

## Chief Ombudsman's opinion under the Official Information Act

### *Office of the Leader of the Opposition and the Minister of Finance*

Request for list of titles and dates of reports and briefings  
received by the Minister from specified government agencies

Reference No: 179181 (W61169)

Date: 17 February 2012

### Summary

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On 22 January 2009 the Office of the Leader of the Opposition (the complainant) requested from the Minister of Finance a list of all reports and briefings, by title and date, received from any government departments since 9 November 2008, in relation to his roles as Deputy Prime Minister, Minister of Finance, and Minister for Infrastructure.

The Minister refused the request on the basis that it was not specified with due particularity (section 12(2) OIA), and even if it was so specified, the information could not be made available without substantial collation or research (section 18(f) OIA). The complainant asked me to investigate and review this decision.

In notifying the complaint to the Minister I advised that the complainant's request was restricted to titles of reports received from the Treasury, the Inland Revenue Department (IRD), the Ministry of Justice, and the Ministry of Transport. The Minister confirmed his position that the refined request was not specified with due particularity, and even if it was so specified, the information could not be made available without substantial collation or research.

Following my investigation and review, I found that the information requested was specified with "*due particularity*" for the purpose of section 12(2) of the OIA, and that the request should not have been refused under section 18(f) of the OIA because it would not have required "*substantial collation or research*" to make the requested information available. I also found there was no substantive reason under section 9 of the OIA for withholding the requested titles on a 'class' or 'blanket' basis.

Certain titles were identified during the course of my investigation as being capable of release. I recommended that the Minister release those titles to the complainant.

Other titles were said to require further consideration. As I saw no reason on the face of it to justify their withholding, I invited the Minister to assess the titles, and provide further information in support of his decision to withhold any or all of them. In the absence of further information that persuades me that the withholding of any or all of the titles was justified under the OIA, I would likely recommend their release after the expiry of 20 working days.

*Post script:* The Minister complied with my recommendation and released all the titles at issue in full, barring the names of two individuals who had made OIA requests to him, which were withheld in order to protect their privacy (section 9(2)(a) refers).

## Relevant statutory provisions

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Official Information Act (OIA) sections 12(2) (information requested must be specified with due particularity), 18(f) (substantial collation or research), 9(2)(a) (privacy), 9(2)(ba) (confidentiality), 9(2)(f)(iv) (constitutional convention protecting the confidentiality of advice tendered by Ministers and officials), and 9(2)(g)(i) (free and frank expression of opinions necessary for the effective conduct of public affairs). See the [Appendix](#) for the full text of these provisions.

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## Background

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1. On 22 January 2009 the complainant wrote to the Minister of Finance requesting *“a list of all reports and briefings, by title and date, that you have received from any government departments since 9 November 2008, in relation to your roles as Deputy Prime Minister, Minister of Finance and Minister for Infrastructure”*.
2. On 23 February 2009 the Minister advised the complainant that he was extending the time limit for responding to its request by a further 20 working days due to the time required to consult with other parties before making a decision.
3. On 23 March 2009 the Minister informed the complainant that its *“request is too broad as it does not specify the subject matter of the information [it] wish[es] to obtain”*. The Minister refused the request on the grounds that it was not specified with due particularity (section 12(2) OIA), and even if it was so specified, the information could not be made available without substantial collation or research (section 18(f) OIA).
4. On 1 April 2009 the complainant asked me to investigate and review the Minister's decision. The complainant claimed that under the previous Labour administration, agencies held records of the reports and briefings they prepared for Ministers, and similar requests were frequently received and responded to in good faith.
5. On 14 April 2009 the complainant sought to address any possible uncertainty about the information sought by restricting its request to titles of reports

received from specified government agencies, namely the Treasury, the IRD, the Ministry of Justice, and the Ministry of Transport.

6. A number of similar complaints were subsequently received against other Ministers, and this became a test case for determining general issues of accessibility of lists of reports received by Ministers from agencies within their portfolios under the OIA.

## Investigation

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7. This section sets out the process followed during my investigation. The actual substance of the various exchanges with Ministers and officials is set out under [Analysis and findings](#) below.
8. On 28 April 2009 I notified the Minister of the complaint and the restriction advised by the complainant. I asked the Minister to consider whether that restriction enabled the request be met without substantial collation or research. Alternatively, if the Minister remained of the view that there were proper grounds for refusing the request, I asked to receive a report explaining those grounds. I also referred to previous investigations of similar complaints by Ombudsmen, and one investigation in particular, which “...established the principle that such requests are specified with sufficient particularity to enable the requested information to be identified.” I explained:

*“While in theory such requests could extend to many different kinds of reports or briefings at different levels of formality, or perhaps from different sources, most often the intent of the requester is, as it is here, to obtain a list of formal or official briefing papers received from the relevant Department or Ministry. In this case, the recipient of the request is reasonably able to identify the information requested, and the request is specified with due particularity for the purpose of section 12(2).”*

*During my earlier investigation, a number of core government agencies (including Treasury and the Inland Revenue Department) were consulted to ascertain whether they would be able to meet a similar request. It emerged that most agencies have relatively sophisticated electronic document management systems that would enable the requested titles to be collated without undue difficulty.”*
9. On 5 June 2009 the Minister wrote to me confirming his position that “[the] refined request is not specified with due particularity under section 12 of the Act ... [and] even if the request were considered to be specified with due particularity substantial collation or research would be required.” He outlined his reasons for refusing the request, and advised that if further assistance was required, my office should contact the nominated Treasury official.
10. In the meantime, Ombudsman David McGee and I began receiving further similar OIA complaints from the complainant and Labour Members of Parliament against other Ministers. We resolved to use this complaint to try and establish principles of broader application.
11. On 30 June 2009, members of my staff met with the relevant Treasury officials. The Minister’s concerns were discussed, and it was resolved that I would write to him setting out my provisional view as to whether those concerns justified the refusal of the complainant’s request.

12. On 22 July 2009, I wrote to the Minister setting out my provisional view. In essence, I did not accept that there was any administrative or substantive reason, in principle, to justify the refusal of the request. However, I acknowledged that the actual process of collating the requested information could be the subject of further discussions between my investigating staff and the relevant officials. I invited the Minister to make any comments he wished in response to my provisional view. Alternatively, if he accepted that view, I proposed a meeting between the relevant officials and my investigating staff.
13. On 20 August 2009, the Minister advised me that he had considered my provisional view and at this stage did not propose to add to his submissions. He noted that he looked forward to hearing the outcome of my meetings with the relevant agencies, and to receiving my final guidance on dealing with requests of this nature. That arrangement was overtaken by subsequent events, and the proposed meetings never eventuated.
14. Having reached the point of establishing our 'in principle' approach to requests of this nature, Dr McGee and I set about communicating that more widely to all the Ministers against whom similar complaints had been made.
15. On 2 November 2009, we wrote to 13 Ministers about 14 complaints, setting out our provisional view on the availability under the OIA of lists of reports received by Ministers from agencies within their portfolios. Dr McGee and I invited the Ministers to make submissions in response to our provisional view, before we considered whether to confirm it as our final opinion. A copy of our provisional view was also provided to the Prime Minister's Chief of Staff, in case the Government wished to provide a coordinated response on behalf of all the Ministers concerned.
16. In our provisional view, we noted that the issue of access to lists of reports received had arisen in the past. From our records, we are aware that such requests were made to, and met by, the former Ministers (or Associate Ministers) of Health, Corrections, Justice, Education, Immigration and Revenue, in previous administrations. Most of the complaints received concerned the Minister in question's failure to meet the maximum 20 working day time limit for responding to the request. All these complaints were resolved following the belated decision to grant the request and disclosure of the information sought. A further three investigations concerned decisions by Ministers to refuse the requests. In two of these (W56142 and W55767), the information was released following the acceptance of the Ombudsman's provisional view that there was no proper basis for the refusal. The third case (W59425) was resolved when the Ombudsman formed the final opinion that the request should not have been refused and recommended release of the information.
17. On 3 December 2009 the Secretary to the Treasury wrote to me requesting the opportunity, alongside his central agency colleagues, to meet with us in order to discuss our provisional view. On 22 December 2009, we met with the Secretary to the Treasury, the State Services Commissioner, the Chief Executive of the Department of the Prime Minister and Cabinet (DPMC) and the Secretary to the Cabinet.
18. Discussions at that meeting did not cause us to alter our view that there is no reason in principle why these requests cannot be made and met under the OIA.

Accordingly, on 16 July 2010, we wrote to all the Ministers confirming the general principles set out in our provisional view as our final opinion. We informed Ministers that our investigation of these complaints would proceed with regard to the specific facts at hand in each individual case. We separately wrote to each Minister suggesting next steps with respect to each complaint. In the Minister of Finance's case, I asked him to:

- Consider whether it would be more efficient and effective to transfer relevant parts of the request to the Treasury, the IRD, the Ministry of Justice and the Ministry of Transport.
  - Identify the information captured by the request. (The Minister was advised that any uncertainties about the scope of the information captured by the request could be discussed with my investigating staff or the complainant.)
  - Collate the requested information. (The Minister was invited to contact my investigating staff if, after scoping the amount of work involved, he still considered that section 18(f) applied.)
  - Decide whether he intended to grant the request in full or with deletions, and let me know.
  - Release the requested list, deleting only individual report titles, or parts of titles, that it was necessary to withhold under sections 6 or 9 of the OIA.
19. On 23 August 2010 Dr McGee and I received a further letter from the Minister of Finance on behalf of all the Ministers concerned. The Minister strongly disagreed with our final opinion in principle, and in particular, with our interpretation of section 18(f) of the OIA, and the activities that can or cannot go toward establishing “*substantial collation or research*” in terms of that provision. The Minister asked us to reflect on the concerns expressed, and reconsider the matter.
20. On 21 March 2011, we wrote to each of the Ministers concerned in similar terms. In respect of the Minister of Finance, I addressed the comments in his letter of 23 August 2010, and once again confirmed my opinion on the general principles raised by these cases. I advised the Minister that Dr McGee and I now regarded those principles as being settled, and that our investigations would proceed with regard to the specific facts at hand in each case. Pursuant to section 19(1) of the Ombudsmen Act, and section 29A of the OIA, I requested a copy of the list at issue, with any individual titles that the Minister considered needed to be withheld under section 9(2) of the OIA clearly identified.
21. Following further discussions with the Secretary to the Treasury, another meeting with the central agencies was arranged, and in anticipation of that meeting, we received a letter from the Minister of Finance dated 3 May 2011. The Minister provided the requested list, and reiterated the Government's objections to our interpretation of key provisions of the OIA (namely sections 12(2) and 18(f)).
22. On 6 May 2011 we met the Chief Executive of DPMC, the Deputy Chief Executive of the Treasury, and the Cabinet Secretary. As a result of that meeting, Treasury agreed to:

*“Test on a practical level the approach that a suitably senior official might reasonably take in quickly reviewing any such list in order to:*

- *understand the nature of the titles listed;*
  - *decide whether further documents need to be reviewed to understand the nature of the titles listed;*
  - *decide whether the titles need to be referred to Managers or other staff or agencies to understand their nature;*
  - *consider whether based solely on that understanding, a withhold/release recommendation could be made to the Minister regarding each listed title;*
  - *consider whether further work or consultation would be required in order to make such withhold/release recommendations; and*
  - *provide [us] with a copy of the list marked to reflect this test.”*
23. On 15 June 2011 I received from the Treasury further information about how this request would be handled on a practical level, were the Minister to agree that it was specified with due particularity, and the results of the practical test of a suitably senior official quickly reviewing the list in question.
24. At this stage, I decided that I had sufficient information to form a final opinion, not only on the relevant principles, but on the application of those principles to this specific case.

## **Analysis and findings**

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25. The arguments advanced by the Minister of Finance and the central agencies on his behalf in the course of the investigation were, in effect, that the information requested:
- is not specified with due particularity in the request, as required by section 12(2) of the OIA;
  - cannot be made available without substantial collation or research (section 18(f) of the OIA);
  - would, if disclosed, prejudice the interests protected by sections 9(2)(f)(iv) and 9(2)(g)(i) of the OIA.
26. The Minister therefore argued that the request is either invalid for lack of particularity or, if it is valid, that he was justified in refusing it under sections 18(f), 9(2)(f)(iv) or 9(2)(g)(i) of the OIA.
27. In the course of investigating similar complaints against other Ministers, Dr McGee and I also formed opinions on the application of sections 9(2)(a) and 9(2)(ba) of the OIA.

### **Section 12(2) – due particularity**

28. Section 12 of the OIA sets out the requirements for requests for access to official information. Subsection (2) provides that a request for official information must be specified with “*due particularity*”. Section 12 is to be read in conjunction with section 13, which makes it a duty of every department, Minister and organisation to give “*reasonable assistance*” to a person to make a request in accordance with section 12.
29. This case has turned in part on the meaning of the phrase “*due particularity*”.

### The Minister's contention

30. The Minister argued that in order to be duly particular a request must specify a subject matter, and a request which asks for a list of documents received by a Minister without referring to a subject matter is not specified with due particularity for the purpose of section 12(2).
31. The Minister referred to section 18A(2) of the OIA – which provides that multiple requests may be treated as a single request for the purpose of section 18(f) if they are about the same or similar subject matter – and said this shows “*the Act clearly anticipates that requests will have subject matters.*”
32. Reliance was also placed on the following passage of the Danks Committee's commentary on the proposed section 12(2):

*“It is not envisaged that individuals should have a right to conduct ‘fishing expeditions’ in the hope or expectation that material of interest or use will turn up, or to make vague or sweeping requests for a class of information.”<sup>1</sup>*

33. The Minister acknowledged that “*fishing expedition*” is not a term recognised in the OIA, and is not itself a reason for withholding information. However, he said, a request of this nature which does not specify a subject matter is clearly made “*in the hope or expectation that material of interest or use will turn up*” and amounts to “*a sweeping request for a class of information.*”

34. He therefore submitted that:

*“...such requests are more appropriately treated as non-requests and should be rejected because they do not specify a subject matter and therefore are not specified with due particularity in accordance with section 12(2).”<sup>2</sup>*

### Due particularity

35. The Danks Committee recommended section 12(2) as a procedural reason for not complying with a request for official information on the basis that “*the information required is not defined sufficiently specifically for an experienced officer to identify it.*”<sup>3</sup> In line with this, successive Ombudsmen have found that the “*due particularity*” requirement is met if the recipient of a request is reasonably able to identify the information requested.<sup>4</sup>
36. That requirement was met in this case, particularly once the complainant clarified that only reports and briefings supplied by specified government departments were required. (If the complainant's omission to do this in the first instance created ambiguity, then in compliance with section 13, it would have been reasonable to assist the complainant to resolve that ambiguity by providing the necessary clarification at an earlier stage.)
37. The information sought was the dates and titles of all reports and briefings received in a particular time period. It is reasonable to expect that this required

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<sup>1</sup> Danks Committee Supplementary Report, page 69 (available on the publications page of the Ombudsmen's website, [www.ombudsmen.parliament.nz](http://www.ombudsmen.parliament.nz)).

<sup>2</sup> Minister's letter dated 5 June 2009 refers.

<sup>3</sup> Supra n1 at 31.

<sup>4</sup> Ombudsmen's Annual Report for the year ended 30 June 2001, page 22; “*Large and broadly defined requests*”, Ombudsmen's Quarterly Review 4(1) March 1998.

some parameters to be set and communicated to the requester around the types of briefing or report captured by the request, but the request was not so inherently vague or ambiguous that the requested information could not be identified.

38. Many requests for official information do specify a subject matter, but that is not a requirement of the legislation. While section 18A(2) provides that multiple requests about the same or similar subject may be aggregated for the purpose of section 18(f), I consider that nothing in that section can serve to invalidate requests that do not specify a subject matter.
39. The presence or absence of a subject matter does not determine whether a request is specified with *“due particularity”*. A request may specify a subject matter and still not meet the *“due particularity”* requirement (e.g. a request for *“all information on climate change”*), while the reverse is equally true. For instance, a request may be for a particular type or category of information (e.g. a request for *“all weekly updates for the month of March”*). That does not mean that it is not specified with *“due particularity”*. If the information is reasonably capable of identification, then the request is specified with due particularity.
40. It could also be argued that the request does specify a subject matter, effectively, *“what official advice was provided to the Minister”* during the time period in question. The motivation for making such a request may be readily perceived. The lists being sought would provide a valuable overview of the issues under recent consideration by the Government. Rather than the request being made *“in the hope or expectation that material of interest or use will turn up”*, the material may be of interest or use as a starting point, because it demonstrates the subjects under consideration by the Minister.
41. For these reasons, my opinion is that the request was specified with *“due particularity”* and valid under the OIA.
42. It is also worth noting that the Minister did not refuse the request as invalid at the outset. Instead he extended the statutory time limit to make and communicate a decision on it. Section 15A of the OIA (the extension provision) applies *“where a request in accordance with section 12 is made”*. This suggests that, at least initially, the Minister accepted the complainant’s request was valid, and more specifically, made in compliance with the due particularity requirement.

#### **Section 18(f) – substantial collation or research**

43. Section 18(f) of the OIA provides that a request for information may be refused if *“the information requested cannot be made available without substantial collation or research”*. It is one of a number of administrative reasons for refusing requests for official information.
44. Most of the arguments in this case have centred on the time and effort required to decide whether or not the titles can be released. However, some consideration was also given to the time and effort involved in collating the requested list.

### Collating the list

45. The Minister initially advised that his office does not have a system which can collate lists of documents easily:

*“My office receives a large amount of information, in a number of forms, from a multitude of agencies. Papers are logged on a spreadsheet when they are received by the office. The spreadsheet attempts to capture the nature of the information in the document whether it is a formal briefing paper, an agenda or some other form of communication. The spreadsheet may not list the particular format of the information and may not refer to the title of the report.*

*The system supplied by the Department of Internal Affairs (Ministerial Services) does not capture the metadata which would allow for the easy compilation of lists of the nature requested by [the complainant]. The compilation of such lists would be an arduous administrative task.”<sup>5</sup>*

46. I responded by noting that even if the Minister did not have a reliable system for logging reports and briefings, the relevant government agencies were likely to have electronic document and records management systems (EDRMS) or business information systems from which the requested dates and titles could be extracted. I noted that if the Minister did not hold the information or the means of collating it, then section 14 of the OIA imposed a duty to transfer the request to the agency that does hold it.
47. I also referred to section 17 of the Public Records Act, pursuant to which every public office must create and maintain full and accurate records of its affairs in accordance with normal prudent business practice, and in an accessible form so as to be able to be used for subsequent reference. I observed that the provision of advice to Ministers is a core business activity for central government agencies, and it would seem to be normal prudent business practice for such advice to be readily identifiable and accessible. If it is not, this may raise questions about an agency’s ability to comply with its obligations under the Public Records Act.
48. This issue appeared to have been addressed, it being acknowledged in subsequent meetings and correspondence from the Minister that *“many electronic document and records management systems now allow lists of documents to be produced with relative ease.”<sup>6</sup>*
49. For the large part of the remainder of my investigation no further arguments were advanced to suggest that the physical task of collating or bringing the material together would be *“substantial”* in terms of section 18(f). This is despite having invited officials to meet with my investigating staff to discuss the actual process of collating the requested information if that posed difficulties (my letters dated 22 July 2009 and 16 July 2010 refer).
50. On 3 May 2011, I received a copy of the list at issue (with no suggestion or indication that the process of collating that information had been administratively inconvenient).
51. On 15 June 2011, I received the results of Treasury’s practical test of a suitably senior official quickly reviewing the list in order to identify titles capable of

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<sup>5</sup> Minister’s letter dated 5 June 2009 refers.

<sup>6</sup> Minister’s letter dated 23 August 2010 refers.

release. This included, amongst other matters, comments directed to the task of compiling the list:

*“Treasury routinely sends reports to different Ministers and such documents are recorded in an electronic document management system. Treasury is able to isolate types of documents (e.g. Treasury Report or Aide Memoire) sent to Ministers, but there are technical constraints that prevent an exact list of document titles sent to (or received by) a specific Minister from being retrieved. This reflects the limitations of an electronic document management system that has finite customisable features but that, until recently, appropriately met the needs of Treasury. There was previously little need for our electronic document system to record the metadata of the Minister(s) to whom a document was sent. Over recent years the number of Ministers that Treasury deals with has increased. This has added complexity for record management, and although Treasury has been actively reviewing how this information can be captured, there are limitations. As a result, compiling a list of document titles received by a specific Minister requires manual review of initial search results.*

*Treasury also inherited the document management system of the former Crown Company Monitoring Advisory Unit (CCMAU) in 2009. The documents were migrated to Treasury’s electronic and records management system but do not have metadata describing the document type (e.g. Report, Letter etc) or status (e.g. Sent to Minister, returned from Minister etc). To identify whether these documents were sent to Ministers requires reviewing the results of a full text search using appropriate key words (e.g. Minister’s name) and then viewing each document to ascertain its relevance to the search. Depending on the number of search results, this manual review can be a significant undertaking.”*

52. The difficulties related to the migration of CCMAU records in 2009 post-date the request at issue here, and are therefore not relevant to the present case (though they may be relevant to future requests and complaints).
53. I can only assume that the other difficulties referenced by Treasury – raised at this late stage and only after the list had been compiled and supplied to me – were not “substantial”. Presumably the information was able to be compiled from Treasury’s EDRMS, but a further level of manual review was required to ensure the information is complete.
54. In a previous investigation of a similar complaint against a former Minister of Immigration (W56142), I considered the argument that section 18(f) justified refusal of the request because of the lengths the Minister would need to go to in order to guarantee the list of reports and briefings received was complete and accurate.
55. In that case I found that it was only necessary to take all *reasonable* steps to ensure the accuracy of information provided in satisfaction of the request. The requester could have no cause for complaint provided the Minister was clear about the limitations of the data and acknowledged that, despite taking all reasonable steps to verify the accuracy of that data, some reports and briefings may inadvertently have been missed.
56. I also considered that if the requester was given the option of receiving some, largely but not necessarily completely accurate, information or receiving no information at all because of the time and effort that would be required to guarantee its complete accuracy, the former option would no doubt be

preferred.

57. In view of the above, I do not accept that it would have required substantial collation or research to compile the list for release.

Deciding whether or not the titles on the list can be released

58. The Minister's key concern was the amount of time and effort required in order to decide whether or not the titles on the list can be released. The Minister said:

*"The title of a paper may in itself constitute information which should be withheld under the Act. Therefore each title must be analysed and consulted upon with the relevant department that provided the document. Further consultation may be required with other organisations or individuals involved in the drafting of the document or to whom it relates.*

*The analysis and consultation process for the title of a document can be almost as involved as the analysis and consultation process for the document itself. Therefore the preparation of a list of documents can certainly constitute substantial collation or research."*<sup>7</sup>

59. The issue for determination was whether the time and effort required in order to decide whether or not the titles on the list can be released can go toward establishing "substantial collation or research".

*Substantial collation or research*

60. The Danks Committee proposed section 18(f) as a procedural ground for refusing a request on the basis that "the information does not exist in a form in which it can be provided without substantial collation or research by the department." It went on to say: "This is simply to say that a person requesting information is not entitled to ask a department to assemble or analyse data for him."<sup>8</sup>

61. The meaning of the phrase "substantial collation or research" was the subject of detailed analysis by the Law Commission in its 1997 review of the OIA. Collation, it said, "must bear its standard ordinary dictionary definition of bringing together material, especially for comparison", whereas research necessarily covers "the actual process of identifying what information comes within the scope of the request".<sup>9</sup>

62. The Law Commission went on to consider whether the wording of section 18(f) required amendment to account for time spent deciding whether or not information can be released. It said:

93. *"The second issue is whether the wording of s 18(f) requires amendment. The process of identifying the relevant information can be a large and difficult one affecting an agency's other operations. It can involve extensive consultation with those who provided relevant information. Section 9(1) of the Official Information Amendment Act 1987 inserted a new s 15A, which expressly recognises that those features of the process might justify an extension of time for handling the request:*

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<sup>7</sup> Minister's letter dated 5 June 2009 refers.

<sup>8</sup> Supra n1 at 31.

<sup>9</sup> Law Commission *Review of the Official Information Act 1982* (NZLC R40, 1997) pages 41-43.

- (1) Where a request in accordance with section 12 of this Act is made or transferred to a Department or Minister of the Crown or organisation, the chief executive of that Department or an officer or employee of that Department authorised by that chief executive or that Minister of the Crown or that organisation may extend the time limit set out in section 13 or section 15(1) of this Act in respect of the request if:
  - (a) the request is for a large quantity of official information or necessitates a search through a large quantity of information and meeting the original time limit would unreasonably interfere with the operations of the Department or the Minister of the Crown or the organisation; or
  - (b) consultations necessary to make a decision on the request are such that a proper response to the request cannot reasonably be made within the original time limit.

94. *When that power of extension and the grounds were introduced along with the 20 working-day time limit, no change was made to the wording of the power of refusal in s 18(f). The two provisions are, however, closely linked: if other operations of the agency might require postponing the process of considering and responding to a voluminous request, they could logically, in extreme cases at least, require that that process not be undertaken at all or at least not be completed. In practice, an agency which has received a large or broadly defined request will face a choice between responding to it on time, extending the time limit for responding under s 15A(1), or refusing the request under s 18(f). Or the agency may extend the time limit and then refuse the request under s 18(f).*

95. *While the processes described in s 15A(1)(a) are accommodated within the reference in s 18(f) to 'substantial collation and research', **the process of consultation described in s 15A(1)(b) is not.** Should s 18(f) mention (substantial) 'consultations necessary to make a decision on the request' as a further ground for refusing a request? We do not think so.*

96. *Any widening of the Act's grounds for refusing requests must be approached cautiously in light of the purpose in s 4(a) to increase progressively the availability of official information. Section 15A(1)(b) is wide enough to include consultation concerning the withholding grounds which might apply to a request, for example, discussions with persons whose privacy might be affected under s 9(2)(a), or with a legal adviser about whether any of the withholding provisions might apply. **Section 18(f), by contrast, is an administrative reason for refusing a request in that it relates to the accessibility of information itself, rather than its contents. We do not consider it appropriate to allow an agency to refuse a request because of the time or difficulty in making a substantive decision about whether it can withhold information.** As we note in the following chapter, an agency is not allowed to charge for the time spent in deciding whether or not to release information, although it may charge for the process of identifying or locating that information. The same distinction should be made in the context of refusing requests."<sup>10</sup> (My emphasis).*

63. In line with this, Ombudsmen have consistently interpreted "*substantial collation or research*" as referring to the administrative difficulty in identifying what information comes within the scope of the request, or in bringing together the

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<sup>10</sup> Ibid, pages 41-42.

requested material.<sup>11</sup> Section 18(f) may be invoked where a substantial amount of work would be involved in locating, extracting and collating the information in order to comply with the request. But it may not be invoked because of the time that would be required in order to decide (or consult with a view to deciding) whether the information can be released.<sup>12</sup>

64. The Minister disputed that interpretation, and on his behalf officials referred to the Law Commission's 2010 issues paper *The Public's Right to Know: A review of the Official Information Act 1982 and Parts 1–6 of the Local Government Official Information and Meetings Act 1987*, with the suggestion that the Law Commission's view of section 18(f)'s application may have changed.
65. In the 2010 issues paper, the Law Commission stated that “one of the most time consuming factors ... is perusing the material to assess whether it, or any part of it, should be released or withheld.” It said “there is some debate as to whether this activity falls within the expression ‘collation or research’”. It suggested the debate ought to be put to rest, and one possible means of doing so would be to add the words “review and assessment” to section 18(f). Officials suggested that “this more recent excerpt indicates that the support for the approach adopted by [me] and previous Ombudsmen may not be as clear as [I] suggest.”
66. The Law Commission in 2010 did not consider in any detail the meaning of the phrase “substantial collation or research”. The Commission's 1997 review remains the only in-depth analysis of the meaning of that phrase that I am aware of. It seems to me that the Commission would not in 2010 have mooted the idea of amending section 18(f) if the task of assessing official information for release was already clearly encompassed in that provision, and I see nothing in the 2010 paper that resiles from the position the Commission took in 1997.
67. As the Ombudsmen pointed out in recent submissions to the Commission,<sup>13</sup> the reasons why that body originally opposed amending section 18(f) to take account of time spent deciding on a request for official information remain cogent. We elaborated on those reasons as follows:

*“The Law Commission in the issues paper emphasises that it does not want to undermine or impair the ability to make legitimate requests, but the proposed extension may well do that. Official information decision-making and consultation processes can be onerous and complicated. They commonly involve inter-departmental consultation, legal vetting, multiple levels of internal sign-off and Ministerial consultation, and they may necessitate consultation with affected third parties. Ministers and agencies have judged that this level of caution is necessary to manage the risks associated with inadvertent disclosure of sensitive or embarrassing information. However, this does not mean that legitimate requests should be refused. There is a risk that if substantial time spent reviewing and assessing information provides a reason for refusing requests, then high risk requests stand a greater chance of being refused. It is often the high risk requests that raise the strongest public interest considerations favouring disclosure, and for*

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<sup>11</sup> E.g. see “Large and broadly defined requests for official information causing problems”, OQR, 4(1), March 1998; and “Too Much to Do - Too Little Time: Answering Official Information Requests”, OQR, 2(3), September 1996, available at [www.ombudsmen.parliament.nz](http://www.ombudsmen.parliament.nz).

<sup>12</sup> E.g. see “‘Consultation’ does not amount to ‘substantial collation and research’”, OQR, 11(2), July 2005, available at [www.ombudsmen.parliament.nz](http://www.ombudsmen.parliament.nz).

<sup>13</sup> Available on the publications page of the Ombudsmen's website, [www.ombudsmen.parliament.nz](http://www.ombudsmen.parliament.nz).

*this reason we think the proposed amendment could significantly undermine access rights. We also note that the administrative difficulty in identifying and pulling together relevant information is capable of objective assessment.... In contrast, the appropriate degree of consultation required and the complexity of the decision-making process are much more subjective. It is not clear what scope there would be to consider whether the projected level of review and assessment is in fact reasonable and necessary in the circumstances.”*

68. The Ombudsmen favoured legislative clarification that “*substantial collation or research*” encompasses time spent identifying, locating and collating the information, reading and reviewing the information, and editing and copying the information – and opposed the inclusion of time spent making a decision, or consulting with a view to making a decision, on a request.
69. That aside, my role is to apply the law as it currently stands, and not as it might be if legislatively amended. I consider that I am applying the current law, and in a manner consistent with the interpretation of previous Ombudsmen, when I say that section 18(f) does not permit an agency to refuse a request because of the time or difficulty involved in making a substantive decision about whether or not it can withhold the information. That interpretation is also consistent with the Law Commission’s interpretation of the existing provision.
70. I made clear to the Minister that decision-making and consultation do fall squarely in the terms of section 15A(1)(b) of the OIA, so that if a lengthy or extensive consultation process is required in order to take a decision on a request for information, then the time limit for response can be extended. I accepted that extensions may be justified with requests of this nature, depending on the time period and number of titles at issue.
71. The Minister responded by noting that if onerous decision-making processes cannot justify refusal under section 18(f), and if agencies are also prevented from levying a charge in relation to such processes,<sup>14</sup> the only option is for the agency is to extend the maximum time limit for responding to the request. He argued:

*“Effectively, therefore you are saying that Ministers and agencies have no defences against requests for lists of documents, however wide the requests may be.*

*The logical extension of this position is that a requester could ask for a list of all documents received by the Minister of Finance in the last five years. If my office’s document management system can produce that list then I must respond to the request and I cannot charge for the time it will take to respond to it.*

*I might decide to extend the time limit on the request for a year, or even two, but satisfying the request would still require hundreds of hours of work on the part of officials. This is not even to mention time spent on the inevitable follow up requests for the actual documents which are listed.*

*To use another example – the Cabinet Office could be asked for a list of papers submitted to Cabinet and Cabinet Committees over the last five years. That list could be produced relatively simply. It would contain over 10,000 documents, covering the entire breadth of government activity. Each*

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<sup>14</sup> Paragraph 3.3 of the Ministry of Justice Charging Guidelines provides that “*time spent by staff in deciding whether or not to approve access and in what form to provide information should not be charged*”. The Guidelines are available at [www.justice.govt.nz](http://www.justice.govt.nz).

*individual title would need to be referred to the portfolio Minister – and, most likely, the relevant department – and, for documents predating the current government, the Leader of the Opposition – for their views on release. The Cabinet Office would need to coordinate the reply; a massive exercise for a small office. The only cost to the requester would be the time it takes to write a one sentence email making the request.”*

72. I do not propose to consider in detail the hypothetical examples discussed above. I agree that a request encompassing thousands of report titles would be unreasonable, and would require substantial collation or research. This is because of the time that would be required just to read and review the information, not the time required to decide whether it can be released. However, I do acknowledge that the decision-making in such a scenario would be substantial, and it is possible in light of this that a request of this breadth could be regarded as vexatious for the purpose of section 18(h). In contrast to the hypothetical examples, the present request covers a period of two and a half months and a total of 101 titles.
73. I also observe that there is another option open to the Minister to manage the decision-making process in a way that reduces any adverse impact on the effective operations of his office or the advising agencies. A Minister may communicate a decision on a request before the actual information is released. The Minister need not be in a position to communicate a decision on each title individually in order to comply with section 15 of the OIA. It would suffice to advise the requester of the intention to grant the request, subject to any necessary redactions under specified provisions of the OIA. It is permissible under the OIA to release the requested information once the necessary work has been completed; the legal obligation is to do so without undue delay.<sup>15</sup> The issue, in the event of a complaint to the Ombudsman, would be whether the Minister had delayed unduly in releasing the information. The Ombudsman would take account of the nature and complexity of the decision-making process in reaching a view on this.
74. Ministers and officials disagree with my interpretation of both sections 18(f) and 12(2). Officials suggested that we might jointly commission with Ministers an expert view on the meaning of the phrases “*substantial collation or research*” and “*due particularity*” to inform our consideration of this matter.
75. I do not accept that this is necessary or appropriate. Parliament has given the Ombudsman the function of investigating and reviewing the refusal of a request under the OIA, and forming an opinion as to whether that refusal was justified. This was expressly recognised by the High Court in *Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council*, which stated “[the OIA] requires [the Ombudsman] to exercise his judgment using experience and accumulated knowledge which are his by virtue of the office he holds.”<sup>16</sup> It would be inconsistent with the independence of the Ombudsman to jointly commission with the holder of the information at issue an expert view going directly to those matters. Ministers and officials have had full opportunity to advance any information they wanted me to consider before I formed an opinion. I consider that I have sufficient information before me to reach an opinion both on the general principles, and on the application of those principles in this particular case.

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<sup>15</sup> Section 28(5) OIA refers.

<sup>16</sup> [1991] 2 NZLR 180 at 191.

*The decision-making process in this case*

76. In any event, I have considered the decision-making process in this case, and whether it could be said to meet any threshold of “*substantial*”.
77. Treasury officials advised that in order to make a decision on each title, consultation would be required both internally and externally (reflecting the nature of Treasury’s work as a central agency and provider of second opinion advice). Unlike a request that specifies a particular subject matter, and which may therefore be assigned to a particular team, this type of request would require coordination and liaison with teams across the whole of the organisation. Officials also said they would need to read or at least familiarise themselves with the content of the actual papers, in order to decide whether the titles might be released.
78. It is obvious that each title will need to be considered with a view to deciding whether it can be released, or whether there is good reason to withhold it in order to avoid prejudice to one or more of the interests protected by the OIA.
79. However, I must emphasise that the information at issue in this case is the *titles* of papers, not the papers themselves. Titles are of necessity brief. It is unreasonable to equate the task of deciding on the titles with the task of deciding on the actual papers.
80. Decisions on some titles may be more complicated than others, necessitating consultation and a greater degree of familiarity with the subject matter under consideration. However, it will not be necessary to go to these lengths in every, or even most, cases.
81. In particular, I do not accept that it will often be necessary to read the actual paper in order to decide whether the title may be released. A suitably senior official ought to be able to make an initial assessment of those titles posing no concern, and those (likely fewer) titles warranting further consideration. If a title is opaque to a person with inside knowledge of the agency’s work programme, it will likely be as, if not more, opaque to an outsider.
82. Surprisingly, while maintaining that requests such as the one at issue here would have a significant administrative impact on the organisation for the reasons canvassed at paragraph 77, Treasury acknowledged that:

*“The decision about whether information contained in the title of a document ought to be withheld is not normally onerous for individual Treasury managers. Judgments can usually be made quickly, as managers are familiar with the relevant portfolio and the judgment only requires assessment of one sentence.”<sup>17</sup>*
83. Officials also objected that there will be follow-up requests for particular papers. That may be so, but this does not render it necessary to read the paper before deciding whether the title may be released. Just because a title is released does not mean that the paper will be. Follow-up requests will need to be considered on their own merits.
84. In this case, Treasury agreed to test the process of a suitably senior official

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<sup>17</sup> Letter dated 15 June 2011 refers.

quickly reviewing the list in question. The list at issue comprised 82 Treasury titles, 18 IRD titles and one Ministry of Justice title (while Ministry of Transport titles were also sought, there were none at issue during the time period in question). In total there were 101 titles at issue.

85. This exercise enabled a determination to be made that 60 of the 101 titles at issue are capable of release. Forty-one titles require reference to the responsible team for further consideration. I do not accept that the decision-making and consultation processes in relation to 41 titles would amount to “substantial” collation or research.
86. In this case, the decision-making process is likely to have been complicated by the passage of time since the request was made. Officials will not be as familiar with the reports and briefings at issue as they would have been at the time. However, that is not something for which the requester should be made to suffer.

#### Future and repeat requests

87. The Minister argued that this request cannot be seen in isolation, because the complainant is likely to make “multiple and ongoing requests for similar information”. He stated:

*“The practical effect is that my office, and other public sector agencies receiving similar ongoing requests, would be expected to constantly release lists of all documents received. These lists would have to be analysed and consulted upon. This would be a fundamental change from the Act’s ‘response and request’ format to a ‘next generation’ pre-emptive release system. I believe the administrative burden could overwhelm public sector agencies and such a change should only be made through legislation.”<sup>18</sup>*

88. I agree that repeat requests of this nature are likely. I can also appreciate the difference between one-off requests that involve a considerable amount of work and regular requests that impose the same burden. In this case, however, even if the complainant was to submit regular requests covering a three-month period, that would only amount to four such requests per year. If other requesters sought the same information, the Minister’s office would not need to duplicate the required work each time.
89. Officials noted that even if a decision on a list is taken at one point in time, if a further request covering the same information is received that process will need to be repeated because the need to withhold changes over time. While that may be true, I do not consider that it justifies refusal of the original request on the grounds of substantial collation or research. Even if a repeat request for the same information is received, the decision-making process need only be repeated in respect of those titles that were withheld. Assuming the list was not withheld in full (a fair assumption based on views expressed elsewhere in this opinion) that should be a much quicker task.
90. I can see that, facing the prospect of multiple and ongoing requests, larger agencies in particular may decide to minimise the administrative burden in generating reactive responses to individual requests, and simply release the information proactively. However, I do not agree that this represents a

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<sup>18</sup> Minister’s letter dated 5 June 2009 refers.

*“fundamental change from the Act’s ‘response and request’ format to a ‘next generation’ pre-emptive release system.”*

91. The purpose of the OIA is to *“increase progressively the availability of official information”*. While part of this involves responding to requests made in accordance with section 12, that is not the full extent of what was envisaged by the Danks Committee. What we now refer to as *“proactive disclosure”* is precisely what the Danks Committee had in mind.
92. The Danks Committee noted:
- “The task of adjusting the formal arrangements for the protection and release of official information to the changing needs and attitudes of the community is likely to be a continuing one. We have identified three distinct but related tasks central to this adjustment:*
- (a) **reviewing the practice** of Government departments and agencies to ensure that official information is in fact made readily available to the public wherever possible;*
  - (b) **hearing complaints** from the public about the withholding of official information, and resolving questions arising from these;*
  - (c) **identifying additional categories** of official information which can be made readily available to the public with minimal safeguards.”<sup>19</sup>*
93. The legislation as originally enacted established the Information Authority, whose role was to *“define and review categories of official information with a view to enlarging the categories of official information to which access is given as a matter of right.”<sup>20</sup>*
94. Section 20 of the OIA requires the publication of the *Directory of Official Information*, setting out in respect of each department or organisation:
- a general description of the categories of documents held; and
  - a description of all manuals and similar types of documents which contain policies, principles, rules, or guidelines in accordance with which decisions or recommendations are made about individuals in their personal capacities (section 21 gives a right of access to such information).
95. The Danks Committee saw sections 20 and 21 as:
- “...an almost indispensable foundation for effective access by the public to information that is properly available. The individual seeking particular information needs to know where it can be found, and who to seek it from.”<sup>21</sup>*
96. Accordingly, the intent behind the OIA was to make available more information:
- as of right and without request;
  - about what the Government actually holds, in order to assist requesters to exercise their rights under the legislation.
97. The proactive publication of lists of reports and briefings provided to Government Ministers – made possible by technological advances the Danks

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<sup>19</sup> Danks Committee General Report, page 6 (available on the publications page of the Ombudsmen’s website, [www.ombudsmen.parliament.nz](http://www.ombudsmen.parliament.nz)).

<sup>20</sup> Expired section 38 refers.

<sup>21</sup> Supra n 19 at 25.

Committee may not have contemplated – is entirely consistent with this. The provision of such lists may assist requesters to exercise their rights under the legislation more effectively, by enabling them to make focused and specific requests.

98. A similar initiative exists in Australia, whereby federal agencies are required to produce an indexed list of files every six months for tabling before Parliament and release on their websites. The production of the list is intended to make the operations of government more transparent to the Australian public.
99. To be clear, I am not suggesting that lists of papers sent to Ministers ought to be made available proactively. That is clearly a decision for Ministers and agencies to take after considering the amount of work involved in reacting to individual OIA requests, and the likely efficiency gains (if any) to be made from proactively publishing the lists in anticipation of such requests.
100. Officials questioned whether there would be any real efficiency gains, again because the need to withhold the titles will change over time. They appeared to believe the withheld titles would need regular re-assessment to determine whether the need to withhold remained. The form and content of any proactive release is at the releasing agency's discretion. Unless a follow-up OIA request is received there is no obligation to re-assess those titles for release. Even if a follow-up request is received only those previously withheld titles would need to be re-assessed. As noted above, this should be a much quicker task than the original release.

#### **Sections 9(2)(f)(iv) and 9(2)(g)(i)**

101. The Minister expressed concern:

*“...that being required to satisfy requests of this type could result in officials and organisations engaging in behaviour such as changing titles of documents so they do not reflect the contents, not using titles at all, or using alternative communications methods to avoid subjects at issue being included in document lists.”<sup>22</sup>*

102. He also referred to *“anecdotal evidence of officials using very vanilla titles on reports and briefings so that if they are released on lists it will not be apparent what the papers are about.”<sup>23</sup>*
103. The concern expressed by the Minister is relevant to section 9(2)(g)(i) of the OIA. Subject to the public interest test in section 9(1), this section provides good reason to withhold official information if, and only if, it is necessary to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers and officials.
104. This section commonly applies where disclosure of official information would have the effect of inhibiting Ministers or officials from expressing or recording the kinds of free and frank opinions that are necessary for the effective conduct of public affairs.

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<sup>22</sup> Minister's letter dated 23 August 2010 refers.

<sup>23</sup> Minister's letter dated 5 June 2009 refers.

105. In addition (although the Minister advanced no detailed arguments on this issue), I have considered the application of section 9(2)(f)(iv). Subject to the public interest test in section 9(1), this section provides good reason to withhold official information if, and only if, it is necessary to maintain the constitutional convention for the time being which protects the confidentiality of advice tendered by Ministers and officials.
106. This section commonly applies where confidential advice has been tendered for ministerial or executive government consideration, and premature disclosure of that advice would prejudice the Minister's or Cabinet's ability to properly consider that advice and decide what course of action to take.
107. The Minister did not argue that *particular* titles needed to be withheld because their disclosure would prejudice the interests protected by sections 9(2)(f)(iv) or 9(2)(g)(i). Rather, the implicit argument appeared to be that all titles must be withheld on a class or blanket basis because otherwise officials might use titles that provide a less than accurate description of the contents of a paper, or not use titles at all, or in the extreme, not provide advice in the form of a written briefing in order to avoid the title of such a briefing becoming available in response to an OIA request.
108. I accept that in some instances disclosure of a *particular* title would prejudice the interests protected by sections 9(2)(f)(iv) or 9(2)(g)(i). However, I do not accept that these sections can legitimately justify the withholding of titles on a class or blanket basis. This could lead to the withholding of titles of papers that are themselves publicly available, or papers which might themselves be released in response to an OIA request if one were made.
109. This is in line with the Ombudsmen's approach in previous similar cases. In case W55767, I concluded that:
- "...there may be good reason to withhold some of the titles in question, but section 9(2)(f)(iv) of the OIA does not provide good reason for withholding the list of titles in its entirety."*
110. In case W59425, Ombudsman David McGee rejected the blanket application of section 9(2)(g)(i) of the OIA to requests of this nature. He stated:
- "...while a few reports may need this absolute protection, I am highly sceptical that the disclosure in most cases of report titles and their reference numbers would be likely to have the effect of making ministry officials ... 'reluctant to provide [you] in a timely manner with the advice [you] require in order to discharge [your] duties as Minister of Health'.*
- Such a scenario would, I suggest, reflect a serious failure of ministry officials to carry out their duty to provide you with free and frank advice, 'without fear or favour' whenever this is deemed necessary..."*
111. Dr McGee referred to the Court of Appeal case *Brightwell v Accident Compensation Corporation* [1985] 1 NZLR 132 at 158, where it was argued that the candour of officials would be inhibited by possible disclosure of their advice, particularly since the coming into force of the OIA. McMullin J observed that in an earlier House of Lords decision it had been said:

*"...the notion that any competent and conscientious public servant would be*

*inhibited at all in the candour of his writings by consideration of the off-chance that they might have to be produced in litigation was grotesque.”*

112. In McMullin J's view, “[a]dvisers should be made of sterner stuff.” McMullin J noted that since the passing of the OIA:

*“...public servants may expect that their advice and recommendations will become the subject of scrutiny through the processes of the Act. Those responsible for the legislation must have thought that no great harm would be done by the new approach. In the light of this statutory development such strength as the candour argument has had must be weakened further.”*

113. Titles are a functional description of the contents of a paper. They enable one paper to be identified and distinguished from another. They are necessary for the benefit of the reader and others who might need to have reference to the paper. It will not serve officials well to use titles that provide a less than accurate description of the contents of a paper. The utility and necessity of titling papers is also such that I do not accept that that practice will cease as a result of the possibility that titles may be made available under the OIA. Nor do I accept the more extreme proposition, that this prospect might make officials and Ministers avoid formal written advice altogether. It seems to me that officials and Ministers may take sufficient assurance from my acceptance that particular titles may justify withholding under sections 9(2)(f)(iv) and 9(2)(g)(i) of the OIA.

114. In my opinion, sections 9(2)(f)(iv) and 9(2)(g)(i) do not provide good reason to withhold the requested titles on a class or blanket basis.

#### **Other withholding grounds**

115. Other Ministers advanced sections 9(2)(a) and 9(2)(ba)(i) as withholding grounds of possible application to requests of this nature. The Minister advanced no such arguments himself, but for the sake of completeness they have been considered here.
116. Subject to the public interest test in section 9(1), section 9(2)(a) provides good reason to withhold official information if, and only if, it is necessary to protect the privacy of natural persons, including that of deceased natural persons.
117. I accept that if the title of a report would disclose personal information about an identifiable individual, then section 9(2)(a) may provide good reason to withhold the identifying details. Section 9(2)(a) is unlikely to have any application beyond these circumstances.
118. Subject to the public interest test in section 9(1), section 9(2)(ba)(i) provides good reason to withhold official information if, and only if, it is necessary to protect information which is subject to an obligation of confidence where the making available of the information would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied.
119. Section 9(2)(ba)(i) is not intended to protect advice supplied to Ministers by officials. This was explained by Ombudsman David McGee in the following terms in case W58450:

*“In my view Ministers do not owe officials an ‘obligation of confidence’ in respect of the information that is provided to them that can be used to deny others access to that information. Rather sections 9(2)(f)(iv) and 9(2)(g)(i) give expression to the relationship between Ministers and officials and the consequences of this in OIA terms. In recognising the confidentiality of advice and the promotion of free and frank expression of opinions as good reasons for withholding information, the Act is endorsing confidentiality in those contexts as a public value in itself and not as an obligation owed by one participant in the policy process to another.”*

120. And in case 292482, Dr McGee stated:

*“Where a Minister requests advice from staff, it is the duty of those employees to provide the advice. The constitutional relationship is reflected in the OIA in section 9(2)(f)(iv) which may be available to protect the advice that is tendered. But I do not accept that a Minister owes an obligation of confidence in this regard (and I think Ministers, on reflection, would find it strange if they did). I am of the view that section 9(2)(ba)(i) cannot apply to advice to a Minister from the Cabinet Secretary or other officials.”*

121. Accordingly, 9(2)(ba)(i) is unlikely to have any application in this context unless a title incorporates a reference to information supplied in confidence by a third party.

122. In my opinion, sections 9(2)(a) and 9(2)(ba)(i) also do not provide good reason to withhold the requested titles on a class or blanket basis.

### **Chief Ombudsman’s opinion**

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123. For the above reasons, I have formed the opinion that the complainant’s request should not have been refused.

124. I consider that:

- the information requested was specified with *“due particularity”*, and therefore the request was made in accordance with section 12;
- it would not have required *“substantial collation or research”* to make the requested information available, and therefore the refusal under section 18(f) was not justified; and
- there were no substantive grounds under sections 9(2)(a), 9(2)(ba)(i), 9(2)(g)(i) or 9(2)(f)(iv) for withholding the requested information on a class or blanket basis.

### **Recommendation**

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125. I recommend, pursuant to section 30(1)(a) of the OIA, that the Minister release the 60 titles identified during the course of my investigation as being capable of release.

126. Under section 32 of the OIA, a public duty to observe my recommendation will be imposed from the commencement of the 21st working day after the date of this opinion. This public duty applies unless, before that day, the Governor-General, by Order in Council, otherwise directs.

## Further action

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127. In respect of the remaining 41 titles, subject to any comments the Minister wishes to make that might persuade me otherwise, I see no reason under the OIA that would have justified their withholding.
128. I therefore invite the Minister to assess the remaining 41 titles for release or withholding, and provide information to support his decision to withhold any or all of those titles.
129. In the absence of any further information that persuades me that the withholding of any or all of the titles was justified under the OIA, I would likely recommend their release after the expiry of 20 working days.

*Post script:* The Minister complied with my recommendation and released all the titles at issue in full, barring the names of two individuals who had made OIA requests to him, which were withheld in order to protect their privacy (section 9(2)(a) refers).

## Appendix - relevant statutory provisions

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### 12 Requests

- (1) Any person, being—
- (a) a New Zealand citizen; or
  - (b) a permanent resident of New Zealand; or
  - (c) a person who is in New Zealand; or
  - (d) a body corporate which is incorporated in New Zealand; or
  - (e) a body corporate which is incorporated outside New Zealand but which has a place of business in New Zealand,—
- may request a department or Minister of the Crown or organisation to make available to him or it any specified official information.
- ...
- (2) The official information requested shall be specified with due particularity in the request...

### 18 Refusal of requests

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

- ...
- (f) that the information requested cannot be made available without substantial collation or research...

### 9 Other reasons for withholding official information

- (1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.
- (2) Subject to sections 6, 7, 10, and 18, this section applies if, and only if, the withholding of the information is necessary to—
- (a) protect the privacy of natural persons, including that of deceased natural persons; or...
  - (ba) protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information—
    - (i) would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or
    - (ii) would be likely otherwise to damage the public interest; or...
  - (f) maintain the constitutional conventions for the time being which protect—
    - (i) the confidentiality of communications by or with the Sovereign or her representative;
    - (ii) collective and individual ministerial responsibility;
    - (iii) the political neutrality of officials;
    - (iv) the confidentiality of advice tendered by Ministers of the Crown and officials; or
  - (g) maintain the effective conduct of public affairs through—

- (i) the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty;...