

## Request for public submissions made on the Green Paper for Vulnerable Children

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<b>Legislation:</b>	Official Information Act, s 9(2)(f)(iv) (constitutional conventions protecting the confidentiality of advice)
<b>Requester:</b>	Jacinda Ardern MP
<b>Agency:</b>	Ministry of Social Development
<b>Ombudsman:</b>	Dame Beverley Wakem
<b>Reference number(s):</b>	331383
<b>Date concluded:</b>	29 August 2012

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### Summary

Jacinda Ardern MP asked the Ministry of Social Development (MSD) for copies of submissions on the Green Paper for Vulnerable Children received from organisations, businesses and academic staff. MSD refused the request under section 9(2)(f)(iv) of the OIA because the *“information is currently under active consideration”*. MSD also advised that a large number of submissions were caught within the terms of the request, and *“the administrative burden of reviewing and assessing the content of each submission for public release would be unreasonably high”*. Ms Ardern complained to the Chief Ombudsman. The Chief Ombudsman formed the provisional opinion that section 9(2)(f)(iv) of the OIA did not provide good reason to withhold the public submissions at issue. MSD reconsidered its decision and agreed to release the information. MSD also took commendable steps to initiate the development of some best practice guidance on the conduct of public submission processes. The Chief Ombudsman discontinued her investigation on the basis that Ms Ardern’s complaint was resolved.

### Background

1. On 14 March 2012, Ms Ardern made a request for:

*“All submissions to the ‘Green Paper for Vulnerable Children’ received from organisations, businesses and academic staff.”*

*This request excludes submissions made by individuals not in an official capacity and those that were provided only in the form of answers to the questionnaire provided by the Ministry.”*

2. On 11 April 2012, the Deputy Chief Executive of MSD replied as follows:

*“The Ministry of Social Development is currently focused on analysing submissions on the Green Paper in preparation for the White Paper. At this time I am withholding all submissions on the Green Paper under section 9(2)(f)(iv) of the Official Information Act as this information is currently under active consideration.*

*I believe that the premature disclosure of this information would prejudice the ability of Ministers and officials to consider the Green Paper submissions in an effective and orderly manner. At this stage in the process, with submissions only having recently closed, it is necessary that this information can be considered in confidence. I believe that releasing the information at this time will prevent the White Paper development process and necessary consultations from proceeding in an effective and informed manner.*

*In addition, a large number of submissions are in the scope of your request, and the administrative burden of reviewing and assessing the content of each submission for public release would be unreasonably high. Once analysis of the submissions is complete, I would continue to refuse your request under section 18(f) of the Official Information Act 1982. The greater public interest is in the effective and efficient administration of the public service.”*

3. On 3 May 2012, Ms Ardern complained to the Chief Ombudsman about the decision on her request.

## Investigation

4. The Chief Ombudsman decided as a first step in her investigation to request a meeting between the investigating staff assisting her and the relevant officials to discuss the reasons for refusing Ms Ardern’s request. A meeting was arranged for 30 May 2012, and in advance of that meeting, formal notification of Ms Ardern’s complaint was faxed through to the Chief Executive.
5. At the meeting, the Chief Ombudsman’s investigating staff explained that successive Ombudsmen had rejected section 9(2)(f)(iv) as a reason for withholding public submissions.
6. The investigators also discussed with officials some of the administrative difficulties involved in making the information available, assuming good reason to withhold under section 9(2)(f)(iv) did not exist.

7. It was agreed that the Chief Ombudsman would write to MSD setting out her provisional opinion on section 9(2)(f)(iv), and inviting further information in support of the contention that section 18(f) of the OIA provided a reason for refusal.
8. On 2 July 2012, the Chief Ombudsman wrote to MSD:
  - a. setting out her provisional opinion on section 9(2)(f)(iv);
  - b. specifying the information required in relation to section 18(f); and
  - c. addressing what appeared to be a side issue in this case, relating to the consistency of messages conveyed to the public about their expectations in terms of privacy and confidentiality of submissions.

### Provisional opinion on section 9(2)(f)(iv)

9. Section 9(2)(f)(iv) of the OIA applies:

*“...if and only if, the withholding of the information is necessary to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials”.*

10. The concern in this case was that premature disclosure would prejudice the ability of Ministers and officials to consider the Green Paper submissions in an effective and orderly manner, and impede the policy development process in relation to the White Paper.
11. The Chief Ombudsman explained that the application of section 9(2)(f)(iv) to submissions made by the public as part of government consultation processes had been considered on a number of occasions in the past:
  - a. In case W56111 (2006), the Chief Ombudsman investigated a complaint about the Ministry of Health’s refusal to disclose certain submissions received in response to its consultation exercise on ‘direct to consumer advertising’ in relation to prescription medicines.
  - b. In case W56175 (2006), former Chief Ombudsman John Belgrave investigated a complaint about the Minister for Economic Development’s refusal to disclose all submissions received in response to the review of business assistance programmes.
  - c. In case 307769 (2012), Ombudsman David McGee investigated a complaint about the Ministry of Health’s refusal to disclose submissions on the draft policy framework pertaining to the Newborn Metabolic Screening Programme and the storage and use of bloodspot samples.
12. The general approach that has developed out of these, and earlier cases, is that section 9(2)(f)(iv) does not provide a legitimate basis for withholding public submissions.

13. The constitutional convention in section 9(2)(f)(iv) protects “*advice tendered by Ministers of the Crown and officials*”. Accordingly, to qualify for protection the information at issue must be advice tendered by officials to Ministers, or Ministers to Cabinet. While section 9(2)(f)(iv) may apply to advice which includes or refers to public submissions, the public submissions themselves are not “*advice tendered by Ministers of the Crown and officials*”.
14. Ombudsmen have rejected the argument that premature release of public submissions would impede the subsequent development and consideration of policy advice by officials and Ministers. Disclosure of submissions cannot pre-empt or prejudice the ability to consider later advice that may in part be based on the submissions. Officials remain free to advise Ministers (and Ministers to advise Cabinet) about the merit or lack of merit in particular submissions as they see fit, and to offer such additional advice as they deem appropriate.
15. Ombudsmen have also noted that the purpose and effect of section 9(2)(f)(iv) is not to protect from disclosure the whole of any policy process prior to ministerial decisions being taken. Such an approach is inconsistent with one of the purposes of the OIA, which is to enable more effective public participation in the making and administration of laws and policies (section 4(a) refers).
16. It is also inconsistent with the generally stated aims and purposes of public consultation processes, which are to engage interested parties in public debate and development of policy options. The stated aims and purposes of the current public consultation process were no different. The Chief Ombudsman noted various references to the “open” nature of the debate, and the intention that public submissions will play a role in shaping future policy directions.
17. In line with previous cases, the Chief Ombudsman formed the provisional opinion in this case that section 9(2)(f)(iv) did not apply to the submissions in question:
  - a. they were not advice tendered by Ministers or officials;
  - b. the Chief Ombudsman did not consider that their disclosure would be premature or likely to hinder the policy development process; and
  - c. withholding would appear to be inconsistent with one of the key purposes of the OIA, and with the stated aims and purposes of the public consultation process.

### Further information required in relation to section 18(f)

18. At the meeting on 30 May 2012, officials explained that over 9000 submissions had been received on the Green Paper.
19. While this was clearly a considerable number, the Chief Ombudsman observed that some of the limitations or exclusions imposed by Ms Ardern’s request may have been overlooked; specifically, Ms Ardern was only seeking organisational not individual

submissions, and she had excluded all submissions provided in the form of answers to the questionnaire provided by the Ministry.

20. The Chief Ombudsman understood that this significantly narrowed the scope of information considered to be captured by Ms Ardern's request, from over 9000 submissions to around 600 submissions.
21. Notwithstanding this, concerns remained that it would require substantial collation or research to make the 600 or so submissions available. Accordingly, the Chief Ombudsman requested further information regarding the basis for these concerns, including a sample of the submissions.
22. The Chief Ombudsman commented that there is always a high degree of public interest in public submission processes. The level of interest in this submission process was probably even higher, given the important nature of the subject under consideration. Requests for copies of public submissions are routine, expected, and usually carefully planned for in advance. Members of the public who have contributed to the debate in a spirit of openness are unlikely to be satisfied simply by receiving the government's analysis of the submissions that have been received.
23. The Chief Ombudsman therefore sought any information held pertaining to the planning of the public submission process, including how submissions would be received, processed, analysed and disseminated. She also query whether MSD had given any further consideration to releasing some or all of the submissions, with appropriate redactions, notwithstanding the work that would be involved, but in view of the public interest.

### Consistency of messages regarding expectations of privacy and confidentiality

24. The Chief Ombudsman noted that the privacy withholding ground (section 9(2)(a)) and the confidentiality withholding ground (section 9(2)(ba)) had not been raised in this case. This was most likely because Ms Ardern focused her request on organisational not individual submissions.
25. The Chief Ombudsman observed (as stated earlier), that most public submission processes are carefully planned, so that submitters are made aware in advance of the prospect that their submission will be publicly disclosed, and they know what to expect (if anything) in terms of privacy and confidentiality.
26. In this case, the Chief Ombudsman was aware that the government sought to engage the public in debate through various channels, including online and print questionnaires, facebook, twitter, email, written submissions, postcards and public meetings. Some of these channels were obviously 'public' (e.g. facebook and twitter); and some contained clear messages on privacy and confidentiality (e.g. the 43-page online questionnaire clearly stated that submissions would be disclosed on request under the OIA, and gave individual submitters the option to remove their personal details from any such

disclosure). However, other channels, including the Green Paper itself, contained no clear statement on disclosure of submissions, and what submitters might expect in terms of privacy and confidentiality.

27. The Chief Ombudsman noted that the same issue had arisen previously during her investigation of a complaint about MSD's refusal to disclose copies of submissions made on the Consultation Document for the Development of a Carer's Strategy for New Zealand (W58660, 2008).
28. In that case, a number of engagement mechanisms had been used, some of which included a clear disclaimer about the application of the OIA, and an ability for participants to opt out of their identifying details being made public, and some of which did not. The former Chief Executive of MSD advised the Ombudsman that the Ministry would take steps to tighten its processes around public consultation and its obligations under the OIA.
29. The Chief Ombudsman commented that closer consideration could be given to this issue when planning future public consultation exercises.

## Outcome

30. After giving careful consideration to the Chief Ombudsman's opinion and the general guidance provided, the Chief Executive advised that MSD would be releasing the submissions at issue on its website.
31. The Chief Executive commented that more guidance on the management of information generated by consultation processes, including the applicability of the OIA, would be advantageous. He said officials had been asked to draft a best practice engagement toolbox, highlighting existing guidance, reinforcing key messages, and developing basic steps in receiving, managing, and releasing information on public consultation exercises.
32. The Ministry noted that the Carer's Strategy at issue in the earlier investigation was a much narrower consultation that produced around 200 submissions, in contrast to the unique engagement process used in this case, which resulted in almost 10,000 submissions. The Ministry also stated that steps were taken to tighten up its consultation processes following the earlier investigation.
33. The Ministry observed that the main channels of communication used in this case (apart from those like facebook and twitter, which are inherently public), included statements about the applicability of the OIA. While the Green Paper did not include any such statements, that paper was authored by an independent person not the Ministry. The Ministry said in future it would work more closely with an author in such circumstances to ensure that appropriate consideration is given to the OIA, and the consequences for the public availability of submissions are taken into account and adequately explained in the consultation document.

34. In the Ministry's view the main issues in the present case were that it made an initial decision that Ms Ardern's request was too large, and it did not have a plan to proactively release submissions to enhance debate. However, it always planned to release a full summary of submissions, which was itself a substantial document, including 172 pages of detailed analysis of the themes and issues raised in the submissions. The Ministry also facilitated the use of public channels such as social media, where comments were immediately available, and held nearly 70 public meetings across the country.
35. The Chief Ombudsman was pleased to note MSD's initiative in relation to the development of best practice guidance on the conduct of public submission processes, and offered the assistance of her office. In view of the fact that MSD had released the submissions at issue, she discontinued her investigation on the basis that Ms Ardern's complaint was resolved.