministry to do some further research on its effectiveness.

The Ombudsman stated:

While section 9(2)(f)(iv) is designed to allow Ministers and Cabinet time and space to consider and deliberate on advice, it does not allow a blanket exemption from disclosure before a final decision is made, nor does it give a blanket right to undisturbed consideration of advice that may be the basis of future decisions on the issue.

The Ombudsman considered that, while the Minister may have had further decisions to make concerning section 70A, it was apparent from her public statements that the Minister had taken steps regarding the advice that was provided, and had indicated that the Government did not intend to change section 70A. The Minister had instead instructed the Ministry to undertake further research on the issue.

The Minister therefore appeared to have had time to deliberate on the advice tendered by officials, and had otherwise publicly indicated her actions and intentions. The Ombudsman therefore found it difficult to see how future decision making processes would be harmed by release of most, if not all, of the information.

The Ombudsman further considered that, even if section 9(2)(f)(iv) had applied, the need to withhold would have been outweighed by the public interest in release. He stated:

[T]here is a public interest in the availability of information to give the public a reasonable opportunity to influence outcomes in the making and administration of laws and policies. This requires adequate availability of information before final decisions are made and not after.

In a free participatory democracy, there is a public interest in adequate transparency to promote contestability of advice and opinions to government not just from officials but also from the public.

Given the wide impact that section 70A can have on individual New Zealanders and their dependent children, the Ombudsman considered that there was a strong public interest in allowing people to see the information officials had provided the Minister to inform her decision making.

As the Minister had announced the Government's current intention and had asked the Ministry to undertake further research into the effectiveness of section 70A, release of the information at issue would allow the public to more effectively participate in the subsequent decision making processes by being able to express their opinions. Disclosure would also allow the public to see the reasoning behind the advice, and the position that the Minister had indicated, promoting transparency and accountability in the manner that ... the OIA clearly envisages.

The Ombudsman formed the opinion that section 9(2)(f)(iv) did not provide good reason to withhold the information. You can read the full case note [here](#).

Back to [index](#).

Case 382375 (2014)—Advice to the Local Government Commission

The Local Government Commission was undertaking consultation on a draft proposal for local government reorganisation in Northland and Hawke's Bay.¹³ A requester asked the Department of Internal Affairs for information about the reorganisation. The Department withheld one paragraph of a briefing to the Local Government Minister, and an attachment to that briefing containing the Secretary of Local Government's (the Secretary's) response to the Local Government Commission's draft proposal. The requester complained to the Ombudsman.

The Department explained that the Local Government Commission had not yet decided on the draft proposal. It was 'concerned to ensure that the Commission is able to consider and respond to the Secretary's advice on the draft reorganisation proposals'. Release of the Secretary's advice would 'prejudice the Commission's ability to take the Secretary's views into account when making decisions'.

¹³ See clause 20, schedule 3, [Local Government Act 2002](#).

The Ombudsman explained to the Department that section 9(2)(f)(iv) applies where confidential advice has been tendered for ministerial or executive government consideration, and premature disclosure of that advice would prejudice the Minister or Cabinet's ability to properly consider that advice and decide what course of action to take. The Secretary's draft response to the Local Government Commission was not advice tendered to Ministers or Cabinet for consideration and decision. It was advice given to an independent statutory body.

The concern expressed – that premature disclosure of the advice would prejudice the ability of that independent statutory body to reach decisions in an effective and orderly manner – was akin to the concern reflected by section 9(2)(f)(iv) in respect of ministerial and executive government decision-making, but it was not something that section 9(2)(f)(iv) applied to protect.

In any case, the Ombudsman questioned whether premature disclosure of the advice would prejudice the Local Government Commission's decision-making process. The Secretary's advice was just one stream of advice that informed the Commission's decision. Other streams included public submissions, and mandated consultation with other specified bodies, such as the Auditor-General. If public submissions were able to be disclosed without any prejudicial impact, it was difficult to see why the Secretary's views had to remain confidential.

The Ombudsman noted that section 9(2)(f)(iv) could, in theory, apply to the paragraph in the briefing to the Minister of Local Government, given that it was advice tendered by officials for ministerial consideration. However, that paragraph did not relate to any ministerial or executive government decision-making process. The information itself noted that *'the Minister of Local Government does not have a decision-making role in reorganisations proposed by the Commission'*. The withheld information was provided to the Minister for noting and information purposes only. In these circumstances, there appeared to be no basis to conclude that withholding was necessary to enable ministerial or executive government decision-making processes to operate in an effective and orderly manner.

After considering the Ombudsman's comments the Department decided to release the information at issue, and the complaint was resolved.

Back to [index](#).

Case 328421 (2013)—Advice concerning partnership schools

In February 2012, the NZPPTA sought policy advice on the development of partnership schools. The Associate Minister of Education partially refused that request under section 9(2)(f)(iv). The NZPPTA complained to the Ombudsman.

In August 2012, the Associate Minister revised his decision, releasing most of the information at issue, but withholding a small amount of information about the funding of partnership schools under section 9(2)(f)(iv). The Ombudsman considered whether the

Associate Minister had good reason to withhold this small amount of information at the time that decision was taken.

He noted that the paper on partnership schools had been presented to Cabinet on 30 July 2012, and before that to the Cabinet Social Policy Committee on 25 July 2012, and had been subsequently published on the Ministry of Education website. Therefore it was apparent that Cabinet and Ministers had already considered the advice tendered by the Ministry and reached a decision as to how they wished to proceed with the policy on partnership schools. In light of this, it was not clear that withholding was necessary to protect the ability of the government to receive and deliberate upon advice in an effective and orderly manner.

The Ombudsman stated:

Section 5 of the OIA requires that decisions on whether or not to disclose official information in response to a request must be determined in accordance with the purposes of the Act set out in section 4. ... [T]here are circumstances in which disclosure of policy advice will promote the accountability and participation purposes of the Act, and these factors are more likely to predominate in decisions on OIA requests once Ministers and/or Cabinet have had the opportunity to consider the advice that has been tendered.

The proposal to create of a new type of school within the New Zealand educational system is a significant step, and is—in my opinion—a circumstance in which the disclosure of policy advice at this stage in the process is required by section 5 of the OIA when considering the accountability and participation purposes of this enactment. Ministers cannot be held fully accountable for the proposals they are putting forward, unless the relevant information is in the hands of the public. Similarly, the public cannot adequately, let alone effectively, participate in the ‘making and administration of laws and policies’ if they are not apprised of key elements of the government’s proposals. The resourcing of a public service is a key component in the development of policy and the public is entitled to know how the government intends that a new service—in this case a type of school—is to be funded.

The Ombudsman formed the opinion that section 9(2)(f)(iv) did not provide good reason to withhold the information at issue, and recommended its release. You can read the full opinion [here](#).

Back to [index](#).

Case 342796 (2012)—Advice regarding proposals for the future of Christchurch education

In September 2012, the Minister of Education publicly announced the Greater Christchurch Education Renewal Plan. This prompted a number of requests for the advice on which decisions had been based. Those requests were refused in full under sections 9(2)(f)(iv) and 9(2)(g)(i), and the requesters complained to the Ombudsman.

After the Ombudsman notified the complaints to the Minister, the Ministry advised that

the decision to withhold was under review. It subsequently released the business case and associated Cabinet papers, with minor deletions, followed by a large number of education reports and aides memoire.

The Ombudsman formed an opinion on the remaining deletions and (given the importance of the principles involved) the original decision to withhold the information at issue in full.

The Ombudsman considered that minor deletions to the business case were warranted under section 9(2)(f)(iv). The deleted information related to matters on which no decisions had been made. Disclosure of that information would have pre-empted the ability of Ministers or Cabinet to deliberate on the advice received and decide how to proceed.

However, the original decision to withhold the information in full was not justified under section 9(2)(f)(iv). By that stage, Cabinet had made the high level decisions on the renewal of the education system in greater Christchurch and the Minister had announced the key elements of the plan. In those circumstances, there was no reason to believe that the interest protected by section 9(2)(f)(iv) would have been harmed by the release of the documents.

In addition, the Ombudsman considered there was a strong public interest in the release of all information relevant to the proposals to close or merge schools, given that the Minister had initiated formal consultation with those schools and there was an obligation to comply with the legal requirements of good consultation.

In relation to business case, the Ministry stated that this was withheld at the time of the Minister's announcement because it was indicative only and a more detailed business case would follow. However, it was the business case which coordinated the education and property responses that had been running in parallel and set out a range of options that Cabinet decided on. It was also used to help finalise the document that was developed for consulting the sector and provided the basis for budget decisions. It was therefore a key document in the decision making process and its disclosure was crucial to enable the public's more effective participation in the making and administration of laws and policies, and to promote the accountability of Ministers of the Crown and officials, and thereby enhance respect for the law and to promote the good government of New Zealand (an object of the OIA expressed in section 4(a)).

Back to [index](#).

Case 309664 (2012)—Cabinet paper on decision to retain new born blood spot cards

In 2011, a requester complained about the Minister of Health's decision to withhold the Cabinet paper that informed the Government's decision to retain new born blood spot cards (also known as 'Guthrie' cards) indefinitely. The paper was withheld under section 9(2)(f)(iv), because '*further advice was under active consideration*'.

The paper was considered by Cabinet Committee in July 2010. The Committee agreed to the proposal for *‘the permanent retention of new born blood spot cards, with a strengthened policy framework, and improved Minister of Health and Advisory Group governance arrangements’*. The Committee invited the Minister to report back on the new policy and governance arrangements. That report back (due in August 2011), had not happened by the time the Minister made a decision on the request.

The Ombudsman formed the opinion that release of the paper at issue would not have prejudiced the Minister’s or Cabinet’s ability to consider the subsequent paper. The purpose of the July 2010 paper was to seek Cabinet Committee agreement to the permanent retention of the new born blood spot cards, to which the Committee agreed. It did not discuss the expected content of the report back, and in fact the later report back was not contemplated in the paper, but was agreed by the Committee when it considered the paper. The paper therefore did not disclose the advice that was subsequently given in August 2011. The Ombudsman could not see how release of the July 2010 paper, addressing permanent retention of the new born blood spot cards, would have prejudiced the consideration of the advice in the August 2011 paper, outlining the policy and governance arrangements for the cards. He was therefore of the view that section 9(2)(f)(iv) did not apply to the paper at the time of the refusal. It was not necessary to recommend release of the paper because it had already been made available.

Back to [index](#).

Case 331383 (2012)—Public submissions on Green Paper for Vulnerable Children

An MP asked the Ministry of Social Development (MSD) for copies of submissions on the Green Paper for Vulnerable Children received from organisations, businesses and academic staff. MSD refused the request under section 9(2)(f)(iv), and the MP complained to the Ombudsman.

The Ministry noted that the submissions were *‘under active consideration’* and that premature disclosure would prejudice the ability of Ministers and officials to consider the submissions in an effective and orderly manner, and impede the policy development process in relation to the White Paper.

The Chief Ombudsman noted that the application of section 9(2)(f)(iv) to submissions made by the public as part of government consultation processes had been considered on a number of occasions in the past. The general approach that has developed is that section 9(2)(f)(iv) does not provide a legitimate basis for withholding public submissions.

The constitutional convention in section 9(2)(f)(iv) protects *‘advice tendered by Ministers of the Crown and officials’*. Accordingly, to qualify for protection the information at issue must be advice tendered by officials to Ministers, or Ministers to Cabinet. While section 9(2)(f)(iv) may apply to advice which includes or refers to public submissions, the public submissions themselves are not *‘advice tendered by Ministers of the Crown and officials’*.

Ombudsmen have rejected the argument that premature release of public submissions would impede the subsequent development and consideration of policy advice by officials and Ministers. Disclosure of submissions cannot pre-empt or prejudice the ability to consider later advice that may in part be based on the submissions. Officials remain free to advise Ministers (and Ministers to advise Cabinet) about the merit or lack of merit in particular submissions as they see fit, and to offer such additional advice as they deem appropriate.

In line with previous cases, the Chief Ombudsman formed the provisional opinion in this case that section 9(2)(f)(iv) did not apply to the submissions in question:

- they were not advice tendered by Ministers or officials;
- the Chief Ombudsman did not consider that their disclosure would be premature or likely to hinder the policy development process; and
- withholding would appear to be inconsistent with one of the key purposes of the OIA, and with the stated aims and purposes of the public consultation process.

After considering the Chief Ombudsman's provisional opinion, MSD decided to publish the submissions on its website. The Chief Ombudsman discontinued her investigation on the basis that the complaint had been resolved. You can read the full case note [here](#).

Back to [index](#).

Case 177919 (2009)—Review of schools' operational funding

A requester asked the Ministry of Education for information about the 2006 schools operational funding review. His request was partially refused and he complained to the Ombudsman. One of the documents at issue, titled *Review of schools' operational funding*, was withheld under section 9(2)(f)(iv).

The Ombudsman noted that this document contained detailed background information and analysis with no formal recommendations. He also noted that it was developed in consultation with an advisory group comprising representatives of non-government organisations in the education sector that was chaired by a senior Ministry official.

Even if the document was regarded as '*advice*', the Ombudsman questioned whether it could be regarded as the work of '*officials*', even if the pen was in fact held by an official (the chair of the advisory group).

While preferred courses of action might be inferred from the report, the absence of formal recommendations, and the extent of non-governmental involvement in the report, suggested that its disclosure would not prejudice the ability of Cabinet, at a later stage, to address the issues raised. The Ombudsman suggested that any public feedback following disclosure would be likely to better inform the tendering of advice to Cabinet and its consideration thereof. The breadth and nature of sector involvement in the document by itself created a need for accountability for that involvement.

The Ministry agreed to release the document after considering the Ombudsman's comments, and that particular aspect of the complaint was resolved.

Back to [index](#).

Case 172541 (2008)—Options and analysis in the review of New Zealand Superannuation Portability

In response to a request for official information in late 2007, the Minister for Social Development and Employment decided to withhold parts of two reports from 2004 and 2005 relating to the review of New Zealand Superannuation Portability. The Minister relied on section 9(2)(f)(iv) because the information was *'still under active consideration through the Budget process'*.

The Minister released the background and issues information, but withheld information about the options and their analysis. She explained that, although Cabinet had agreed to a package of proposals in October 2007, that agreement was subject to funding in Budget 2008. She argued that release before the budget announcements in May 2008 would undermine the convention of budget secrecy and the effective functioning of government.

In relation to budget secrecy, the Chief Ombudsman said this convention would only apply if a decision had been made to include the proposals in the budget. At the time of the decision on the request, no such decision had been made.

She went on to consider whether it was necessary to withhold the options and analysis under section 9(2)(f)(iv), in order to maintain the constitutional convention protecting the confidentiality of advice. She drew a distinction between the analysis and bare options.

She accepted that analysis of options that had been agreed by Cabinet but which were still subject to funding decisions needed to be withheld. Disclosure would pre-empt the ability of Cabinet to deliberate on the advice and decide how to proceed. She agreed with the Minister that these options remained *'under consideration'* until the funding issues had been resolved.

The Chief Ombudsman did not accept that it was necessary to withhold the bare options:

In my view the release of the bare options tendered in 2005 is not likely to have the effect predicted. The advice is two years old and no advice has been issued as to which of the options are currently under consideration. In these circumstances it is difficult to see how release of this advice would be likely to interfere with the funding decision making process.

She also considered that there was a strong public interest in release of the bare options. The review had been ongoing since 2001, and in 2006 the Social Services Committee urged that it be accorded urgency. Disclosure of the bare options would promote the accountability of Ministers and officials to the people of New Zealand in relation to a

long-running review. It would also enable the New Zealand public to participate in the making of laws and policy in relation to a matter of national interest.

The Chief Ombudsman acknowledged that this was a complex and controversial area of policy, but this in itself did not amount to a good reason to withhold information from the New Zealand public. In contrast, it was a factor that favoured release of information, because:

...disclosure of the options tendered can fuel public debate and therefore ensure that decision makers have a contestable avenue of advice to that put forward by officials before decisions are taken.

The Chief Ombudsman formed the final opinion that section 9(2)(f)(iv) did not provide good reason to withhold the bare options at the time that decision was taken. She recommended release of that information, except to the extent that a decision had been made to include any of the options in Budget 2008. The Minister complied with the Chief Ombudsman's recommendation, releasing all options except for one which was then the subject of a current budget bid.

Back to [index](#).

Case 176459 (2008)—Advice on electoral finance, after the introduction of the Electoral Finance Bill

After the introduction of the Electoral Finance Bill (the Bill), requesters sought information about the policy development, and complained to the Ombudsman when some information was withheld under section 9(2)(f)(iv).

The Minister of Justice explained that, despite the Bill's introduction, some of the advice had not been the subject of final decisions. In particular, an independent review of a range of electoral finance issues was to be conducted by an expert panel, with the assistance of a 'Citizens' Forum'. The issues would be considered further by the Government on receipt of the expert panel's report.

The Minister argued that releasing the previous advice on these issues would be likely to hinder the future decision making process, by causing undue focus on matters already considered by the Government, when the intention was that the review be completely objective and unfettered by any previously considered or adopted proposals.

The Ombudsman did not accept that section 9(2)(f)(iv) applied in this context. The introduction of the Bill constituted the end of a discrete phase or break-point in the policy development process. The policy process was not complete, as the Government would have more issues to consider once the independent review was finished. However, the Ombudsman did not consider that release of the information would prejudice the future ability of Ministers to consider the issues afresh, in light of the expert panel's report. The fact that the Government had an open mind on the issues to be considered was reflected in the fact that a decision had been made to refer them to an independent review and the terms of that review. While some members of the public

may have been sceptical about the independence of the review, the proper approach was to provide a contextual statement to address any misunderstanding that may have arisen. The Minister accepted the Ombudsman's provisional opinion and released the advice.

Back to [index](#).

Case 176675 (2008)—Abandoned options, South Auckland primary teacher supply

A requester complained to the Ombudsman when deletions were made to an education report on South Auckland primary teacher supply. The Ministry of Education argued that initiatives covered in the report had not been finalised and release would prejudice the development and implementation process.

The Ombudsman noted that the report in question contained options for further investigation. However, the Ministry had subsequently been made aware through the budget process that funding was not available to pursue those options. Accordingly, the options had been abandoned, and the Ministry was focusing on the development of other options that would achieve the same ends. Consultation on those other options was already underway.

The Ombudsman characterised the content of the report as containing bare options for investigation. No detailed advice was provided on those options. The options were standard options for addressing problems involving teacher recruitment and retention.

In addition, by the time the request was refused the associated decision-making in respect of the particular advice had been completed. The first decision was the Minister's, namely, to approve investigation of those particular options. The second decision was made by the Ministry, namely to abandon those options as a result of advice it had received during the budget process.

Because of the content of the advice and the stage reached in the policy making process at the date of the request, the Ombudsman was not convinced that section 9(2)(f)(iv) applied.

The Ombudsman acknowledged the Ministry's concerns that release of the information would raise expectations in the sector which would not be met, and prejudice the effectiveness of its consultation with stakeholders. He considered this could be addressed by release of an accompanying contextual statement, explaining the basis on which the advice was prepared and the subsequent direction of the policy.

The Ministry decided to release the relevant information after considering the Ombudsman's comments, and that aspect of the complaint was resolved.

Back to [index](#).

Case 177645 (2008)—Information relating to appointment of an honorary consul in Monaco

A requester sought advice to the Minister of Foreign Affairs on the appointment of an honorary consul in Monaco. It was withheld under section 9(2)(f)(iv) and the requester complained to the Ombudsman. The Minister explained that a decision had not been taken, and release of the advice would prejudice his ability to make an objective decision about the proposal.

The Ombudsman acknowledged that this was a relevant factor. He stated:

It is accepted that one of the purposes of section 9(2)(f)(iv) is to allow Ministers and Cabinet to consider advice whose release could prejudice their ability to make well-considered decisions on what course of action to take. Prematurely releasing details of a matter under consideration could damage the public interest in good governance—for example, by dissuading individuals whose appointment was under consideration from offering themselves for office.

However, there were two factors in this case ‘which [told] against the public value in confidentiality’. The first was the length of time that an appointment had been under consideration. The issue first appeared to have been raised in 1991. The latest advice was in 2007. The Ombudsman acknowledged ‘the Government’s prerogative to make or defer a decision as it sees fit’. However, ‘the public interest ... in withholding information to permit a Government to consider advice in private must diminish over time since a Government will, by definition, have had an increasing amount of time in which to deliberate on the matter’.

The second factor telling against the public value of confidentiality in this case was the amount of information already available. From publicly available information, it was clear that there was already widespread knowledge of the appointment under consideration.

In view of those two factors the Ombudsman was not persuaded that section 9(2)(f)(iv) provided a justifiable ground for withholding the information. On further consideration, the Minister confirmed that no further steps regarding the appointment of an honorary consul to Monaco would be taken, and agreed to release the advice.

Back to [index](#).

Case 174609 (2007)—Ministerial briefing on citizenship review

A requester sought information about a review of the concept of citizenship, and complained to the Ombudsman when the Minister of Internal Affairs refused that request under section 9(2)(f)(iv).

The information at issue consisted of a briefing to the Minister prepared by officials at the Department of Internal Affairs. While that is the type of information that can attract the protection of section 9(2)(f)(iv), the Ombudsman was not persuaded that it properly applied in this case.

The briefing consisted of background and factual information, and discussion of a research report that was publicly available. The Ombudsman could not see how release of such limited *'advice'* as there was would undermine the Minister's ability to make decisions. Indeed, it was not clear what executive government decisions were required or pending.

All the briefing recommended was a meeting with officials to discuss the Minister's views. It contained no detailed advice regarding policy options under consideration, except for recounting those canvassed in the publicly available research report.

Beyond the factual / background information, there were a few high-level statements of principle and expressions of opinion. However, these were neither surprising, nor, so far as the Ombudsman could see, potentially prejudicial to whatever ongoing executive government decision-making processes there may have been.

The Ombudsman appreciated that these statements and opinions may not have represented Government policy, but could not see why this would make withholding necessary under section 9(2)(f)(iv). She noted that the briefing could be disclosed with a disclaimer that it did not represent Government policy.

The Ombudsman also considered that there was a public interest in release of this kind of general background or high-level issues-based information because it would contribute toward public understanding of, and participation in, an important policy debate.

After considering the Ombudsman's comments, the Minister decided to release the briefing, and the complaint was resolved.

Back to [index](#).

Case 175435 (2007)—Advice on daylight savings and the 2011 Rugby World Cup

The Minister for the Rugby World Cup refused to release Cabinet advice regarding the amendment of daylight savings under section 9(2)(f)(iv), and the requester complained to the Ombudsman.

The Ombudsman noted the limited nature of the advice at issue. It briefly outlined stakeholder preferences and set out the process the Government would follow to arrive at a decision on the issue. As the advice was anticipatory, it did not contain opinions or recommendations as to what the decision should be. In the Ombudsman's opinion, disclosure of the issue and the fact that it was under consideration by officials was not likely to prejudice the ability of government to receive and deliberate upon future advice in an effective and orderly manner.

The Minister observed that there had been public speculation the issue was under consideration, but no official confirmation of that fact. However, the Ombudsman noted that in withholding advice about *'daylight savings and the 2011 Rugby World Cup'* the Minister had, in effect, already confirmed that advice had been tendered about the issue

and therefore that the issue was under consideration.

The Ombudsman also noted that despite the public speculation, there had been no resulting media frenzy or misinformed public debate. There was nothing ambiguous in the content of the advice which led her to think that any resulting public debate would be ill-informed.

In these circumstances the Ombudsman was not convinced that disclosure of the information at issue would be likely to prejudice the ability of Ministers and Cabinet to consider advice on the issue, and therefore that release of the information would undermine the interests which section 9(2)(f)(iv) seeks to protect.

The Ombudsman also observed that there was a public interest in disclosing the fact that this matter was under consideration by the Government. The availability of this information to the people of New Zealand at this time would *'enable their more effective participation'* at a later time when policy advice on the issue was under consideration.

The Minister had acknowledged that *'the potential alteration of daylight savings is of national importance, and will affect all New Zealanders'*. In the Ombudsman's opinion, *'issues of national importance demand timely transparency so that decision makers have a contestable avenue of advice to that put forward by officials before decisions are taken'*.

The Minister complied with the Ombudsman's recommendation to release the advice.

Back to [index](#).

Case 174587 (2007)—Stock take report on the Crime Reduction Strategy

A requester sought information relating to the review of the Crime Reduction Strategy, and complained to the Ombudsman when a *'stock take report'* on the strategy was withheld under section 9(2)(f)(iv).

The Chief Ombudsman advised the Minister of Justice of his provisional opinion that section 9(2)(f)(iv) did not apply to the report. The report was commissioned by the Ministry of Justice and authored by an external consultant. It contained a significant amount of factual information. One section of the report set out future options. Those options may have been adopted by officials and later tendered to the Government, but the report itself could not be described as advice which had been tendered in terms of section 9(2)(f)(iv). Furthermore, disclosure of the report would not pre-empt any future advice from officials as officials may not necessarily advise that one of the options proposed by the author be adopted by the Government.

The Chief Ombudsman noted that the purpose of section 9(2)(f)(iv) is *'not to protect from disclosure the whole of any policy process from disclosure prior to ministerial decisions being taken'*. This would be inconsistent with the purpose of the OIA to enable effective public participation in the making and administration of laws and policies.

The Minister of Justice revised his decision to withhold the report after considering the

Chief Ombudsman’s provisional opinion, and the complaint was resolved.

Back to [index](#).

Case 173160 (2005)—Treasury costings of student free loan policy

In the run-up to the 2005 general election the then Labour Government announced a policy commitment to abolish interest on student loans. The Treasury had completed some preliminary analysis of the policy at the Minister of Finance’s request. Opposition researchers sought access to this analysis, and complained to the Chief Ombudsman when their request was refused under sections 9(2)(f)(iv) and 9(2)(g)(i).

The Chief Ombudsman did not consider that section 9(2)(f)(iv) applied. That section is concerned with *‘the risk of actual prejudice to decision-making processes by governments’*.¹⁴ In this case the advice in question was to the Labour Party in relation to an election commitment, rather than the Labour Government in relation to an executive government decision making process. The executive government decision making process had yet to begin. In addition, there was no reason to believe that disclosure of the advice would prejudice the executive government decision making process once it began. The need to withhold under section 9(2)(f)(iv) is usually temporary while decisions have not been made. In this case, *‘a clear decision had been made on the advice that had enabled the Labour Party to make a public announcement on the policy proposal as part of the election campaign’*. Because the announcement of the policy was so unequivocal, it appeared to allow no room for movement on the essentials of the policy. It was therefore difficult to see how disclosure could prejudice the process by which Ministers would eventually deal collectively with the policy, including subsidiary issues such as implementation. The Chief Ombudsman also concluded that even if section 9(2)(f)(iv) (and 9(2)(g)(i)) applied, the need to withhold would be outweighed by the public interest in release (this case is also discussed in our [public interest guide](#)). He recommended disclosure of the information. You can read the full case note [here](#) and the annual report article [here](#).

Back to [index](#).

¹⁴ Ombudsman’s Annual Report 2005/06 at 30, available at <http://www.ombudsman.parliament.nz/resources-and-publications/corporate-documents/annual-reports>.