

Requests for information regarding the production of *The Hobbit* and film production generally

Ombudsman's opinion

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| Legislation: | Official Information Act |
| Agency: | Minister for Economic Development |
| Ombudsman: | David McGee |
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Summary

In late 2010 the New Zealand Council of Trade Unions and Radio New Zealand sought information from Ministers regarding the production of *The Hobbit*. The former also sought information about film production generally in New Zealand. These requesters along with a number of other requesters, received a response from the Hon Gerry Brownlee. The Minister noted that because similar requests had been made to a number of Ministers, a decision had been made to release the same documents to all those who had made a request. Although some information was provided (including information that was outside the scope of the requests) some of the requested information was withheld. The New Zealand Council of Trade Unions and Radio New Zealand sought the Ombudsman's review of the information withheld.

On review my key findings are:

- Section 9(2)(ba) of the Official Information Act 1982 (OIA) does not apply to information which was supplied to the Government by the film industry third parties (the parties identified by Ms Kelly in her request). This provision is not intended to permit Ministers or departments to erect a barrier to the disclosure of general policy submissions made to them by third parties on the ground that an obligation of confidence thereby arises that is owed to those submitters.
- Section 9(2)(h) applies to the legal advice obtained by the Government. The conduct of Ministers was not inconsistent with maintaining the confidentiality of the privileged material. The public interest considerations which favour disclosure do not outweigh the section 9(2)(h) interest, with the exception of the case of one document.
- This document is a letter which was drafted by Crown Counsel as part of advice to Ministers on how to respond to submissions made by a film industry third party. Although this draft was never turned into a letter sent to, or formally received by, the film industry third party, it was shown to that third party at a meeting. Accordingly, while in its origin it may have been legal advice, it was adopted by Ministers as representing their own position. Ministers cannot expect their correspondence with third party submitters on issues of public policy to remain confidential (with the exception of personal or commercially prejudicial material), especially when matters which have been urged on Ministers are subsequently implemented by policy or legislative changes. The submitter's urgings and the ministerial response become part of the history (which the public has a legitimate interest in knowing) of how policy or legislation was developed.
- Section 9(2)(g)(i) does not apply to the submissions and comments that were made to Ministers by the film industry third parties. While there will be circumstances in which persons may feel inhibited from making submissions by the prospect of those submissions being made public, this was not so in this case. The submissions and comments that were made to Ministers by these parties were made in their own direct interests with a view to persuading the Government to a policy stance that advantaged them in their commercial dealings. There is nothing improper in this and it has not been suggested that there was. But it is not accepted that persons who have a commercial interest in making submissions to Ministers would be likely to be deterred from doing so

by the prospect of release. They might *prefer* non-release, but release is a consequence that has to be, and is likely to be, borne with.

Background

On 2 November 2010 Helen Kelly of the New Zealand Council of Trade Unions made requests to the Prime Minister, the Minister for Economic Development, the Minister of Labour and the Minister for Arts, Culture and Heritage for:

“...all correspondence, advice, text or phone records or any other form of communication, within the last 12 months, between any Government Ministers or Government Departments and either Wingnut films, Peter Jackson, Warner Brothers or Three Foot Seven in relation to either film production generally in New Zealand, the production of the Hobbit or any other matter. I am also requesting any internal advice between Ministers on the same topic and between any Government Departments and Ministers.”

The wording of the request to the Minister for Economic Development was subsequently amended to:

“all correspondence, advice, text or phone records or any other form of communication within the last 12 months between the Minister for Economic Development, Ministry of Economic Development, or NZ Trade and Enterprise, and Wingnut Films, Peter Jackson, Warner Bros, SPADA and Three Foot Seven in regard to any matter in relation to film production generally in NZ or production of the Hobbit, and any advice from Ministry of Economic Development or NZ Trade and Enterprise to the Minister for Economic Development on the same topic”.

On 5 November 2010 Brent Edwards of Radio New Zealand made requests to the Prime Minister and the Minister for Economic Development for:

- *“all reports, papers and correspondence, including emails,...you received in regard to the controversy over the Hobbit movies;*
- *official advice you received which led to the announcement the Prime Minister made on October 27 that the movies would be made in New Zealand;*
- *any correspondence, emails or other reports between you and Warner Bros, Sir Peter Jackson and any other company or individual involved in the film dispute;*
- *any correspondence, emails, reports or advice you received in relation to the movies being made here, before the Actors’ Equity dispute began”.*

The Prime Minister’s response related only to information within the scope of the request which was not held by the Minister for Economic Development.

On 17 December 2010 Ms Kelly and Mr Edwards, along with a number of other requesters, received the following response from the Hon Gerry Brownlee (then Minister for Economic Development) ('the Minister'):

"I refer to your recent request under the Official Information Act for information relating to the production of the Hobbit or the wider film production industry in New Zealand.

As similar requests have been made to a number of Ministers, we have decided to release the same documents to all those who have made a request. As a consequence the enclosed documents may include some that are outside the scope of your request."

Twenty-six reports, 28 emails and 25 other documents were then released. Some information in the released documents was withheld in part. Other documents were withheld in full. Information was withheld relying on sections 9(2)(a), 9(2)(ba), 9(2)(f)(iv), 9(2)(g)(i), 9(2)(h) and 9(2)(j) of the OIA.

On 21 December 2010 Ms Kelly asked me to investigate and review the Minister's decision. A similar complaint was received from Mr Edwards on 24 December 2010.

Investigation

On 23 December 2010 I notified the Minister of Ms Kelly's complaint. I sought a report on the decision to withhold information and a copy of the information at issue. I also noted that Ms Kelly was seeking an assurance that all the information captured by her request had been considered.

On 28 January 2011 I notified the Minister of Mr Edwards' complaint.

On 1 February 2011 the Minister gave notice of an extension of time in which to respond to Ms Kelly's complaint. He noted that my letter had arrived after his office had closed for Christmas and the office was not fully operational again until 25 January 2011. An extension was thus sought in order to compile the information and write a report. The time for response was extended until 21 February 2011. A further extension in respect of both complaints was sought on 17 February 2011. The time for the response was extended until 7 March 2011.

The Minister provided me with his response on 21 March 2011. He commented:

"As you will see from the report, the compilation of the information and the consultation and communication with other Ministers' offices, government agencies, and third parties that was required made this a large logistical exercise. At the time of the requests my office was extremely busy responding to issues relating to the Pike River tragedy and the Canterbury Earthquake and I believe it was a significant achievement getting to the point of being able to release the documentation when we did.

I am aware there was a particular effort made to release the information the week of 17 December rather than the following week (being the week before Christmas)."

I numbered the documents which had either been withheld in part or withheld in their entirety. There were 60. (I have treated as one document those documents which had attachments and as one a group of emails from members of the public who wrote to Ministers in relation to the production of *The Hobbit*.)

One of the documents referred to a Crown Law legal opinion. I asked the Ministry for Economic Development ('MED') to confirm that this was the Crown Law opinion which the Chief Ombudsman had considered in the context of her consideration of a complaint against the Prime Minister for "*all briefings and reports received... since 1 January 2009 mentioning the Hobbit films, New Line or Warner Bros*" (ref:300619). MED confirmed that it was and I asked for a copy of that opinion so that I could consider it in the context of my own investigation and review.

On 12 April 2011 the investigator assisting me with my investigation, met with officials from MED to discuss the complaints.

On 9 May 2011 I expressed to the Minister a provisional view that the OIA did not provide good reason to withhold all of the information which had been withheld. I asked the Minister to consult the third parties affected by my view and said that I was willing to consider any comments he or the third parties wished to make before I decided whether to confirm my opinion.

On 20 May 2011 I received a copy of the Crown Law legal opinion from the Office of the Minister for Arts, Culture and Heritage. This opinion referred to two documents which also appeared to be captured by Ms Kelly's request but which had not otherwise been identified up to that time. As a result, the Office of the Minister for Arts, Culture and Heritage and the Crown Law Office were asked whether they could locate the relevant documents.

On 20 June 2011 the Minister wrote to me in response to my provisional view. He advised that his officials had reviewed the documents and consulted with other Ministers' offices and agencies as required, as well as with third parties. He agreed that some further information could be released but continued to assert the justification for withholding other information. He advised that he was still considering the status of some of the documents (documents 16-19, 42, 44, 45 and 49) and the views of the third parties involved and he advised that his comments on those documents would be forwarded separately.

On 28 June and 1 July 2011 the Crown Law Office provided me with the two documents which had been referred to in the Crown Law legal opinion. On 7 July 2011 an advisor from the Office of the Minister for Arts, Culture and Heritage advised that he could not "*confirm whether the material you refer to are complete documents or who the authors/recipients are. The reason for this is that we simply do not have original/full copies of those documents in our office...*". On 13 July 2011, after making further enquiries as to whether I had received all information that was within the scope of the requests, an advisor from the Office of the Minister for Arts, Culture and Heritage provided me with a further 14 documents. This increased the number of documents at issue to 77.

On 30 June 2011 I wrote to Ms Kelly regarding the withholding of the Crown Law legal opinion. Ms Kelly had previously made submissions in response to the Chief Ombudsman's view on the withholding of the opinion. I advised Ms Kelly that I could see no reason to depart from the Chief Ombudsman's view that section 9(2)(h) of the OIA provided good reason to withhold this document.

On 20 July 2011 the Minister advised that he had decided to release some previously withheld information from documents 16-19, 42, 44, 45 and 49 but he would continue to withhold other information from those documents. The Minister advised that he was happy to discuss any issues relating to these documents before I provided my final opinion.

On 12 August 2011 I wrote to the Minister confirming my request for a meeting and asking him to release the information which he had agreed could be released and which did not involve documents which contained information which was still in dispute. It was arranged that I would meet the Minister and the Minister for Arts, Culture and Heritage on 25 October 2011 (I was to be absent overseas during the greater part of September and October).

I advised the requesters of my decision to meet with Ministers. I also advised the requesters that in my provisional view there was good reason to withhold some of the information at issue. This information largely comprised advice which had been tendered to the Minister in relation to screen infrastructure in New Zealand and in relation to specific applications for the Large Budget Screen Production Grant. There were also communications between the Crown Law Office and the Minister for Arts, Culture and Heritage and between other legal advisers and third parties which in my view attracted legal professional privilege.

On 16 August 2011 I wrote to the Minister expressing a provisional view on the additional documents which had been forwarded to me by the Office of the Minister for Arts, Culture and Heritage. I expressed the view that there was good reason to withhold some information under section 9(2)(h) of the OIA. I did not see that there was good reason to withhold the remainder of the information.

On 29 August 2011 I met with Ms Kelly to discuss the complaint and the progress of the investigation and review.

On 23 September 2011, the Minister for Arts, Culture and Heritage responded to my provisional view on the additional documents which were within the scope of Ms Kelly's request and which were held by his Office. On 4 October 2011, the Minister released further information to the requesters.

On 17 October 2011 the Minister's Office cancelled the meeting which had been set for 25 October 2011 because of an unexpected Cabinet meeting which had been called by the Prime Minister. Given the then impending general election it was clear that little further progress could be made in regard to a meeting for some time.

Accordingly, on 1 November 2011, I asked the Ministers to release the documents which contained information which they had agreed could be released but which also contained information which was still in dispute. It seemed to me that the requesters should not be

required to wait any longer for the release of information for which no good reason to withhold was still being asserted.

I ultimately met with the Minister on 9 February 2012. Immediately following our meeting I wrote to the Minister, to the Hon Steven Joyce (as the new Minister for Economic Development), and to the Minister for Arts, Culture and Heritage. I noted that the Minister had in light of my comments undertaken to review the disputed material (contained in documents 8, 15-20, 42, 45, 49, 61, 65, 67, 69, 70 and 73) and to respond accordingly. I also noted that there was some information which Ministers had already agreed could be released but which remained undisclosed. I asked the Minister to release that material.

On 24 April 2012 the Minister released further information to the requesters. He also wrote to me and advised that he continued to believe that the OIA provided good reason to withhold the information which remained in dispute. He informed me that he had consulted with the Minister for Arts, Culture and Heritage who had also reviewed the documents and who concurred with his decision.

On 25 May 2012 I wrote to Minister and to the Hon Steven Joyce regarding two further papers which had come to my attention and which appeared to be captured by these complaints, but which had not been provided to me by the Minister. These consisted of an immigration policy paper and a document headed "Notes for Oral Cabinet Item". This brought the total number of documents at issue to 79.

On 27 June 2012 an official advised this Office that it was proposed that the immigration policy paper be released with minor redactions. I was also advised that there were two Cabinet Minutes which related to the paper and that these were to be released as well. The official advised that he understood the Minister did not intend to release the document "Notes for Oral Cabinet Item" because in the Minister's view it was not covered by the requests.

On 29 June 2012 I issued a consolidated provisional opinion to the Minister, the Minister for Economic Development and the Minister for Arts, Culture and Heritage. This view covered all the information still in dispute apart from the two papers which I had recently identified. I sought a response by 3 August 2012.

On 30 July 2012 the Minister for Arts, Culture and Heritage wrote to me to advise that he and the Minister would require more time to go through the opinion thoroughly. He advised that they would respond as soon as practicable. He also asked whether I had supplied my opinion to all third parties involved.

On 9 August 2012 I advised the Minister for Arts, Culture and Heritage that I understood that Ministers would undertake the third party consultation as per the practice which was established in earlier correspondence with the Minister. I also noted that, in his letter of 23 September 2011, the Minister for Arts, Culture and Heritage had stated that he would need to engage in consultation with Wingnut Films ("Wingnut") if I was unwilling to reconsider my view on the application of the OIA. I asked the Minister for Arts, Culture and Heritage to advise me if this understanding was incorrect. I proceeded on this basis.

On 1 October 2012 the Minister for Arts, Culture and Heritage wrote and advised:

"I reiterate the comments I have made in past correspondence about your analysis of the application of section 9(2)(b)(ii) of the Official Information Act 1982 to a number of documents that remain in dispute. Ministers of the Crown who frequently engage in commercial negotiations, and I think a Minister's considered opinion that the release of certain documents could cause damage should be given greater consideration [sic]. I remain unconvinced of your reasoning you employ in arguing for the release of these documents. Further, the clear feedback Ministers have received from the commercial entities with whom we negotiate suggests your decision could greatly impede our ability to conduct full free and frank negotiations in the future."

The Minister asked for a meeting before I finalised my opinion.

On 17 October 2012 I wrote to the Minister, the Minister for Economic Development and the Minister for Arts, Culture and Heritage outlining my provisional view on the two additional papers.

A meeting with Ministers was arranged for 5 December 2012 and the complainants were advised of this.

On 5 December 2012, I was advised by an official from the Office of the Minister for Arts, Culture and Heritage that due to the late calling of a Cabinet Committee meeting, the Minister and the Minister for Arts, Culture and Heritage were unable to meet with me. I was further told that the Ministers had discussed my provisional opinion and now had no further comments to make before it was finalised.

Analysis and findings

Sections 6(a) and 6(b)(i)

These provisions provide conclusive reasons for withholding official information if the making available of that information would be likely to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand (section 6(a)), or to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the Government of any other country or any agency of such a Government (section 6(b)(i)).

Information at issue

Section 6(b)(i) was relied upon to make some deletions to a 2010 report from the Minister for Arts, Culture and Heritage to the Cabinet Domestic Policy Committee – titled *"Film Production Agreement between the Government of New Zealand and the Government of the People's Republic of China"*.

Application of section 6

It seems to me that both sections 6(a) and 6(b)(i) are of relevance to the information at issue. Having seen the information concerned I am satisfied that the withholding of it is necessary to avoid prejudice to the international relations of the Government of New Zealand and so as not to prejudice the entrusting of information from other countries on a basis of confidence.

Section 9(2)(a)

Section 9(2)(a) applies if the withholding of the information is necessary to protect the privacy of natural persons.

Information at issue

- Information deleted from a letter sent by the Minister for Arts, Culture and Heritage to the Minister – 2008. (This information is technically outside the scope of both of these requests because it predates November 2009 or is not relevant subject matter.)
- Deletion of business email addresses.
- Communications between the film industry third parties and Ministers in relation to the production of *The Hobbit* – 2010.
- Deletion of the identity of members of the public who wrote to Ministers in relation to the production of *The Hobbit* – 2010.

Application of section 9(2)(a)

The Minister for Arts, Culture and Heritage referred to this section as a possible reason for withholding some communications between the film industry third parties and Ministers. As required by the OIA, I have consulted with the Privacy Commissioner on its applicability. She has commented:

"I am inclined to deal with all the documents as a group rather than individually. I do so because the topics within the documents are not specifically personal to anyone in particular. The context is the various discussions and opinions about the actions of union interest groups within the film industry here and in Australia. Arguments have been raised around whether or not film workers are employees or independent contractors and the desire or not for collective bargaining. Those matters on their own do not produce a context which would require protection on privacy grounds.

I assume that the primary personal interest in the documents is who wrote or produced them and not the interests conveyed. In that case the privacy interest would be those of all the named parties that have contributed to the debate in the various documents.

Privacy v Public interest

The group of people relevant to these documents were all involved in the government's investigation into the challenges about labour practice within the film industry. This was a highly publicised matter in late 2010 with a great deal of the debate being aired on the mainstream news. The events included meetings with representatives of Warner Brothers Pictures who came to New Zealand and with the Prime Minister and others. The Unions, including CTU, were highly visible and ready to debate the issues in the public domain.

The outcome was an amendment to the Employment Relations Act excluding a certain class of film industry workers from the definition of employees and passed by parliament under urgency.

I acknowledge that there will be many circumstances where submissions to Parliament by business interest will require confidentiality around some content. However, I consider that anyone who petitions the government for a law change does so in the knowledge that there is a general expectation of openness and transparency and that confidentiality around submissions will be unlikely.

On this occasion the key private protagonists were all identified in public debate. Many of their broad positions were articulated publicly. Similarly the fact that the government was involved was no secret and again the representatives identified.

In all the circumstances the privacy interests of any of the individuals involved do not appear to be significant given the context and the public nature of the issues. I consider their privacy interest to be low."

In agreement with the Privacy Commissioner, I do not consider that section 9(2)(a) justifies deletion of the identities of the film industry third parties who communicated with Ministers in relation to the production of *The Hobbit*.

There are some private email addresses (business email addresses are generally publicly available) included in the information at issue and a candidate for the film industry review is identified. I have accepted that this information can be withheld under section 9(2)(a).

The identities of members of the public who communicated with Ministers have also been redacted. Ms Kelly advised me that in respect of those emails she could "*accept that those of general support or criticism from the general public do not need to be identified but those from parties to this dispute should not have been withheld*".

As I have indicated above I have considered communications from film industry third parties (as identified by Ms Kelly) separately from communications from other members of the public. In any case a consideration of a breach of other correspondents' privacy sufficient to involve section 9(2)(a) would require an assessment of the particulars of each case. Given Ms Kelly's advice, I have not undertaken such an assessment and have accepted that section 9(2)(a) justifies the redactions of these other persons' identities.

Section 9(2)(b)(ii)

Section 9(2)(b)(ii) applies if the making available of the information would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information.

Information can be withheld under this provision if:

- a prejudice can be identified that would be likely to result to a third party's commercial position if the requested information were to be made available; and
- the predicted prejudice is likely to occur and such prejudice would be unreasonable.

Information at issue

- Reports and information deleted from Ministry of Economic Development reports to the Minister - Film Studio Infrastructure -2009/2010. (Some of this information is technically outside the scope of both of these requests because it predates November 2009 or is not relevant subject matter.)
- Reports and information deleted from Ministry of Economic Development reports to the Minister – Applications for Large Budget Screen Production Grant – 2010.
- Information deleted from a Ministry of Economic Development report to the Minister – Film Industry Meeting on Actors' Equity and Immigration Issues –2010.
- Communications between the film industry third parties and Ministers in relation to the production of *The Hobbit*- 2010.
- Information deleted from a Ministry of Economic Development report to the Minister – Asia Pacific Producers Network Conference – 2010.
- Information deleted from an email from a Ministerial adviser to Ministers and others in relation to the production of *The Hobbit* – 2010.

Application of section 9(2)(b)(ii)

In my view section 9(2)(b)(ii) applies to some of the information at issue. This section is relevant to documents relating to the Government's assessment of, and assistance for, screen infrastructure in New Zealand and some briefings relating to specific applications for the Large Budget Screen Production Grant. Several of the papers describe potential studio development proposals or disclose production costs and budgets. Some financial information relating to a request for sponsorship was also deleted from the Asia Pacific Producers Network Conference report. I accept that this is all information which, if it had been disclosed at the time of the request, would have been likely to prejudice the commercial positions of the companies involved.

This provision was also relied upon to withhold advice which had been supplied by the film industry third parties to Ministers during the industrial dispute which preceded the filming of *The Hobbit*.

New Line Productions ('New Line') stated:

"Motion picture studios hold such delicate production information and negotiations, as well as budget and cost data, in the strictest of confidence as their trade secrets. When it comes to The Hobbit, two of the most expensive movies that will ever be made, this is especially true. Disclosing our negotiations and innermost thinking, including certain strategic decisions, legal and personal opinions, offers from third party governments and other private information, could damage business relationships we have with others (including those third party governments that offered us special incentives), as well as impair our ability to effectively negotiate with certain third parties in the future, including the relevant unions."

Wingnut was similarly concerned:

"In short, the disclosure of the Wingnut information to a wider audience would unreasonably prejudice Wingnut's commercial position when dealing with both the local and international film community."

However, the information which had been supplied to Ministers is not information which in my view was likely unreasonably to prejudice the commercial position of the person who supplied or who was the subject of the information. I accept that some of the information at issue may not be helpful to business relationships. But in this case I cannot accept the existence of a serious risk of unreasonable prejudice to a third party's commercial position.

Indeed information of a similar nature was already in the public domain at the date of the request or was released by the Minister to the requesters in December 2010.

On 22 October 2010, New Line issued the following press release about its position:

"Recent reports that the boycott of the Hobbit was lifted by unions a number of days ago and that Warner Bros asked to delay this announcement are false. It was not until last night that we received confirmation of the retractions from SAG, NZ Equity, AFTRA through press reports. We are still awaiting retractions from the other guilds. While we have been attempting to receive an unconditional retraction of the improper Do Not Work Orders for almost a month, NZ Equity/MEAA continued to demand, as a condition of the retractions, that we participate in union negotiations with the independent contractor performers, which negotiations are illegal in the opinion of the NZ Attorney-General. We have refused to do so, and will continue to refuse to do so. The actions of these unions have caused us substantial damage and disruption and forced us to consider other filming locations for the first time. Alternative locations are still being considered."

The Minister also released the following information to the requesters in response to the official information requests:

“What Warners requires for The Hobbit is the certainty of a stable employment environment, and the ability to conduct its business in such a way that it feels its \$500m investment is as secure as possible.

Unfortunately Warners have now become very concerned about the grey areas in our employment law. This situation hasn’t been helped by the fact that they spent a lot of money fighting (unsuccessfully) the Bryson case in our courts, so they have seen these vague laws in action....

They are just looking for reasonable security, and unless its provided, its likely they will choose to base the movie somewhere else. ...” [Sir Peter Jackson’s email to the Minister’s Office 18 October 2010]

In my view the advice supplied by the film industry third parties to Ministers during the industrial dispute takes public knowledge of the commercial concerns no further than this public information.

Section 9(2)(ba)(i)

Section 9(2)(ba)(i) applies if the withholding of the information 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.

Information at issue

This interest has been relied on in connection with communications from the film industry third parties to Ministers in relation to the production of *The Hobbit* - 2010

Application of section 9(2)(ba)(i)

The third parties in this case have referred to the “*highly confidential*” nature of the information which was supplied to the Government.

Wingnut stated:

“Wingnut continues to assert strongly that it urgently supplied this highly candid commercial/industrial information on the clear understanding that it was to be kept totally confidential as between Wingnut and Government Ministers.

Ministers were, in October 2010, contemplating national policy issues at the highest level and under great urgency given the production of the Hobbit Movies in NZ was at serious risk. The information supplied was not subjected to any analysis by Wingnut at the time as to its confidentiality, as that was considered to be inherent in the candid and sensitive nature of the information.”

The issue of confidence attaching to documents supplied to Ministers has been considered in a 2010 Court of Appeal judgment. In that case, *Jeffries v Attorney General*,¹ the court had to consider whether a letter received by the then Minister of Finance was subject to section 9(2)(ba) of the OIA.

The Overseas Investment Office had received a request for the letter to the Minister and indicated its intention to release the letter under the OIA. The author of the letter challenged this decision, arguing that it was subject to an obligation of confidence that ought to be respected. He was unsuccessful in both the High Court and the Court of Appeal. In the latter, Chambers J stated at [44]:

“I appreciate that Mr Jeffries purported to make his letter to Dr Cullen (copied to the State Services Commissioner and the Solicitor-General) ‘private and confidential’ and also purported to bind ‘the recipients of this letter’ to not releasing the letter to ‘the Powells’ current solicitors, Kensington Swan” without his consent. Dr Cullen, however, never indicated he was prepared to accept the letter on that basis. If Mr Jeffries had wanted to gain such protection, he should first have ascertained whether Dr Cullen was prepared to accept the information he wished to convey on such a confidential basis. For obvious reasons, citizens cannot write to Ministers of the Crown and hope to avoid the release of their letters to enquirers simply by marking the letters ‘private and confidential’. The information contained in Mr Jeffries’s letter was not, therefore, ‘subject to an obligation of confidence’ on either Dr Cullen’s part or on the part of the other recipients.”

The communications in this case were not marked confidential though, as the Court of Appeal made clear, even that in itself is not sufficient to invoke section 9(2)(ba).

There is no indication that the third parties here ascertained whether Ministers were prepared to accept the information they wished to convey on a confidential basis. As far as I can see, their claim of an obligation of confidence has been constructed after the event in response to the official information requests. I do not consider that section 9(2)(ba)(i) provides a tenable basis for withholding these communications.

However, I would go further and say that I doubt whether communications of the nature involved in this case attract an ‘obligation of confidence’ whatever the parties making them may have claimed at the time (here they made no claim at the time). As I remarked above, they are submissions on a matter of public interest designed to persuade Ministers to adopt a particular policy stance. They are not intrinsically confidential communications on personal matters, indeed much less so than in the *Jeffries* case itself. I do not consider that section 9(2)(ba) was ever intended to permit Ministers or departments to erect a barrier to the disclosure of general policy submissions made to them by third parties on the ground that an obligation of confidence thereby arises that is owed to those submitters. I do accept that obligations of confidence can arise from the provision of sensitive or personal information of a factual nature that might not otherwise be provided if it was known that it would be released.

¹ [2010] NZCA 38.

In such cases, provided it was clear that the information was being provided on this basis, section 9(2)(ba) might be engaged. But that is not the case here. These are submissions on a contentious policy matter designed to persuade the Government to the view of the submitters. They do not have the quality of confidential communications.

I do not consider that section 9(2)(ba) applies to the bulk of this information.

However (adverting to a point discussed further below regarding section 9(2)(g)(i)), I do accept that emails which SPADA attached to a communication with the Minister in October 2010 and which contained information which had been passed to SPADA *“in confidence”* are subject to an obligation of confidence in the hands of the Minister. It would appear that, in this particular instance, the relevant third parties did not know or could not reasonably be expected to have known that their discussions would be transmitted to the Minister in the wholesale way that occurred. In this case, it seems to me that the disclosure of this information would be likely to prejudice the supply of similar information or information from the same source and that it is in the public interest that such information should continue to be supplied.

Some redactions to an email between film industry third parties dated 29 September 2010 also fall into this category.

In my view section 9(2)(ba)(i) applies to these particular communications.

Section 9(2)(f)(iv)

Section 9(2)(f)(iv) applies if the withholding of the information is necessary to maintain the constitutional convention which protects the confidentiality of advice tendered by Ministers of the Crown and officials.

Information at issue

- Reports and information deleted from Ministry of Economic Development reports to the Minister – Screen Infrastructure/studio development proposals – 2009/2010. (Some of this information is technically outside the scope of both of these requests because it predates November 2009 or is not relevant subject matter.)
- Information deleted from a Treasury report to Minister of Finance and Associate Ministers – Government assistance for the film industry - 11 February 2010.

Application of section 9(2)(f)(iv)

At the time of the request this advice was under consideration by Ministers. I consider that withholding was necessary to protect the ability of government to receive and deliberate upon advice in an effective and orderly manner. Section 9(2)(f)(iv) thus justified withholding this advice.

Section 9(2)(g)(i)

Section 9(2)(g)(i) applies if the withholding of the information 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.

In considering whether section 9(2)(g)(i) applies, it is not enough merely to assert that disclosure would inhibit free and frank expression of opinions necessary for the effective conduct of public affairs. Three questions must be answered.

1. How would disclosure of the information at issue inhibit the free and frank expression of opinions in future?
2. How would the inhibition of such free and frank expression of opinions prejudice the effective conduct of public affairs?
3. Why is this predicted prejudice so likely to occur that it is necessary to withhold the information in the circumstances of the particular case?

Information at issue

- Emails and information deleted from the film industry third parties' emails to the Minister in relation to the production of *The Hobbit* – 2010.
- Ministerial adviser's note for the Minister in relation to the production of *The Hobbit* – 2010.
- Information deleted from Ministry of Economic Development reports to Ministers concerning the New Zealand Film Commission, Film Industry Studio Infrastructure and the Asia Pacific Producers Network Conference – 2009/2010. (Some of this information is technically outside the scope of both of these requests because it predates November 2009 or is not relevant subject matter.)

Application of section 9(2)(g)(i)

Views expressed within the government sector

In general terms, the purpose of section 9(2)(g)(i) is to avoid prejudice to the generation and expression of free and frank opinions which are necessary for good government. The ability of Ministers, officials and other advisers to the Government to express their opinions on relevant issues in a free and frank manner is an essential ingredient of the climate necessary for the effective conduct of public affairs. The ongoing nature of the relationships within government and, in the case of public servants, their political neutrality, does justify recognition of a degree of confidentiality in their exchanges within government.

In my view this section applies to some of the information at issue. In particular, it applies to opinions expressed by officials during the development of advice pertaining to screen infrastructure in New Zealand, the review of the New Zealand Film Commission, immigration

policy and other industry issues. It also applies to a note generated by a ministerial adviser for the Minister's consideration prior to a meeting with Warner Brothers.

However, I do not accept the proposition that it applies to the options which were tendered by officials to Ministers in a report dated 28 April 2010 titled *"Film Industry Meeting on Actors Equity and Immigration Issues"*. In this case, by the time of the request Ministers had reached a decision on this matter and some parties had already been advised of it. I note for example that Sir Peter Jackson had discussed the issue with the Minister's Office via email in October 2010. Sir Peter Jackson reported to Tim Hurdle on 18 October 2010:

"I'm going to need to bring Warners up to speed about the failure to address the visa issues at today's cabinet meeting. Does Gerry want me to tell them, or is he intending to tell them himself?"

Tim Hurdle replied to Sir Peter Jackson on 18 October 2010:

"It is Mr Brownlee's intention to speak to Carolyn Blackwood tomorrow to explain what decisions have been made. He is more than happy to explain. At the moment, it is a call on timing of the announcement of decision. ..."

(These emails have already been released by the Minister.)

Furthermore, on 17 December 2010 (the day that Ms Kelly's and Mr Edwards' requests were declined), SPADA e-news #20 reported:

"Numbers of production companies experienced issues with obtaining temporary work visas for engagement of offshore personnel during the year and approached SPADA for assistance, often at the eleventh hour when production schedules were already in jeopardy. SPADA put a substantial effort into policy discussions with officials and Ministers on the immigration process during 2010. Only at year's end was an unexpected change signalled, which involves changing the letter of Non Objection process to one of silent approval by guilds in a three day time frame. This change has now been delayed until early 2011."

In the circumstances, I do not consider that the Minister had good reason to withhold the options which had been identified on the immigration issue. I do not accept that the disclosure of this advice after the event would result in reluctance on the part of officials to provide Ministers with such options. I emphasise too that officials only provided options for Ministers to choose from, they did not recommend a particular course of action themselves. I do not believe that release of this information would inhibit officials in the future from providing Ministers with options for action for Ministers themselves to decide upon.

Views expressed from outside the government sector

The application of section 9(2)(g)(i) is not limited to information produced within government. If the elements of this section are established, it can also apply to opinions conveyed to Ministers or officials by third parties.

In this case, section 9(2)(g)(i) was relied upon to withhold submissions and parts of submissions made to Ministers by New Line, Wingnut and SPADA representatives.

The Minister stated:

“During September/October 2010 my office was receiving information from multiple sources and it was important for the Government’s decision making that we received full information on the different matters that were in play at that time.

As a Government we place a high value on the wider community, including business leaders, both in New Zealand and off-shore, being able to provide free and frank views and commercially sensitive information to Ministers. Without this level of communication the Government would, at times, not have the full set of information as it makes decisions. In this situation I am firmly of the belief that we required full information and I know without a doubt that if released, our ability to acquire such information in the future would be seriously compromised. I am also concerned that release of such information would impact on the willingness for other business leaders, again both locally and internationally, in providing their views and information to the Government.”

New Line stated:

“If the government is not willing to adequately protect this sensitive information from disclosure, this will operate as a major disincentive to motion picture studios- as well as local and foreign talent – to utilize New Zealand as a location for future productions.”

Wingnut stated:

“The emails were an open expression of a free and frank discussion between the key participants in the film industry and Ministers. Public release will undoubtedly prejudice the supply of any further such information between the film industry (especially from Wingnut Films) and the Government.

I can categorically assure you that if the above information was released and a similar situation occur in the future, neither myself nor Wingnut Films would be inclined to help the Government again with such a candid level of advice and opinion.”

While I accept that there will be circumstances in which persons may feel inhibited from making submissions by the prospect of those submissions being made public, I am not convinced that this was so in this case. The submissions and comments that were made to Ministers by these parties were made in their own direct interests with a view to persuading the Government to a policy stance that advantaged them in their commercial dealings. There is nothing improper in this and it has not been suggested that there was. But I do not accept that persons who have a commercial interest in making submissions to Ministers would be likely to be deterred from doing so by the prospect of release. They might prefer non-release, but release is a consequence that has to be, and is likely to be, borne with.

I note that by the time of the decision on these requests, similar opinions and information had already been shared in the public domain by the submission makers.² I accept that anticipation that one's views on an issue might be released under the OIA (though this possibility was not adverted to in this case) can change the way in which views are expressed. But I do not consider that release would stop third parties from approaching the Government if they considered it was in their commercial interests to do so. I also accept that sometimes the way in which information is expressed can be an important means of communicating the significance of issues and I have considered this too, but having done so I do not consider that there is justification to withhold information on the ground of the particular language used. It does not seem to me that release would discourage or inhibit the free and frank expression of opinions that occurred in this case or that the prospect of release if this had been appreciated would have materially altered its mode of expression.

Views expressed between organisations not subject to the OIA

Some of the communications with Ministers had attached to them emails which had passed between organisations which are not subject to the OIA. Different considerations apply to such exchanges.

In cases where the author of such an email knew or can be reasonably assumed to have known that it would be transmitted to the Minister or the department it is effectively a direct communication to the Minister or department and falls to be judged for release on the same principles as those discussed above. But in the absence of such an indication I do accept that the possibility that such communications may be released raises further questions.

Emails between third parties are not themselves communications “*by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation...*” (though they may be embodied in other communications that are). In themselves then, I do not see section 9(2)(g)(i) as being applicable to these emails. Section 9(2)(g)(i) is applicable to the covering email to the Minister or other official source that attaches such an email. I have given my reasons above for concluding that generally release of such emails in this case will not be inimical to the effective conduct of public business. As far as section 9(2)(g)(i) goes the same applies to the incorporation into such an email of a communication from a more remote party.

But I do consider that release of such an email where the author did not know or cannot reasonably be expected to have known that it would be transmitted to a Minister or official raises other potential grounds for withholding. I have discussed emails which falls within this category above in the context of section 9(2)(ba)(i).

² For example, Sir Peter Jackson's public statement dated 26 September 2010; comments made by Philippa Boyens and Fran Walsh during an interview with Kathryn Ryan (RNZ) on 21 October 2010; Sir Peter Jackson's response to union action as reported by 3 News on 22 October 2010; SPADA's response to MEAA newsletter 27 October 2010.

Section 9(2)(h)

Section 9(2)(h) applies if the withholding of the information is necessary to maintain legal professional privilege.

Information at issue

- Legal advice from a barrister to a film industry third party in relation to the production of *The Hobbit - 2010*.
- Information deleted from emails sent by the film industry third parties to Ministers in relation to the production of *The Hobbit – 2010*.
- Information deleted from an email sent by a Ministerial adviser to Ministers and others in relation to the production of *The Hobbit – 2010*.
- Advice from Crown Law to the Minister for Arts, Culture and Heritage in relation to the production of *The Hobbit – 2010*.
- Letter drafted by Crown Counsel and used by the Minister and the Minister for Arts, Culture and Heritage to respond to a film industry third party in relation to the production of *The Hobbit – 2010*.

Application of section 9(2)(h)

Existence of the privilege

Section 9(2)(h) is an unusual withholding ground because it (subject to any public interest override) grants exemption to a particular class of information. This contrasts with other withholding grounds in section 9(2) of the OIA. These apply by reason of the effect their release has on identified public values (privacy, commercial position, etc). There is therefore, where legal advice is concerned, an element of exemption because of who is the author of that advice.

Solicitor/client privilege applies to confidential communications between a legal adviser and client, where the legal adviser is acting in his or her capacity as such, and the communications are for the purposes of obtaining or giving legal advice.

In this case there are a number of documents which contain communications between legal advisers and their clients, where the clients are either the Crown or third parties.

I am satisfied that the communications in question were subject to solicitor/client privilege at the time they came into existence. In the circumstances, subject to any waiver of the privilege, withholding the information is "necessary... to maintain legal professional privilege" within the meaning of section 9(2)(h).

Waiver

Successive Ombudsmen have taken the view that it would not be “*necessary*” to withhold privileged information if the circumstances are such that, were legal proceedings to be issued, a Court would be likely to hold that the privilege had been waived. I have considered whether in all the circumstances the conduct of Ministers has been inconsistent with maintaining the confidentiality of the privileged material.

A party is entitled to waive legal professional privilege and disclose or acquiesce in the disclosure of legal advice. Furthermore, waiver need not be express, but can be implied and contrary to the intentions of the party claiming it. However, disclosure to a particular person or organisation will not amount to waiver unless done so in circumstances where it can be said that the holder of the privilege is abandoning the right to keep the information confidential.

It is accepted that, in principle, there is a particularly strong public interest in the maintenance of legal professional privilege. It is not to be lightly considered to have been lost. As the Privy Council said:

“A lawyer must be able to give his client an unqualified assurance, not only that what passes between them shall never be revealed without his consent in any circumstances, but that should he [the client] consent in future to disclosure for a limited purpose those limits will be respected.”³

This passage confirms that a person is able to limit the extent to which privileged material is disclosed without necessarily waiving the privilege entirely.

Ms Kelly contended that the legal professional privilege which attaches to a Crown Law opinion has been waived.

There were a number of reasons put forward for this. First the Attorney-General /Minister for Arts, Culture, and Heritage in a letter to the studios of 29 September 2010 referred to legal advice which the Government had obtained.

Secondly, Ms Kelly noted that the Attorney-General/Minister for Arts, Culture, and Heritage had advised her that the opinion had been provided to Sir Peter Jackson and Warner Brothers. Consequently, it was, she said, unfair to deny access to other members of the public. She also noted that “*significant content of the Crown Law opinion, but not all of its content was disclosed by the Attorney-General to the public at large to claim publicly that a group of New Zealand citizens (film workers) were acting unlawfully, and that effectively their claimed rights to freedom of association did not extend to collectively negotiating conditions of work in the context of the Hobbit dispute*”.

³ *B v Auckland District Law Society* [2004] 1 NZLR 326 at [71].

This question of the “fairness” of maintaining the privilege is a concept that has been explored by the Courts. The approach of the courts to waiver is that set out in the Ophthalmological Society case⁴ and is summarised in *Shannon v Shannon*⁵ as follows (at [56]):

“The Court recognised that the fairness factor can be important in cases where there has been partial disclosure of legal advice and the consideration is whether natural justice requires disclosure of the whole advice. What must be assessed objectively in all cases, however, is the consistency of the conduct with maintaining the privilege. That requires close analysis of the particular context, what the issue is in relation to the privilege, how the evidence relates to that issue, and the question of whether there is inconsistency that could lead to injustice if the privilege is upheld. The weight to be given to fairness will depend on the circumstances, including the character of the privilege said to have been waived”.

Ms Kelly submitted:

“The Government was a third party to this dispute and chose to support the decision of an employer not to negotiate with a union, and to do so in an very public manner by using the offices of the Crown to seek legal advice in support of that employers position and then publicly release it to generate pressure on the union to drop its claim.”

However, the Government has not released the legal advice it has received. The comments made were restricted to disclosing that the Government had obtained legal advice confirming that the Commerce Act 1986 prevented producers from entering into a union-negotiated agreement with performers who are independent contractors. These comments are akin to those referred to in the *Shannon* case. That is, they refer to the existence of legal advice as being the basis for a position which has been taken. They do not amount to waiver.

The Government is entitled to request legal advice in any circumstances, just as any individual person is. In this case the fact that the Government went on to make it known that it had obtained legal advice and that the advice supported the movie producers’ stance is not, in my view, sufficient evidence that it has waived privilege in that advice.

It should be noted that in the *Shannon* case, not only did the Court hold that there had been no waiver on the facts of the case, but also observed (at [59]):

“For completeness, we note that we are not to be taken as accepting that, if [Mrs Shannon] had referred to the existence of legal advice as being the basis for her honest belief, she would be held to have waived privilege. To the contrary, we consider that a bare statement of this kind would not normally waive privilege.”

As to the question of whether it is “unfair” for the Attorney-General/Minister for Arts, Culture and Heritage to be able to make a public statement and then claim legal professional privilege

⁴ *Ophthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 at [38]

⁵ [2005] 3 NZLR 757

in order to avoid any request that might arise to back the statement up, it is clear from the *Ophthalmological Society* and *Shannon* decisions that general notions of “unfairness” in this context are not enough for waiver to occur. In particular, in *Shannon*, the Court of Appeal agreed with the comments in an article by D L Mathieson QC and Julian Page,⁶ where the authors distinguished between the unfairness caused by reliance upon the substance of privileged evidence to advance a legal claim, while at the same time denying the other side access to that evidence, and the unavoidable “unfairness” caused by every assertion of privilege.

More generally, in my view, these considerations of unfairness arose in the context of legal proceedings where it is easy to see that the interests of justice may require a court to consider such a factor in a particular case.

It is not so easy to see their relevance when what is in issue is access to official information rather than the determination of the legal rights of parties to litigation. In the former case the OIA itself identifies the values to be promoted and protected. It is questionable whether considerations of fairness based on natural justice concerns do enter into an assessment of whether a legal professional privilege subsists for the purposes of section 9(2)(h). While I am satisfied that no “unfairness” in the sense discussed in the cases exists in this case, I doubt its applicability to a consideration under the OIA (as opposed to during discovery in legal proceedings).

As regards the disclosure of the opinion to Warner Brothers and Sir Peter Jackson, I have been advised by the Attorney-General’s office that the opinion was provided to these parties on the clear understanding that it was subject to an obligation of confidence. The Attorney-General was not waiving legal professional privilege in providing it. There is nothing which I have seen which indicates that this obligation has not been respected.

Conclusion on legal professional privilege

If there has been no implied waiver and the holder of the privilege does not wish to waive privilege, then the withholding of the information *is* necessary to maintain legal professional privilege. The Government’s ability to withhold legal advice does not vary depending on the context in which the need for that advice was generated (litigation, commercial, policy, etc). As noted above, the exemption is predicated on the source of the advice.

My conclusion is that section 9(2)(h) does apply in respect of the material that was withheld as being subject to legal professional privilege.

Section 9(2)(j)

Section 9(2)(j) applies if the withholding of the information is necessary to enable a Minister of the Crown or any department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations).

⁶ *Implied Waiver of Privilege* [2000] NZLJ 355.

Information at issue

This interest has been relied on in connection with communications between the film industry third parties and Ministers in relation to the production of *The Hobbit* -2010.

Application of section 9(2)(j)

Ministers have argued that disclosing some of the information at issue would prejudice or disadvantage any subsequent negotiations with New Line or similar organisations because the latter would be less forthcoming about their negotiating positions and the reasons for them, if they believed such information would be released.

I have not identified any link between the information at issue and the predicted harm. To my mind, what is in effect being argued is that being subject to the OIA would disadvantage the Government in future unspecified negotiations. But this I take to be one of the consequences of the OIA. It is militated against by withholding grounds (sections 9(2)(j) and (i)) which permit the Government and its agencies to withhold information in specific circumstances. No specific circumstances have been identified here.

A concern was also raised about the effect of the disclosure of some of the information on the negotiating positions of third parties. But section 9(2)(j) does not provide protection for the negotiating positions of third parties, only the current or reasonably anticipated positions of Ministers, departments or organisations which are holding the requested information. I discount this concern as not relevant to section 9(2)(j).

Outside the scope of the request

Information at issue

- Notes for oral Cabinet item in relation to the production of *The Hobbit* – 2010.
- Information deleted from a letter appended to a report from the Ministry for Culture and Heritage to the Minister for Arts, Culture and Heritage – Review of New Zealand Film Commission -2010.
- Information deleted from an Aide Memoire: Meeting with Peter Jackson – 2010.
- Deletion of recipient of Ministerial correspondence regarding infrastructure situation in New Zealand – 2009.

The Minister submitted that the document headed “Notes for Oral Cabinet Item” (identified by me late in this investigation) is not within the scope of the requests.

I disagree. In my view it is captured by Ms Kelly’s request for “...any internal advice between Ministers on the same topic...” and Mr Edwards’ request for “...papers ...received by the Minister in regard to the controversy over the Hobbit movies”.

I am not aware of any good reason to withhold the “Notes for Oral Cabinet Item” when the decision on these requests was made and none has been expressed to me.

In my view the redactions made to the aforementioned letters and the aide memoire are justified on the basis that the information at issue is outside the scope of both requests (because the information predates November 2009 and does not relate to relevant subject matter).

The public interest

Having accepted that some section 9(2) interests apply, I have considered whether “*the withholding of the information is outweighed by other considerations which render it desirable, in the public interest, to make that information available*” (section 9(1) refers).

Section 9(1) is not about whether there is “*a public interest*” in making the information available, but whether any considerations favouring disclosure in the public interest *outweigh* a presumptive justification for withholding information.

I do not consider that the public interest considerations which favour disclosure outweigh the section 9(2) interests which apply, with the exception of the case of one document.

The greater part of the information in respect of which I have accepted that the withholding grounds apply is information about “*film production generally*” which at the time of the request was either still under consideration or involved commercially confidential information. I can identify no public interest factors that would outweigh the withholding grounds in respect of this information, nor were any seriously suggested to me.

On the other hand very little information regarding “*the production of The Hobbit*” in my view attracts the protection of section 9(2) of the OIA. The principal exception is the legal advice generated during the industrial dispute. The fact that this advice concerns a contentious policy issue does not persuade me that its release should override the section 9(2) interests (with the one exception I will discuss below). Contentious policy development is the stuff of government, the decisions taken to secure and expedite the production of *The Hobbit* are not uniquely contentious. While the various parties to the dispute will have their own perspectives on the wisdom of the course chosen, this is so in many other matters. I have seen nothing in this case suggesting impropriety, for instance, that would cause me to take a different view.

Ms Kelly argued, in particular, that the legal advice referred to by the Attorney General in his letter of 29 September 2010 ought to be disclosed. She considered that the topic of the legal opinion and the nature of the amendment to the law increased the public interest in disclosure. I am not persuaded that the public interest in transparency in this case is elevated to a level that outweighs the interest in protecting the Government's ability to receive legal advice in confidence. The OIA does endorse a general public interest in the availability of official information, but it also recognises that this is not of itself sufficient to require all official information to be available on request. One limitation on availability is where the information is subject to legal professional privilege. Where this is the case, the OIA expressly protects that privilege. It would require circumstances of some exceptional nature (either generally or in respect of the particular advice) to set that privilege aside.

The complainants also referred to the fact that the legislation amending the Employment Relations Act was passed by Parliament in a single day without examination by a select committee. This factor, it was claimed, increased the public interest in disclosure of the legal advice in this case. I am not sure to what extent it would be proper to take into account what is, in effect, a criticism of the parliamentary process followed in enacting the legislation. But I note that (with the exception of advices on Bill of Rights Act compliance) it is not usual for select committees to ask for or to be given copies of the legal advice on which a bill or part of a bill may be based. The particular information at issue is unlikely to have surfaced in any event. I discount this factor entirely in my consideration.

As far as the public interest in transparency is concerned, the Government's reasons for introducing the legislation were publicly aired in the parliamentary debate during the passing of the bill and by way of the released Cabinet papers entitled "*Report Back on the Employment Relations (Film Production Work) Amendment Act 2010*". I thus see no reason for overriding the withholding grounds that apply in respect of the legal advice or the other information relating to the production of *The Hobbit* that does fall within section 9(2).

However, there is one document to which legal professional privilege may apply that I consider should be released in the public interest.

This document is a letter which was drafted by Crown Counsel as part of advice to Ministers on how to respond to submissions made by a film industry third party. In these circumstances I have accepted that it is privileged. The draft was never turned into a letter sent to, or formally received by, the film industry third party. However, I have been told by Ministers that it was shown to that third party at a meeting. Had a letter been sent by Ministers it would not (certainly in its entirety) have been subject to legal professional privilege. Given that this draft was used by the Minister and the Minister for Arts, Culture and Heritage to respond to submissions which had been received, it seems to me that there is a public interest in its release.

Just as persons corresponding with Ministers on issues of public policy cannot expect their correspondence to be treated as confidential by Ministers, Ministers cannot expect their correspondence with submitters on policy issues to remain confidential (with the exception of personal or commercially prejudicial material), especially when matters which have been urged on Ministers are subsequently implemented by policy or legislative changes. The submitter's urgings and the ministerial response become part of the history (which the public has a legitimate interest in knowing) of how policy or legislation was developed. The fact that limited disclosure may not waive privilege does not mean that such disclosure is irrelevant to a consideration of the public interest in release. I consider that in this case it is highly relevant.

As I have indicated in this opinion, I do not depreciate the interest in protecting legal professional privilege. However, the privilege in this case is very different from the usual form of legal advice. It was a draft letter for Ministers to send to a film industry third party. If the letter had remained as a discarded draft there would in my view be no public interest sufficient to override section 9(2)(h). But it was not discarded; it was used by Ministers to convey their position to another party in the discussions. In its origin it may have been legal advice, but it was adopted by Ministers as representing their own position. It was at least partly as a result of

submissions such as those made by this film industry third party, that the group of Ministers with power to act approved the introduction of the Employment Relations (Film Production Work) Amendment Bill. The Bill was passed on 29 October 2010.

The disclosure of the information at issue will promote the accountability of the Government for its decision-making in relation to this law change. As recognised in the purpose statement of the OIA, there is strong public interest in availability of official information to promote the accountability of Ministers of the Crown and officials. This enhances respect for the law and promotes the good government of New Zealand (section 4(a)(ii)).

I consider that the public interest in release of this document outweighs any interest in maintaining legal professional privilege in it.

Ombudsman's opinion and recommendation

I have formed the opinion that the OIA does not provide good reason to withhold the following information:

- The remainder of Document 8 – Report from Ministry of Economic Development to Minister - *“Film Industry Meeting on Actors’ Equity and Immigration Issues”* - 28 April 2010.
- Some information in Document 15 – Email and attachments from Penelope Borland to Tim Hurdle - 12 October 2010.
- All of the information in Document 16 with the exception of a redaction pursuant to section 9(2)(h).
- The remainder of Document 17 with the exception of a private email address – Email from Fran Walsh and Sir Peter Jackson to Tim Hurdle and Mark Da Vanzo - 15 October 2010 - 4.07 pm.
- The remainder of Document 18 with the exception of a private email address – Email and attachments from Sir Peter Jackson to Tim Hurdle and copied to Mark Da Vanzo - 15 October 2010 - 3.45 pm.
- All of Document 19 with the exception of a private email address.
- The remainder of Document 20 - Email from Penelope Borland to Tim Hurdle - 19 October 2010.
- The remainder of Document 42 – Email from Penelope Borland to Tim Hurdle - 23 September 2010.
- The remainder of Document 45 with the exception of a private email address – Email from Sir Peter Jackson to Tim Hurdle -18 October 2010.
- The remainder of Document 49 with the exception of a redaction pursuant to section 9(2)(h) – Email from Tim Hurdle to Hon Gerry Brownlee and others - 28 September 2010.

- All of Document 61.
- All of Document 65.
- All of Document 67 with the exception of a redaction pursuant to section 9(2)(h).
- All of Document 69 - Letter drafted by Crown Counsel and used by the Minister and the Minister for Arts, Culture and Heritage to respond to a film industry third party.
- All of Document 70 with the exception of redactions pursuant to section 9(2)(h).
- All of the attachments to Document 73 with the exception of redactions pursuant to section 9(2)(h).
- All of the immigration policy paper with the exception of redactions pursuant to section 9(2)(g)(i).
- All of the “Notes for Oral Cabinet Item” dated 29 October 2010 and the related Cabinet Minutes.

I recommend, pursuant to section 30(1)(a) of the OIA, that the Minister for Economic Development release this information.

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.