|  |
| --- |
| Request for advice relating to Amendment Bill |
|  |
| Legislation Official Information Act 1982, s 9(2)(f)(iv)  Agency Minister of Internal Affairs  Ombudsman Beverley Wakem  Case number(s) 174609  Date March 2007 |

*Cabinet had approved legislative proposals in principle but still key steps to be taken before Bill could be introduced to the House—confidentiality required in order to protect the executive government’s ability to develop and negotiate political support for the draft legislation, in a timely and orderly fashion—s 9(2)(f)(iv) applies—opportunities for public participation in legislative process once draft legislation introduced*

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

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

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

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

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

The Ombudsman made clear that she was not concerned about the potential for Ministerial embarrassment. Her view was based on the fact that ‘the Government of the day must assume responsibility for assessing changes in the political, economic and social environment and for determining whether adjustments to the law are needed in response to those changes’.[[1]](#footnote-1) The process of developing and negotiating political support for draft legislation may, in the circumstances of a particular case, be unduly impeded by premature disclosure of advice concerning the proposed content and operation of that legislation. Ministers would be called upon to justify and debate legislative proposals that were still in development and subject to change. This in turn would divert ministerial attention from the core process of developing the legislation to the stage where it was fit for introduction to the House, and had sufficient political support to proceed.

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

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

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

*This case note is published under the authority of the* [*Ombudsmen Rules 1989*](http://legislation.govt.nz/regulation/public/1989/0064/latest/DLM129834.html?src=qs)*. It sets out an Ombudsman’s view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.*

1. Legislation Advisory Committee Guidelines on Process and Content of Legislation, 2001 Edition (now superseded by 2014 Edition), page 9. [↑](#footnote-ref-1)