

# Requests for documents concerning the Government's proposed mixed ownership programme

## Chief Ombudsman's opinion

<b>Legislation:</b>	Official Information Act, ss 9(2)(f)(iv), 9(2)(g)(i)
<b>Agency:</b>	Treasury and the Minister of Finance
<b>Ombudsman:</b>	Dame Beverley Wakem
<b>Reference number(s):</b>	318858, 319224 & 319684
<b>Date:</b>	24 November 2011

## Summary

This document summarises the opinion formed by me in relation to three Official Information Act (OIA) complaints:

No.	Complainant	Agency	Ref.
1	The Labour Party Research Unit	Treasury	318858
2	Guyon Espiner / TVNZ	Minister of Finance	319224
3	Russel Norman / Green Party of Aotearoa New Zealand	Treasury	319684

The complaints concerned the refusal by the Minister of Finance and the Treasury to release certain documents pertaining to the Government's proposed mixed ownership programme. The refusals were made in reliance on sections 9(2)(f)(iv) and 9(2)(g)(i) of the OIA.

Complaint 1 covered five documents. Complaint 2 covered the same five documents, plus one additional document. Complaint 3 covered a small number of emails between officials regarding the drafting of one of the documents at issue in complaints 1 and 2.

The complainants asked me to investigate and review the refusals on an urgent basis given the perceived relevance of the information to the general election on 26 November 2011.

Following my investigation and review, I found that it was open to the Minister and the Treasury to refuse the requests under the OIA. Sections 9(2)(f)(iv) and 9(2)(g)(i) of that Act applied, and the withholding grounds were not outweighed in the circumstances of this case by the public interest considerations favouring disclosure.

## Relevant statutory provisions

Official Information Act (OIA) sections 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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## The OIA

1. The OIA enables people to request official information held by Ministers of the Crown and state sector agencies.
2. The guiding principle under the OIA is that official information must be made available unless there is good reason for withholding it.<sup>1</sup> “*Good reason*” for withholding is defined in the OIA, under a number of grounds, and it is against these grounds that any refusal to make official information available is considered.
3. A Minister or agency retains the discretion to make official information available even if one of the grounds for withholding applies. The OIA does not prohibit the release of

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<sup>1</sup> Section 5 OIA refers.

official information. Nothing in that Act prevents a Minister or agency from disclosing official information if they choose to do so.

## The Ombudsman's role

4. As an Ombudsman, I am authorised to investigate and review, on complaint, any decision by which a Minister or agency subject to the OIA refuses to make official information available when requested.<sup>2</sup>
5. My role in undertaking an investigation is to evaluate the grounds for withholding official information in terms of the tests set out in the OIA, and to form an opinion as to whether the request was properly refused.
6. An Ombudsman does not release or withhold official information. An Ombudsman does not “*suppress*” official information, or deny requests for official information.
7. An Ombudsman forms an independent view on whether it was open to the Minister or agency to refuse a request for specified information in terms of the legislation. Even if the Ombudsman finds that a refusal was permissible under the OIA that still does not prevent the Minister or agency from releasing the information at issue should they choose to do so.

## Background

8. In May 2011, Cabinet agreed to extend the mixed ownership model to Genesis Energy, Meridian Energy, Mighty River Power, and Solid Energy, and to further reduce the Crown's shareholding in Air New Zealand, subject to the government receiving a mandate in the 2011 general election, market conditions, and detailed scoping studies. Cabinet also agreed to the Treasury undertaking associated pre-implementation work ahead of the 2011 general election (see CAB Min (11) 18/6).
9. Information pertaining to the Cabinet decision was released proactively and in response to requests for official information, and made available to the public on the Crown Ownership Monitoring Unit (COMU) website <http://www.comu.govt.nz/publications/information-releases/mixed-ownership-model/>. COMU is a unit in the Treasury.
10. On 31 August 2011, the Minister of Finance issued a press release entitled “*Strong NZ demand expected for SOE shares*”.<sup>3</sup> In that release, the Minister stated:
  - a. New Zealanders will be at the front of the queue for shares.

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<sup>2</sup> Section 28 OIA refers.

<sup>3</sup> Available at [www.beehive.co.nz](http://www.beehive.co.nz)

- b. In total, we expect New Zealanders will own at least 85 to 90 per cent of these companies – including the Government’s cornerstone shareholding.
- c. It is the Government’s intention to impose a maximum shareholding cap (most likely of 10 per cent) on the mixed ownership companies.

## Complaints

### Complaint 1 (Labour Party Research Unit)

11. On a date unknown to me a member of the Labour Party Research Unit requested from the Treasury *“all documents concerning the purchase by foreigners of shares sold under the proposed extension of the mixed ownership model”*.
12. The Treasury’s reply directed the requester to a publicly available document,<sup>4</sup> and stated:  
*“There are additional documents covered by your request that I have decided to withhold in full under ... section 9(2)(f)(iv) – to maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials.”*
13. On 29 September 2011, the requester asked me to review the Treasury’s response to ascertain whether the documents should be released under the OIA or, failing that, to require Treasury to provide a list of the titles of the documents that are being withheld.

### Complaint 2 (Guyon Espiner / TVNZ)

14. On 6 September 2011, Guyon Espiner of TVNZ requested the following information from the Minister of Finance:  
*“All reports, memos, advice, briefings, correspondence, departmental communications, emails and any other written material, including any Cabinet papers, held by your office in relation to the August 31, 2011 announcement on the mixed ownership programme, specifically:*
  - *Plans to impose a maximum shareholding cap, most likely at 10%, on the mixed ownership companies*
  - *The above documentation relating to how New Zealanders will be put ‘at the front of the queue for shares’, as stated in your media release of August 31, 2011*

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<sup>4</sup> Treasury Report: *Extending the Mixed Ownership Model*, available at <http://www.comu.govt.nz/publications/information-releases/mixed-ownership-model/>.

- *Analysis provided to the government about the proportion of shares in the mixed ownership companies which will be owned by New Zealanders*
  - *Analysis provided to the government about the proportion of shares in the mixed ownership companies which will be foreign owned."*
15. The Minister referred Mr Espiner to the same publicly available document, and refused to provide additional documents covered by his request under sections 9(2)(f)(iv) and 9(2)(g)(i) of the OIA.
  16. On 7 October 2011 Mr Espiner asked me to investigate and review this decision, stating that *"these decisions are ones that would take effect after the general election and voters have every right to know how such vital considerations were arrived at."*

### Complaint 3 (Russel Norman / Green Party)

17. On 14 September 2011, Dr Russel Norman made a request to the Ministry of Foreign Affairs and Trade (MFAT) for *"copies of all papers prepared by [MFAT] regarding the current Government's proposals to partially privatise state owned assets"*.
18. MFAT transferred Dr Norman's request to the Treasury on the basis that it was more closely connected with that agency's functions (section 14(b)(ii) OIA refers).
19. On 17 October 2011, Treasury informed Dr Norman of its decision on his request, which it interpreted as being for *"copies of all [advice provided to Treasury] prepared by [MFAT] regarding the current Government's proposals to partially privatise state owned enterprises"*. Treasury advised that it was withholding the relevant documents under sections 9(2)(f)(iv) and 9(2)(g)(i) of the OIA.
20. On 18 October 2011, Dr Norman asked me to review the response to his OIA request, seeking urgency by virtue of *"the fact that the privatisation of state-owned assets is one of the key issues of the upcoming General Election, now less than 6 weeks away"*.

### Investigation

21. I agreed to conduct an urgent investigation and review of these complaints.
22. On 17 October 2011 I notified complaint 1 to the Treasury and complaint 2 to the Minister. On 31 October 2011, I notified complaint 3 to the Treasury. In each case I requested a copy of the information at issue within 10 working days.
23. Treasury and the Minister's office complied promptly, and I received all of the information at issue by 1 November 2011.
24. On 7 and 10 November 2011 the senior advisors assisting me with my investigation met with the nominated Treasury officials to discuss the concerns with release of the information at issue.

25. On 14 November 2011 I received detailed submissions from the Treasury in support of the decision to withhold the information at issue.
26. On 14 and 18 November 2011 my senior advisors made additional enquiries with the Minister's office.
27. On 22 November 2011 I communicated my provisional view to the complainants. I invited their comments in response. I indicated that I wished to form a final opinion in relation to these complaints before the general election on 26 November 2011. I asked to receive any comments at their earliest convenience and preferably before close of business on 23 November 2011.
28. On 23 November 2011 I received further submissions from the complainants. I gave careful consideration to those submissions before forming this opinion.

## Information at issue

29. The information at issue in complaint 1 comprised:
  - a. two Treasury reports (T2011/1710: *Mixed Ownership Model - Foreign Ownership Restrictions*; and T2011/1184: *Mixed Ownership Model - Foreign Ownership Restrictions - Initial Share Allocations*);
  - b. one Treasury aide memoire (*Additional advice on potential share allocations*); and
  - c. two discussion papers on allocation policy prepared by the Crown's financial advisors Deutsche Bank / Craigs Investment Partners.
30. The information at issue in complaint 2 comprised the same five documents, plus an additional Treasury report (T2011/1578: *Mixed Ownership Model - Achieving Widespread and Substantial New Zealand Ownership*).
31. The information at issue in complaint 3 comprised a small number of emails between Treasury and MFAT officials regarding the drafting of advice to Ministers (namely, Treasury Report T2011/1710: *Mixed Ownership Model – Foreign Ownership Restrictions*), and a copy of the draft advice with comments and suggested changes tracked.

## Analysis and findings

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

32. The information was withheld under sections 9(2)(f)(iv) and 9(2)(g)(i) of the OIA.
33. Subject to the countervailing public interest test in section 9(1), section 9(2)(f)(iv) 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.

34. 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.
35. Section 9(2)(f)(iv) can also apply where the process to which the advice relates is such that premature disclosure would limit the ability of executive government to consider options on how to realise the best outcome for New Zealand's economic interests.
36. Subject to the countervailing public interest test in section 9(1), section 9(2)(g)(i) 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.
37. 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.
38. Both of these provisions are, in general terms, aimed at maintaining the effective conduct of public affairs – on the one hand, by enabling orderly and effective government decision-making, and on the other, by protecting the generation and expression of free and frank opinions which are necessary for good government.
39. This was well summed up by the Danks Committee (which recommended the introduction of the OIA), when it said:

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

## Application of the withholding grounds

40. As noted above, Cabinet agreed in May 2011 to extend the mixed ownership model to Genesis Energy, Meridian Energy, Mighty River Power, and Solid Energy, and to further reduce the Crown's shareholding in Air New Zealand, subject to the government receiving a mandate in the 2011 general election, market conditions, and detailed scoping studies. Cabinet also agreed to the Treasury undertaking associated pre-implementation work ahead of the 2011 general election (see CAB Min (11) 18/6).
41. Treasury advised me that it is in the preparatory stage of providing advice to Ministers on a possible extension of the mixed ownership model. It has not yet provided detailed

advice to Ministers on whether, or how, to implement an extension of the mixed ownership model, and will not do so until after the election (if the newly elected government requires that advice).

42. Treasury also explained that the advisory process is both complicated and dynamic. 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.
43. I have viewed 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.
44. Given the context in which the information at issue was generated and the current stage of the policy development process, I accept that disclosure now would not only be premature, but would also undermine the orderly and effective conduct of the advisory and decision-making processes, and thus impair the effective conduct of public affairs.
45. As noted by Cabinet “*there are a wide range of execution and other risks that could have a material impact on how the programme proceeds*” (CAB Min (11) 18/6). A key theme of the advice that has been publicly released<sup>5</sup> is the need to maintain flexibility in programme design and structure in order to manage these risks.
46. I accept that 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.
47. It is with this in mind that I must weigh the likely degree of inhibition that would be caused if the information at issue were disclosed. Officials have attested that the economic stakes are such that if the information were disclosed, they would need to re-

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<sup>5</sup> See <http://www.comu.govt.nz/publications/information-releases/mixed-ownership-model/>.

think the manner in which they provide advice to Ministers on the programme on an ongoing basis. In the context where release of official information could potentially affect the success of the offers and the level of return to the Crown, I accept that officials are likely to feel inhibited in generating, expressing and recording their opinions, and that a degree of protection at this stage of the process is required so that this particular harm does not eventuate.

48. On the whole, I am satisfied that the information at issue needs to remain confidential at this particular stage in the policy development process in order to protect the interests specified in sections 9(2)(f)(iv) and 9(2)(g)(i) of the OIA.

### Application of the public interest test

49. Under section 9(1) of the OIA, the decision-maker and the Ombudsman on review must consider whether *“the withholding of the information is outweighed by other considerations which render it desirable, in the public interest, to make that information available”*.
50. Section 9(1) is not about whether there is *“a public interest”* in making the information available, but whether the considerations favouring disclosure in the public interest **outweigh** the need to withhold.
51. If the decision-maker, or the Ombudsman on review, believes that the competing considerations are evenly balanced, or too close to decide between, that is not enough to require disclosure under the OIA.
52. I considered the public interest in light of initial submissions made by the complainants, and again, once I received additional submissions in response to my provisional view.

### Initial assessment of the public interest

53. The Labour Party Research Unit asked me to consider the following:

*“It is fundamental to our democracy that the public have the right to make an informed choice when they vote.*

*To do so, they must have access to information that might be reasonably expected to inform that vote. Asset sales is a major election issue. 8.7% of voters rate it as their top issue ([http://www.nzherald.co.nz/politics/news/article.cfm?c\\_id=280&objectid=10765466](http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=10765466)) and 68% of voters oppose it with 26% supporting meaning only 6% of New Zealanders do not have an opinion on this issue (<http://tvnz.co.nz/politics-news/poll-reveals-opposition-state-asset-sale-video-4503949>).*

*The possibility of foreign ownership of assets if sold, and foreign investment in New Zealand in general, has been a major election issue. Any information that the Treasury holds in regard to foreign ownership of assets if sold, would likely inform the voting choices of many voters.*

*The National Party has made clear that, if re-elected, it would regard the election as a mandate for asset sales. The election, therefore, is the public's one chance to make their decision on an issue that it cares strongly about.*

*Asset sales to foreigners will be a major determinant of how New Zealanders choose to cast their votes. It is not acceptable for a government agency to hide behind commercial concerns to deny New Zealanders information that could be crucial to the democratic decision that they will make on November 26th.*

*The public interest in making an informed choice on a major issue clearly outweighs commercial grounds for denying the release of this information."*

54. Mr Espiner asked me to consider the following:

- *"National says if it leads the government again after the November 26 election it will sell shares in five state owned companies*
- *these are public assets currently owned by all New Zealanders*
- *the action will only occur if the government receives a mandate from the electorate*
- *in order for voters to judge whether to give them that mandate they need to know how robust the proposal put forward by the government is*
- *one of the key issues is the degree of domestic versus foreign ownership of these public assets*
- *we have heard the public statements made by politicians – but these are just words*
- *what we need is the actual analysis by experts and officials*
- *this must be done before the election otherwise the affect is that this whole process has the affect of hiding the full truth from New Zealanders about the future of their assets."*

55. I acknowledge that:

- a. This is a contentious policy.
- b. There is a great deal of public and political opposition.
- c. It has been presented as a key election issue.

56. The significant public interest factor in this case is the forthcoming election, in light of the fact that the current Government is seeking a mandate from the electorate for pursuing this policy. But for that factor I would be unlikely to see any compelling public interest

arguments in favour of disclosure of the information at this particular stage of the policy development process.

57. As recognised in the purpose statement of the OIA, there is strong public interest in availability of official information to enable the people of New Zealand to participate more effectively in the making and administration of laws and policies (section 4(a)(i) refers).
58. For most people, there is no greater opportunity for political participation than in a general election. In our 1991 annual report the Ombudsmen stated that “*a general election is the central event in a constitutional democracy*”, and acknowledged “*the constitutional importance of ensuring that the electorate [is] well informed before it commit[s] itself to selecting the parliamentarians from whom a government would be formed.*” That remains the view the Ombudsmen.
59. In a similar vein, the Australian High Court has stated:<sup>6</sup>

*“If the institutions of representative and responsible government are to operate effectively and as the Constitution intended, the business of government must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box. The electors must be able to ascertain and examine the performances of their elected representatives and the capabilities and policies of all candidates for election. Before they can cast an effective vote at election time, they must have access to the information, ideas and arguments which are necessary to make an informed judgment as to how they have been governed and as to what policies are in the interests of themselves, their communities and the nation.”*

60. While acknowledging the strength of these general public interest considerations, the test under the OIA is whether they outweigh the reason for withholding the particular information at issue in the circumstances of this case. For the reasons that follow, I am not persuaded that they do.
61. The information at issue is not about whether to pursue a policy of partial privatisation in respect of these particular assets. The Government has already decided to pursue such a policy, provided it is returned at the election and subject to market conditions and the outcome of detailed scoping studies. This information concerns preliminary thinking on the manner in which such a policy might be implemented.
62. There is already a considerable amount of information available to inform the public about the Government’s rationale for pursuing a policy of partial privatisation.<sup>7</sup> This includes information about the Government’s reasons for expecting strong New Zealand

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<sup>6</sup> *Australian Capital Television Pty Limited and Others and The State of New South Wales v The Commonwealth and Another (No 2)* (1992) 177 CLR 106 at 231.

<sup>7</sup> See <http://www.comu.govt.nz/publications/information-released/mixed-ownership-model/>.

demand for shares, options for encouraging New Zealand participation, and options for restricting foreign ownership.<sup>8</sup>

63. Having regard to the content of the information at issue, and the information that is already available publicly, I do not consider that the refusal of these requests undermines the ability of the public to participate in the general election on an informed basis.
64. Mr Espiner particularly wished to obtain the detailed analysis behind the stated expectation of 85-90 per cent New Zealand ownership across the programme, including the Government's cornerstone shareholding. However, the Treasury advised that it has not provided Ministers with any detailed analysis on this matter. I understand that the extent of New Zealand demand will be tested through investor surveys in due course. The Treasury noted that:

*"...when making these statements, Ministers also referred to a large and growing pool of New Zealand investment funds, including:*

- New Zealand investors currently have more than \$300 billion of investments excluding their own homes, ranging from money sitting in term deposits to financial assets and investment housing.*
- The 34 registered KiwiSaver providers have about \$9 billion invested and will double in size over the next four years.*
- New Zealand institutions (excluding KiwiSaver) have about \$59 billion under management.*
- Crown financial institutions (including the NZ Super Fund, ACC and GSF) have almost \$40 billion under management.*
- Iwi are estimated to have over \$10 billion of assets.*

*and on this basis concluded that the mixed ownership model spread over three to five years, is small compared with the size of the local capital pool. They also stated that New Zealanders have been telling them that they 'are hungry for other investment options, particularly with the shine having come off the investment property and finance company sectors'."*

65. Similarly, Treasury advised that it has not provided the Minister with any advice about a possible 10 per cent maximum shareholding cap.
66. In light of this, I sought clarification from the Minister's office whether any additional relevant information is held by the Minister or his office in relation to these matters. The Minister's office confirmed that no additional written material is held. The basis for the

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<sup>8</sup> See, in particular, the attachment to Treasury Report T2011/336 *Extending the Mixed Ownership Model* (available at <http://www.comu.govt.nz/publications/information-released/mixed-ownership-model/>).

85-90 per cent expected take up, and the 10 per cent shareholding cap, was oral advice provided by Ministers' economic advisors and informal discussions with market contacts.

67. Treasury advised that if newly elected Ministers decide to proceed with an extension of the mixed ownership model, they intend to proactively release further information once the policy and decision-making processes are further advanced. Legislation will be required in order to remove the companies from the State Owned Enterprises Act, and the select committee process will provide a further opportunity for public examination and debate of the issues.
68. Based on these considerations, I formed the provisional view that the withholding of the information at issue is not outweighed in the circumstances of this case by the countervailing public interest in disclosure.

### **Subsequent assessment of the public interest**

69. I received further submissions from the complainants in response to my provisional view. All the complainants considered that I had given insufficient weight to the public interest in ensuring that the electorate is well informed.
70. TVNZ argued:

*"The public interest here is the fundamental right in a democracy for the voting public to be as well informed as possible at election time, and the importance of the news media's role to provide information to the public that is or may be relevant to their voting choices.*

*We are at the height of the election campaign. The policy of asset sales is one of the primary election issues for voters. The public interest in disclosure at this time is critical. The Courts have recognised the fundamental right of citizens in a democracy to 'be as well informed as possible before exercising their right to vote'. Refer Dunne v CanWest TVWorks Ltd [2005] NZAR 577 at [43].*

*The fundamental importance of electoral expression is reinforced by the New Zealand Bill of Rights Act 1990. Section 14 provides that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. This right is subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

*Given that electoral speech must be one of the highest types of speech deserving of protection, any restraint on that requires clear and compelling justification.*

*Section 6 of the Bill of Rights Act also provides that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other*

*meaning. In Alliance Party v Electoral Commission & Ors [2010] NZAR 222 at [19] Hammond J, delivering the judgment of the Court of Appeal, said at [35]:*

*'If there is any doubt about the meaning of the words, that meaning should be preferred which accords with the critical context of this allocation: that of a general election. Statutory language should be read, if reasonably possible, in a way which facilitates the important democratic feature of dissemination of election messages.'*

*Applying this to the OIA, both the withholding grounds and the public interest exception need to be constructed and applied with that firmly in mind.*

*In summary, we ask you to reconsider your provisional view, taking into account s 14 of the Bill of Rights, the high value of electoral expression and the significance of the issue of asset sales to the election campaign."*

71. Dr Norman *"urged [me] to reconsider [my] decision to suppress Treasury documents ... until after the election"* on the basis that *"this information may be crucial to the public's full understanding of this policy"*.

72. Dr Norman also argued that this case is analogous with the interest free student loans costing case reported in the Ombudsman's annual report for the year ended 30 June 2006. He stated:

*"In urging you to reconsider I would like to point out that the Ombudsman's office was in a similar position prior to the 2005 election. In that case, the Ombudsman received complaints regarding the then Minister of Finance Michael Cullen's refusal to release Treasury documents relating to a Labour Party commitment to abolish interest on student loans.*

*The background to that case involved the Minister of Finance asking Treasury to cost a range of interest-free student loan scenarios. The Minister of Finance released some of treasury's costing but withheld others.*

*These scenarios were part of Labour's policy platforms that they campaigned on for the 2005 election.*

*In that case the Ombudsman concluded there was strong public interest in disclosing information relating to Treasury's costings of Labour's student loan policy.*

*The Ombudsman, in the 2005 case, referred back to the 1991 Annual Report of the Ombudsmen, when it was observed (pages 16 -19), that '[a] General Election is the central event in a constitutional democracy' and that there is, '...the constitutional importance of ensuring that the electorate was well informed before it committed itself to selecting the parliamentarians from whom a government would be formed'."*

73. Dr Norman concluded that *“the constitutional importance of ensuring that the electorate [is] well informed’ should be paramount in this particular case”*.
74. I trust it is clear from paragraphs 55-59 above that I had the public interest in ensuring that the electorate is well informed firmly in my mind when I conducted my initial assessment of the public interest.
75. The OIA requires an Ombudsman to exercise judgment using experience and accumulated knowledge which are the Ombudsman’s by virtue of holding that office. In the words of the High Court, this is a task which is at times *“complex and even agonising”*.<sup>9</sup>
76. The situation in the case referred to by TVNZ<sup>10</sup> is quite different to this one. In that case the issue was whether the leaders of two minor political parties (who were also Members of Parliament) should be excluded from a *“leader’s debate”* during an election campaign. In short, the Court accepted that voters had a fundamental right to be as well informed as possible before exercising their democratic right to vote, and granted a mandatory injunction requiring TV3 to include them in the debate so that their parties’ policies could be aired.
77. In the present case, the issue is whether sections 9(2)(f)(iv) and 9(2)(g)(i) of the OIA apply to the requested information, and if so, whether the public interest in making that information available outweighs the need to withhold it. It is undeniable that voters have a fundamental right to be as well informed as possible before exercising their right to vote. The question is whether the information at issue in this case would materially assist voters in this regard.
78. It is a matter of judgment for an Ombudsman to consider:
- a. whether the predicted prejudice to a protected interest would occur if the information were to be disclosed; and if so
  - b. whether the public interest in disclosing that information is sufficiently strong to outweigh the predicted prejudice.
79. In this case, I have accepted that there is a credible risk of harm from disclosure, heightened by the potential economic implications of premature release. Whilst there is an exceptionally strong public interest in disclosure of information that may help voters to decide how to exercise their vote, I am not persuaded that the specific information concerned in this case would provide such assistance. Accordingly, in my judgment, the public interest that would be served by making the information available does not outweigh the need to withhold this particular information.

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<sup>9</sup> *Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180 at 191.

<sup>10</sup> *Dunne v CanWest TVWorks Ltd* [2005] NZAR 577.

80. It is worth emphasising here that the information at issue is early thinking on two component parts of what will be a much greater whole (refer paragraph 43). It will not inform voters about how the government proposes to implement the mixed ownership programme. Such advice has not been tendered yet, and no decisions have been reached. The Government has made its policy clear – if re-elected it will extend the mixed ownership model to four state owned energy companies, and further reduce the Crown’s shareholding in Air New Zealand, subject to market conditions and detailed scoping studies. A considerable amount of official information is available online for voters who wish to better inform themselves about this policy.<sup>11</sup>
81. To be clear, I have not “*decided to suppress*” the information. I have evaluated the information at issue in these three requests against the grounds for withholding under the OIA and formed the opinion that the decision to withhold at the time it was taken was one that was open to the Minister and the Treasury to make. It is still open to them to release the information should they choose to do so.
82. In respect of Dr Norman’s argument, I acknowledge some apparent similarities between this case and the student loans costing case, where my predecessor, the late John Belgrave, formed the opinion that the information at issue should not have been withheld. Both occurred in the run-up to a general election, and both raised the public interest issue of access to official information to promote an informed electorate. In both cases, Ombudsmen agreed to conduct urgent investigations to determine whether the requesters had received the full information to which they were entitled under the OIA.
83. However, there are some key differences between this case and the 2005 case, the outcome of which was summarised at pages 29-32 of our 2006 annual report. First, and most significantly, the Chief Ombudsman did not accept that sections 9(2)(f)(iv) and 9(2)(g)(i) of the OIA applied in the 2005 case. Secondly, the information at issue in that case, being costings of a specific policy, was fundamentally different in nature to the information at issue in this case. Thirdly, the nature of the then Government’s public statements about the costings and the assumptions on which they were based gave rise to a particularly strong public interest in disclosure.
84. It is a fundamental principle of the legislation that each case must be considered on its own merits. My decision in this case is based on the specific information at issue; the stage reached in the advisory and decision-making processes; and the information that is already publicly available. Taking these factors together, and for the reasons I have given, my view is that the applicable withholding grounds are not outweighed by the public interest in disclosure.
85. Considerable attention has focused on the fact that the Government is withholding “*five Treasury papers*”. Readers should appreciate that this is just the information that meets the terms of the specific requests under consideration. It is not to suggest that this is the full extent of official information held by government agencies and Ministers of the

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<sup>11</sup> See <http://www.comu.govt.nz/publications/information-rerleased/mixed-ownership-model/>.

Crown (I do not know the full extent of information held by government agencies and Ministers of the Crown, nor was it my role to make enquiries in this regard).

## Chief Ombudsman's opinion

86. For the reasons set out above, I have formed the opinion that it was open to the Minister and the Treasury to refuse the requests under the OIA. I consider that sections 9(2)(f)(iv) and 9(2)(g)(i) of that Act applied, and the withholding grounds were not outweighed in the circumstances of this case by the public interest considerations favouring disclosure.

## Appendix 1. Appendix - relevant statutory provisions

### 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—
  - (f) maintain the constitutional conventions for the time being which protect—
    - (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;...