

## The OIA and parliamentary privilege

The impact of the Parliamentary Privilege Act and the reasons for withholding parliamentary proceedings

*In 2014 the [Parliamentary Privilege Act \(PPA\)](#) was passed with the dual purpose of:*

- *reaffirming and clarifying the law relating to privilege; and*
- *ensuring adequate legal protection for parliamentary proceedings.*

*Questions have arisen about whether the PPA has:*

- *changed the reasons that might exist for withholding official information that constitutes parliamentary proceedings; and/or*
- *limited the Ombudsman's jurisdiction to investigate the withholding of such information.*

*This guide explains that there is no specific ground for withholding information that constitutes parliamentary proceedings **just because** it constitutes parliamentary proceedings. The reasons for refusal must be found in sections 6, 9 or 18 of the Official Information Act (OIA), as usual.*

*It also explains that the PPA does not prevent the Ombudsman from investigating and reviewing the withholding of information that constitutes parliamentary proceedings under the OIA.*

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### Glossary

**The House of Representatives (the House)** is comprised of the elected Members of Parliament (MPs)

**Parliament** is the House plus the Sovereign (in practice, the Governor-General)<sup>1</sup>

**The Speaker of the House (the Speaker)** is an MP chosen by the House to act as a spokesperson. The Speaker chairs meetings of the House and maintains order.

**The Clerk of the House (the Clerk)** provides the Speaker and members of the House expert advice on parliamentary procedure.

<sup>1</sup> See s 14(1) Constitution Act 1986.

## What is parliamentary privilege?

The role of the [House of Representatives](#) is to make laws and scrutinise the Executive (Ministers and government agencies). To do this effectively, it is granted certain privileges and immunities. These are collectively known as parliamentary privilege. Three fundamental privileges are [freedom of speech](#), Parliament's right to control its own proceedings (exclusive cognisance), and the power to punish for [contempt](#).

### Freedom of speech

Freedom of speech is the idea that people should not be sued or prosecuted for what they say in Parliament so that they are able to speak freely.

This concept goes back a long way, to the Bill of Rights 1688 (UK), which is part of New Zealand law.<sup>2</sup> Article 9 of the Bill of Rights provides that *'freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'*.

Put very simply, this means that parliamentary proceedings cannot be *'impeached'* (made subject to liability in civil or criminal proceedings) or *'questioned'* (examined critically) in a court or tribunal.<sup>3</sup>

In 2014, the PPA reaffirmed and clarified aspects of Article 9. It defined *'proceedings in Parliament'*, and explained what *'impeached or questioned'* meant.

### Proceedings in Parliament

Proceedings in Parliament means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of [the House](#) or of a committee.<sup>4</sup> This includes *'reasonably apprehended'* business.<sup>5</sup>

Parliamentary proceedings include, but are not limited to:<sup>6</sup>

- the giving of evidence (and the evidence so given) before the House or a committee;
- the presentation or submission of a document to the House or a committee;
- the preparation of a document for purposes of or incidental to the transacting of any business of the House or a committee; and

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<sup>2</sup> See s 3 and schedule 1 of the Imperial Laws Application Act 1988.

<sup>3</sup> [Parliamentary Practice in New Zealand](#) (chapter 45) notes: *'Freedom of speech is "impeached" where it is sought to make a member or person liable in criminal or civil proceedings for what they have said or done in Parliament; whereas freedom of speech is "questioned" when it is sought to undertake a critical examination in legal proceedings of what a member or person has said or done in Parliament.'*

<sup>4</sup> See s 10(1) PPA.

<sup>5</sup> See s 10(3) PPA.

<sup>6</sup> See s 10(2) PPA.

- the formulation, making, or communication of a document, under the House's or a committee's authority (and the document so formulated, made, or communicated).

## Impeached or questioned

The prohibition on impeaching or questioning means that—in proceedings in a court or tribunal—evidence must not be offered or received, and questions must not be asked or statements, submissions, or comments made, concerning [proceedings in Parliament](#), by way of, or for the purpose of, all or any of the following:

- questioning or relying on the truth, motive, intention, or good faith of anything forming part of those proceedings in Parliament;
- otherwise questioning or establishing the credibility, motive, intention, or good faith of any person;
- drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament;
- proving or disproving, or tending to prove or disprove, any fact necessary for, or incidental to, establishing any liability; and
- resolving any matter, or supporting or resisting any judgment, order, remedy, or relief, arising or sought in the court or tribunal proceedings.

## What 'official information' constitutes parliamentary proceedings?

Agencies may hold a range of information that constitutes parliamentary proceedings. This can include:

- draft legislation;
- drafting instructions;
- draft and final advice, briefings or reports prepared for select committees;
- draft answers to parliamentary questions;
- preparatory material, drafts and final speeches or statements to the House or committees; and
- preparatory material held by witnesses or advisers appearing at select committee hearings.

This information is subject to the OIA,<sup>7</sup> which means it must be released on request unless there is a legitimate reason for refusal.

## Reasons for refusal

Official information cannot be withheld just because it constitutes parliamentary proceedings.

The PPA does not provide a reason for withholding such information. Releasing it under the OIA would not be *'contrary to'* the PPA.<sup>8</sup> Nor would it *'derogate'* from the PPA.<sup>9</sup>

The PPA does not restrict the disclosure of information under the OIA, although it does limit what can be done with information that constitutes parliamentary proceedings that may be disclosed under the OIA (that is, it cannot be used in court or tribunal proceedings for the purpose of impeaching or questioning parliamentary proceedings).

Discussed below are some of the more common reasons for refusing OIA requests for information that constitutes parliamentary proceedings.

### Contempt of the House—section 18(c)(ii)

Section 18(c)(ii) of the OIA provides that a request may be refused if *'the making available of the information requested would constitute contempt ... of the House of Representatives'*.

The [Standing Orders](#) (SO 409) say that the House may treat as contempt any act or omission which:

- obstructs or impedes the House in the performance of its functions;
- obstructs or impedes a member or officer of the House in the discharge of their duty; or
- has a tendency, directly or indirectly, to produce such a result.

SO 410 lists examples of conduct that may constitute contempt. One example is *'divulging the proceedings or the report of a select committee or a subcommittee contrary to the Standing Orders'*. Relevant orders include:

- SO 219, which allows a committee to declare evidence to be secret;

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<sup>7</sup> Subject to the exceptions contained in paragraphs (a)-(l) of the definition of *'official information'* in s 2 of the OIA.

<sup>8</sup> Section 18(c)(i) of the OIA provides that a request may be refused if *'the making available of the information requested would be contrary to the provisions of a specified enactment'*.

<sup>9</sup> Section 52(3)(b) of the OIA (which is a savings provision), provides that *'nothing in [the OIA] derogates from ... any provision which is contained in any other enactment and which ... imposes a prohibition or restriction in relation to the availability of official information; or ... regulates the manner in which official information may be obtained or made available'*.

- SO 239(1), which says that *‘the proceedings of a [committee] other than during the hearing of evidence are not open to the public and remain strictly confidential to the committee until it reports to the House’*; and
- SO 240(1), which says that *‘a report or a draft of the report of a select committee or a subcommittee is strictly confidential to the committee until it reports to the House’*.

Accordingly, releasing:

1. evidence that has been declared to be secret; or
2. the proceedings of a committee, other than evidence heard in public,<sup>10</sup> before it has reported to the House; or
3. the report of a committee, before it has been presented to the House;

is likely to constitute contempt of the House. A request for such information may be refused under section 18(c)(ii) of the OIA.

Absent these special circumstances, parliamentary proceedings are generally very transparent. Where it is not clear that release would constitute contempt, agencies should consult the Office of [the Clerk of the House](#)) before relying on section 18(c)(ii) of the OIA.

The application of section 18(c)(ii) of the OIA was considered in cases [180074](#), [177763](#), [165413](#) and [W44156](#).

## **Confidential advice to Government—section 9(2)(f)(iv)**

Section 9(2)(f)(iv) of the OIA provides good reason to withhold official information if, and only if:

- it is necessary to maintain the constitutional convention protecting the confidentiality of advice tendered by Ministers and officials; and
- the need to withhold is not outweighed by the public interest in release.

This section usually applies where the release of confidential advice given to Ministers or Cabinet would prejudice the orderly and effective conduct of government decision making processes.

Section 9(2)(f)(iv) will usually apply to draft answers to parliamentary questions tendered by officials to Ministers (see case [W45495](#)). Other withholding grounds have applied to information of a similar nature that was not *‘tendered’* (see [470699](#) and [W49982](#)), or was not tendered by *‘officials’* ([W44156](#)).

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<sup>10</sup> [Parliamentary Practice in New Zealand](#) (chapter 46) notes: *‘In principle, all evidence heard by select committees is heard at public meetings and all written evidence received is available to the public. Questions of contempt can arise only if the committee has taken special steps to protect evidence from public disclosure’*.

More detailed guidance on [section 9\(2\)\(f\)\(iv\)](#) and the [public interest test](#) is available on our website.

## Confidentiality—section 9(2)(ba)

Section 9(2)(ba) of the OIA provides good reason to withhold official information if, and only if:

- it is necessary to protect information subject to an obligation of confidence, where disclosure would be likely to:
  - prejudice the ongoing supply of information that is in the public interest; or
  - otherwise damage the public interest; and
- the need to withhold is not outweighed by the public interest in release.

The application of section 9(2)(ba) was considered in cases [180074](#) (correspondence between an MP and the Registrar of Pecuniary interests held by the Prime Minister) and [W44156](#) (draft answer to a parliamentary question tendered by HNZ staff).

More detailed guidance on [section 9\(2\)\(ba\)](#) and the [public interest test](#) is available on our website.

## Free and frank opinions—section 9(2)(g)(i)

Section 9(2)(g)(i) of the OIA provides good reason to withhold official information if, and only if:

- it is necessary to maintain the effective conduct of public affairs through the free and frank expression of opinions; and
- the need to withhold is not outweighed by the public interest in release.

Section 9(2)(g)(i) is about maintaining the effective conduct of public affairs through the free and frank expression of opinions. It recognises that the effective conduct of public affairs requires the candid and unreserved expression of opinions, and that public exposure of those opinions can sometimes have a chilling effect on people's willingness to express themselves openly, honestly and completely in future.

The application of section 9(2)(g)(i) was considered in cases [470699](#) (emails between officials discussing the advice that should be tendered on the answering of parliamentary questions), and [W49982](#) (draft answers to parliamentary questions prepared by Police staff, but not 'tendered').

More detailed guidance on [section 9\(2\)\(g\)\(i\)](#) and the [public interest test](#) is available on our website.

## Legal professional privilege—section 9(2)(h)

Section 9(2)(h) of the OIA provides good reason to withhold official information if, and only if:

- it is necessary to maintain legal professional privilege; and
- the need to withhold is not outweighed by the public interest in release.

This section most often applies to confidential communications between a solicitor and client for the purpose of giving or receiving legal advice (known as solicitor-client privilege).

It can also apply to drafting instructions and draft legislation. Section 61 of the Legislation Act 2012 makes it clear that drafting instructions received by the Parliamentary Counsel Office (PCO), and draft legislation prepared by, or on behalf of, the PCO, are subject to legal professional privilege. See case [469770](#) (drafting instructions on the Injury Prevention, Rehabilitation and Compensation Bill).

More detailed guidance on [section 9\(2\)\(h\)](#) and the [public interest test](#) is available on our website.

## Impact of the PPA on the Ombudsman’s jurisdiction

Under the PPA, ‘*courts and tribunals*’ are prohibited from [impeaching or questioning proceedings in Parliament](#). The Ombudsman falls within the PPA’s definition of a ‘*tribunal*’,<sup>11</sup> and is thereby also precluded from impeaching or questioning proceedings in Parliament.

This does not fundamentally alter the position that existed previously. Ombudsmen were always prevented from impeaching or questioning parliamentary proceedings by Article 9 of the Bill of Rights 1688 (see [Freedom of speech](#)).

However, neither Article 9 nor the PPA prevent the Ombudsman from carrying out their investigative role under the OIA, in relation to complaints about the withholding of information that constitutes parliamentary proceedings.

The Speaker of the House has said he does not see a general conflict arising from the Ombudsman performing the duties of that office, including conducting investigations into the withholding of official information that may also be a proceeding of the House (see cases [470699](#) and [469770](#)).

The Ombudsman may need to exercise caution if, when investigating the withholding of information that constitutes parliamentary proceedings, it appears that there may be a basis for forming an opinion that could be seen as questioning (or critically examining) those proceedings. In such circumstances, the Ombudsman would consult the Speaker before proceeding.

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<sup>11</sup> See s 2 PPA, ‘*tribunal*’ means ‘*any person or body ... with power to summons witnesses and take evidence on oath or affirmation, or with power to require (by, or without, a summons) the giving or supply (on, or without, oath or affirmation) of any kind or form of evidence or information*’.

### Ombudsman cannot investigate responses to parliamentary questions

While parliamentary privilege does not prevent the Ombudsman from investigating the withholding of information that constitutes parliamentary proceedings in response to an OIA request, it does prevent the Ombudsman investigating the actual response made to a written or oral question in Parliament.

In case [W46007](#), an MP lodged a series of related written parliamentary questions. The Minister's replies to these questions purported to withhold some information in reliance on section 9(2)(a) of the OIA. In addition, the reply incorrectly informed the MP of a right to seek, by way of complaint to an Ombudsman, an investigation and review of the refusal to provide the information.

The Chief Ombudsman advised the complainant that he could not investigate and review a Minister's answers to parliamentary questions, as this would breach the prohibition on impeaching or questioning Parliament. However, there was nothing to prevent the MP from making a request for the same information under the OIA, and if he was dissatisfied with the Minister's response, complaining to the Ombudsman.

## Further information

Appendix 1 of this guide has a [summary](#) of the key information contained in this guide.

Appendix 2 has [case studies](#) illustrating the application of some of the more common reasons for refusing OIA requests for information about parliamentary proceedings.

Related guidance material includes:

- [\*Confidential advice to government—A guide to section 9\(2\)\(f\)\(iv\) of the OIA\*](#)
- [\*Practice guidelines on confidentiality\*](#)
- [\*Free and frank opinions—A guide to section 9\(2\)\(g\)\(i\) of the OIA and section 7\(2\)\(f\)\(i\) of the LGOIMA\*](#)
- [\*Practice guidelines on legal professional privilege\*](#)
- [\*Public interest—A guide to the public interest test in section 9\(1\) of the OIA and section 7\(1\) of the LGOIMA\*](#)

Our website contains searchable case notes, opinions and other material, relating to past cases considered by the Ombudsmen: [www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz).

If you are dealing with an OIA request for information that constitutes parliamentary proceedings, and you need guidance on whether those proceedings are confidential or not, you can approach the Office of the Clerk ([clerk@parliament.govt.nz](mailto:clerk@parliament.govt.nz)).

You can also contact our staff with queries about the OIA and parliamentary privilege by email [info@ombudsman.parliament.nz](mailto:info@ombudsman.parliament.nz) or freephone 0800 802 602. Do so as early as possible to ensure we can answer your queries without delaying your response to a request for official information.

## Appendix 1. Summary

<b>Parliamentary privilege</b>	<i>‘Parliamentary privilege’</i> describes the set of privileges and immunities that the House of Representatives has in order to fulfil its functions.
<b>Freedom of speech</b>	A key privilege is <i>‘freedom of speech’</i> , which means that <b>parliamentary proceedings</b> (things that are said or done in Parliament) cannot be <b>impeached</b> (made subject to liability in civil or criminal proceedings) or <b>questioned</b> (examined critically) in a court or tribunal.
<b>The information is subject to the OIA</b>	Information about parliamentary proceedings is <b>official information</b> in the hands of a Minister or agency subject to the OIA (unless it is covered by one of the exclusions to the definition of ‘official information’ in section 2 of the OIA). This means it must be released on request unless there is a <b>good reason</b> to withhold it.
<b>Types of information</b>	Information that may constitute parliamentary proceedings includes draft legislation, drafting instructions, information prepared for select committees or witnesses and advisers appearing before select committees, draft answers to parliamentary questions, and draft speeches or statements to the House or committees.
<b>Can’t withhold just because it is parliamentary proceedings</b>	This information cannot be withheld just because it constitutes parliamentary proceedings, or because of the Parliamentary Privilege Act 2014. Reasons for refusal must be found in sections 6, 9 or 18 of the OIA.
<b>Common reasons for withholding under the OIA</b>	Common reasons for withholding information that constitutes parliamentary proceedings include sections 18(c)(ii) (contempt of the House), 9(2)(f)(iv) (confidential advice to Government), 9(2)(ba) (confidentiality), 9(2)(g)(i) (free and frank opinions) and 9(2)(h) (legal professional privilege). Section 9(2)(f)(iv) often applies to draft answers to parliamentary questions (see case <a href="#">W45495</a> ). Section 9(2)(h) often applies to draft legislation and drafting instructions (see case <a href="#">469770</a> ). Remember that section 9 withholding grounds are subject to a <a href="#">public interest test</a> .
<b>Contempt of the House</b>	Agencies should consult the Clerk before relying on section 18(c)(ii) of the OIA, unless it is clear that release would breach Standing Orders.
<b>Ombudsman can investigate</b>	Requesters can complain to the Ombudsman if they are unhappy that official information about parliamentary proceedings has been withheld. The prohibition on impeaching or questioning parliamentary proceedings does not prevent the Ombudsman from investigating such complaints. The Ombudsman will consult the Speaker if there appears to be a basis for forming an opinion that could be seen as questioning (or critically examining) parliamentary proceedings.

## Appendix 2. Case studies

These case studies are published under the authority of the [Ombudsmen Rules 1989](#). They set out an Ombudsman's view on the facts of a particular case. They should not be taken as establishing any legal precedent that would bind an Ombudsman in future.

Case number	Year	Subject	Outcome
470699	2019	<p><a href="#">Emails between officials discussing the advice that should be tendered on the answering of parliamentary questions</a></p> <p><i>PPA did not provide a statutory bar on the Ombudsman's investigation of a complaint under the OIA—section 9(2)(g)(i) applied—release would prejudice the free and frank expression of similar communications in future—no public interest override</i></p>	Good reason to withhold under section 9(2)(g)(i)
469770	2019	<p><a href="#">Drafting instructions on the Injury Prevention, Rehabilitation and Compensation Bill</a></p> <p><i>PPA did not provide a statutory bar on the Ombudsman's investigation of a complaint under the OIA—section 9(2)(h) applied—withholding necessary to maintain legal professional privilege—no public interest override</i></p>	Good reason to withhold under section 9(2)(h)
180074	2010	<p><a href="#">Correspondence between MP and Registrar of Pecuniary interests held by the Prime Minister</a></p> <p><i>Correspondence subject to the OIA because it was held by the Prime Minister for official purposes—section 18(c)(ii) did not apply—release by the Prime Minister, to whom the information had properly been disclosed, would not constitute contempt of the House—s 9(2)(h) did not apply—the Registrar was not a lawyer and there was no solicitor-client relationship—section 9(2)(ba)(i) applied—implied obligation of confidence—release would inhibit the future supply of information from Ministers to Ministerial Services—no public interest override because the matter had already been the subject of a comprehensive inquiry by the Auditor-General</i></p>	Good reason to withhold under section 9(2)(ba)(i)
177763	2008	<p><a href="#">Information about issues raised by the Legislation Advisory Committee in relation to the Public Transport Management Bill</a></p> <p><i>Section 18(c)(ii) did not apply—information was not advice to select committee but advice to Minister about what the advice to select committee might be—sections 9(2)(f)(iv) and 9(2)(h) applied—no public interest override</i></p>	Good reason to withhold under sections 9(2)(f)(iv) and 9(2)(h)

Case number	Year	Subject	Outcome
165413	2002	<p><a href="#">Draft amendments to the Terrorism (Bombings and Financing) Bill</a></p> <p><i>Section 18(c)(ii) did not apply—once a select committee has reported back to the House all proceedings of that committee, oral and written, can be referred to and used without any confidentiality restrictions stemming from parliamentary privilege</i></p>	Release in full
W49982	2003	<p><a href="#">Draft answers to parliamentary questions prepared by Police staff, not 'tendered'</a></p> <p><i>Section 9(2)(g)(i) applied—release would prejudice the free and frank expression of similar communications in future—no public interest override</i></p>	Good reason to withhold under section 9(2)(g)(i)
W44156	2001	<p><a href="#">Draft answer to parliamentary question tendered by HNZ staff</a></p> <p><i>Section 18(c)(ii) did not apply—the House had no interest in maintaining the confidentiality of a draft answer to a parliamentary question after it had been given—s 9(2)(ba)(ii) applied—release of confidential draft would undermine the Minister's ability to answer parliamentary questions, and the quality of accountability to Parliament</i></p>	Good reason to withhold under section 9(2)(ba)(ii)
W45495	2001	<p><a href="#">Draft answer to parliamentary question tendered by DPMC officials</a></p> <p><i>Section 9(2)(f)(iv) applied—release of confidential draft would undermine the Minister's ability to answer parliamentary questions, and the quality of accountability to Parliament</i></p>	Good reason to withhold under section 9(2)(f)(iv)

### Case 470699 (2019)—Emails between officials discussing the advice that should be tendered on the answering of parliamentary questions

A requester sought general advice given or received by the Minister of State Services on answering parliamentary questions. The Minister refused the request in reliance on section 9(2)(g)(i) of the OIA, and the requester complained to the Ombudsman.

The information at issue comprised emails between officials discussing the advice that should be tendered on the answering of parliamentary questions. It was not the actual advice tendered to the Minister.

#### Parliamentary privilege

The Chief Ombudsman noted that the information at issue constituted [proceedings in Parliament](#), as defined in the PPA. He considered first whether the PPA gave rise to any limitation on his ability to investigate the withholding of that information. He consulted the Speaker who advised:

*I do not see a general conflict with parliamentary privilege arising from the Ombudsman performing the duties of that office, including conducting investigations into the handling of official information that may also be a proceeding of the House.*

The Chief Ombudsman then considered whether section 9(2)(g)(i) of the OIA provided good reason to withhold the emails.

#### Section 9(2)(g)(i)

The key issue under section 9(2)(g)(i) is whether release of the information at issue would inhibit the future free and frank expression of opinions that are necessary for the effective conduct of public affairs. Relevant factors include the nature and content of the information, the source of the information, and the context in which it was generated.

The emails comprised officials' opinions on how the Minister might wish to answer parliamentary questions. They were written under pressure of time and in very informal terms. The Chief Ombudsman stated that *'the informality and immediacy of the advice is relevant to whether its disclosure may be likely to inhibit the future expression of similar advice in a free and frank manner'*.

The Chief Ombudsman said it was important that officials are able to discuss and revise proposed advice on responses in a free and frank manner without concern that this process will later become publicly available. It is also important that such discussion is documented rather than undertaken orally, a practice which would undermine accountability for the advice.

The Chief Ombudsman concluded that release of the emails would prejudice the free and frank expression of similar communications in future, which would in turn prejudice the effective conduct of public affairs by inhibiting the candour and quality of advice on suggested answers to parliamentary questions.

## Public interest

Having reviewed the emails, the Chief Ombudsman concluded there was nothing in their content that gave rise to a public interest in disclosure sufficient to outweigh the interest in preserving the ability of officials to provide the Minister with the best advice and information on such matters in the future, and the ability of the Minister to seek that advice.

The public interest was addressed by the parliamentary process and the Minister's actual response. The Minister is accountable to Parliament for the responses to questions, and if a reply is deemed insufficient, MPs can ask additional questions.

The Chief Ombudsman formed the opinion that section 9(2)(g)(i) of the OIA provided good reason to withhold the emails.

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## Case 469770 (2019)—Drafting instructions on the Injury Prevention, Rehabilitation and Compensation Bill

A requester sought the drafting instructions on the Injury Prevention, Rehabilitation, and Compensation Amendment Bill. The Ministry of Business, Innovation and Employment withheld the instructions under section 9(2)(h) of the OIA, on the basis that it was necessary to maintain legal professional privilege. The requester complained to the Ombudsman.

### Parliamentary privilege

The Chief Ombudsman noted that the information at issue constituted [proceedings in Parliament](#), as defined in the PPA. He considered first whether the PPA gave rise to any limitation on his ability to investigate the withholding of that information. He consulted the Speaker who advised:

*I do not see a general conflict with parliamentary privilege arising from the Ombudsman performing the duties of that office, including conducting investigations into the handling of official information that may also be a proceeding of the House.*

The Chief Ombudsman then considered whether section 9(2)(h) of the OIA provided good reason to withhold the drafting instructions.

### Section 9(2)(h)

Section 9(2)(h) of the OIA applies where withholding is necessary to maintain legal professional privilege. Generally, the withholding of legally privileged information will be necessary to maintain the privilege, unless it has been waived.

The drafting instructions were subject to legal professional privilege. Section 61(2) of the Legislation Act 2012 makes it clear that drafting instructions are subject to legal

professional privilege. There was no indication that privilege had been waived in this case. Accordingly, withholding was necessary to maintain the privilege.

### **Public interest**

The requester pointed out ambiguity in the legislation, and argued that the instructions would be a useful tool in understanding the intention behind the treatment injury provisions.

The Chief Ombudsman was not persuaded that there were sufficiently strong public interest considerations favouring the availability of the instructions to outweigh the need to withhold the information on the grounds of maintaining legal professional privilege.

If the instructions were the only indication of the intentions behind the relevant provisions, then the public interest in them might be strengthened. However, the instructions were only one of a number of different sources of information that may assist with the courts' interpretation of the provisions, and the Chief Ombudsman did not consider that the instructions alone would provide a decisive indication.

The Chief Ombudsman formed the opinion that section 9(2)(h) of the OIA provided good reason to withhold the drafting instructions.

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### **Case 180074 (2010)—Correspondence between MP and Registrar of Pecuniary interests held by the Prime Minister**

The Prime Minister/Minister for Ministerial Services withheld a letter from the Registrar of Pecuniary interests to the Minister of Finance at the time, and the requester complained to the Ombudsman.

Initially, the Prime Minister refused to provide the letter to the Chief Ombudsman, saying that this would constitute contempt of the House. The Chief Ombudsman consulted the Clerk of the House, who advised that release of the letter to the Chief Ombudsman would not constitute contempt. However, the Prime Minister maintained that release of the letter to the requester would constitute contempt of the House, and relied on section 18(c)(ii) of the OIA to refuse the request, as it related to this letter.

### **Status of the letter**

The Chief Ombudsman noted that correspondence between the Registrar and MPs relating to the returns they are required to submit under the Standing Orders is not '*official information*' in the hands of the Registrar or the MP to whom the correspondence relates.

In the case of the Registrar and MPs who hold no ministerial office, this is because the OIA does not extend to them at all.

In the case of MPs who are Ministers, this is because the correspondence is not held by them in their official capacities as Ministers. The requirement to register pecuniary interests and dealings with the Registrar in fulfilment of this requirement arise from one's position as an MP, not from one's ministerial office. This is recognised in the House's own procedures whereby questions cannot be addressed to Ministers about the registration of their pecuniary interests since these are not matters for which they have a ministerial responsibility (as opposed to a responsibility as MPs).

In this case, the letter was not official information in the Finance Minister's hands. However, the Finance Minister had forwarded the letter to the Department of Internal Affairs in support of his declaration, and Ministerial Services had used it in the course of carrying out services with respect to ministerial properties. It was, therefore, *'official information'* in the hands of the Department and Minister for Ministerial Services.

### **Contempt by release**

The Chief Ombudsmen consulted with the Clerk of the House before forming any views on the issue of contempt of the House.

The Chief Ombudsman accepted that it would be a contempt of the House if the Registrar or other staff of the Office of the Clerk were to disclose correspondence with MPs relating to the register other than as authorised by the Standing Orders. Clause 18 of Appendix B of the Standing Orders set out the circumstances in which returns and information may be released.

However, she did not accept that it would be a contempt for an MP to disclose their correspondence with the Registrar. In fact, MPs commonly release copies of their returns or correspondence that they have had with the Registrar when questions arise as to their compliance with the rules. There could be no question of MPs thereby committing a contempt.

Nor did the Chief Ombudsmen accept that a third party to whom such returns or correspondence is properly disclosed commits a contempt of the House in disclosing that information in turn. There is nothing in the Standing Orders to suggest this, or that it would serve any parliamentary interest to attempt to do so (the basis of the contempt power), or that it would be practicable to do so. As most such disclosures by MPs are by tabling in the House and thus disclosing to the world at large, there is usually no intention on the part of the MP to maintain confidentiality. There may well be such an intention in a disclosure to another person, but that is a private matter between those parties, not a matter of enforcement by invoking the House's power to punish for contempt. (However, it is relevant in assessing whether other withholding grounds applied).

If such information is obtained by a third party improperly (for example, by theft) that is a different matter. To obtain such material improperly is probably a contempt in itself, and disclosure of improperly obtained material would compound the contempt.

The Chief Ombudsman did not accept that section 18(c)(ii) applied in this case. Release of the letter by the Prime Minister (or anyone else into whose hands it came legitimately) would not constitute a contempt of the House.

### **Other grounds for withholding**

The Chief Ombudsman then considered whether there were other grounds for withholding the letter.

Section 9(2)(h) of the OIA (withholding necessary to maintain legal professional privilege) did not apply because the Registrar's advice was not legal advice. The Registrar was not a lawyer and there was no solicitor-client relationship.

However, section 9(2)(ba)(i) of the OIA (withholding necessary to protect the ongoing supply of confidential information that is in the public interest) did apply. It was implied from the circumstances of this particular case that there was a mutual understanding between the Finance Minister and Ministerial Services that the advice the Minister had voluntarily supplied to Ministerial Services was provided in confidence.

There was a real risk that disclosure of the Registrar's advice in this case would inhibit the future supply of information from Ministers to Ministerial Services. This would not be in the public interest because a free-flowing dialogue between Ministers and Ministerial Services enables Ministerial Services to manage the utilisation of public money and resources.

The Chief Ombudsman did not consider that the public interest considerations favouring release outweighed the interest in withholding. The principal reason for this was that an Auditor-General inquiry had comprehensively addressed the public interest in transparency and accountability.

The Chief Ombudsman formed the opinion that section 9(2)(ba)(i) of the OIA provided good reason to withhold the correspondence.

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### **Case 177763 (2008)—Information about issues raised by the Legislation Advisory Committee in relation to the Public Transport Management Bill**

The Legislation Advisory Committee's (LAC's) annual report referred to meetings and correspondence with the Ministry of Transport about the Public Transport Management Bill, which was due to come before the Transport and Industrial Relations Select Committee.

A requester sought information about the issues raised by the LAC. The Ministry withheld correspondence with the LAC, correspondence with its legal advisors, and advice to the Minister about the issues raised by the LAC, under sections 18(c)(ii), 9(2)(f)(iv) and 9(2)(h) of the OIA. The requester complained to the Ombudsman.

### **The Ministry's position**

The Ministry explained that the information was withheld because it could form part of its report to the select committee, which had not yet been finalised, and release at that time could breach the confidentiality of the select committee's proceedings, and constitute contempt of the House.

However, after consulting the Clerk of the House, the Ministry decided some of the information could be released.

The Clerk said that, while the LAC material was a **source** for the Ministry's advice to the select committee, it was not the advice itself:

*The Ministry's advice (expressed in its report [to the select committee] forms part of the proceedings of the Select Committee and it would be a contempt to divulge it (see Standing Orders 240(1) and 400(p)) but material that simply informs the advice is not in the same category.*

The Ministry released some of the information, but continued to withhold information that it said would be included in its departmental report to the select committee, on the basis that it formed part of the proceedings of the committee, and it would constitute contempt to divulge it. The Ministry also continued to withhold correspondence with its legal advisors under section 9(2)(h).

### **Contempt by release**

The Ombudsman acknowledged that advice to a select committee becomes part of the proceedings of the committee when it is tendered to it. To disclose departmental advice to a select committee without the committee's authority, or before the committee reports to the House, would be contempt. To disclose a draft of that advice would also be likely to constitute contempt, as would disclosure of what occurred at a select committee meeting closed to the public.

However, the information at issue here was advice to a Minister about what a department may advise a select committee. Parliamentary privilege is a privilege of the Legislature, not of the Executive, or of an agency. The information in this case related solely to the business of the Executive—that is, what position the Executive should advocate before the Legislature. Release of this information would not constitute contempt of the House.

### **Other withholding grounds**

The Ombudsman then considered whether there were other grounds for withholding the information.

He concluded that section 9(2)(f)(iv) of the OIA (withholding necessary to maintain the constitutional convention protecting the confidentiality of advice tendered by Ministers

and officials) provided good reason to withhold the advice to the Minister about the issues raised by the LAC.

He also concluded that section 9(2)(h) of the OIA (withholding necessary to maintain legal professional privilege) provided good reason to withhold the Ministry's correspondence with its legal advisors.

The need to withhold the information at issue was not outweighed by the public interest in disclosure, especially considering the extent of information that had already been released.

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### Case 165413 (2002)—Draft amendments to the Terrorism (Bombings and Financing) Bill

A requester sought a copy of proposed amendments to the Terrorism (Bombings and Financing) Bill (the Bill) that the Minister of Foreign Affairs and Trade had referred to in a media statement.

The information at issue was a draft PCO parliamentary slip containing proposed amendments to the definition of a *'terrorist act'*. The Minister said he could not release it as it was legal advice to the select committee.

The Chief Ombudsman consulted the Clerk of the House.

The Clerk noted that the Bill was reported back to the House on 22 March 2002, and no evidence was received by the committee as secret evidence. Consequently, from 22 March 2002, all proceedings of the committee, oral and written, on the Bill could be referred to and used without any confidentiality restrictions stemming from parliamentary privilege. In his view, section 18(c)(ii) could not apply in respect of any material received by the committee in its examination of the Bill.

The Clerk also noted that all submissions and written advice received on a Bill are deposited in the Parliamentary Library, and he would have no grounds to refuse access to that material. While practice has been to retain only the first and final versions of amendments drafted for the committee, if other versions existed, and were retained, they would be provided to an enquirer as a matter of course.

In light of the clarification provided by the Clerk, the Minister decided to release the information.

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### Case W49982 (2003)—Draft answers to parliamentary questions prepared by Police staff, not ‘tendered’

An MP asked the Police for draft answers to parliamentary questions on a pilot youth justice programme. The Police explained that this was a Ministry of Justice project, and so the draft replies prepared by Police staff had never been tendered. The Police withheld the draft replies under section 9(2)(g)(i) and the requester complained to the Ombudsman.

Section 9(2)(f)(iv) of the OIA usually applies to draft answers to parliamentary questions tendered by ‘officials’ (members of the public service, employed in public service departments) to Ministers (see case [W45495](#)). The advice in this case had not been ‘tendered’, and there was a question about whether Police staff (whether sworn officers or civilians) were ‘officials’. However, the ‘underlying constitutional issues’ were the same. The Ombudsman therefore considered the matter under section 9(2)(g)(i) of the OIA.

#### Section 9(2)(g)(i)

The key issue under section 9(2)(g)(i) is whether release of the information at issue would inhibit the future free and frank expression of opinions that are necessary for the effective conduct of public affairs. Relevant factors include the nature and content of the information, the source of the information, and the context in which it was generated.

The draft answers were the opinions of Police staff on how they thought the Minister should respond to the questions. The drafts had never been submitted to the Police Executive or to the Minister, where further quality control processes may have been applied.

The Ombudsman was satisfied that release of the draft replies in the circumstances of this case would inhibit the generation and expression of free and frank opinions in similar circumstances in the future. He commented that ‘*Police staff must be able to prepare responses of this type for the Minister in a manner that allows the free and frank exchange of views, providing options to allow the best possible response for the Minister*’.

#### Public interest

While there may be a public interest in disclosure of information related to the performance of officials in the drafting of replies for their ministers, this did not outweigh the overall public interest in disclosure of information that would be likely in this case to undermine the ability of the Police to provide the Minister of Police in the future with their best advice on such matters. The public interest in disclosure was further lessened by the fact that the drafts were never submitted to the Minister.

The Ombudsman formed the opinion that section 9(2)(g)(i) of the OIA provided good reason to withhold the draft answers.

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### Case W44156 (2001)—Draft answer to parliamentary question tendered by HNZ staff

A political party researcher asked Housing New Zealand (HNZ) for a copy of all alternative answers to a parliamentary question that it had provided to the Minister of Housing. HNZ had prepared two alternative answers, and the Minister had decided which one to present. The request was refused under section 9(2)(g)(i) of the OIA and the researcher complained to the Ombudsman.

#### Contempt by release

Although not raised by HNZ, the Ombudsman considered whether release under the OIA would amount to contempt of Parliament. He sought advice from the Clerk of the House.

The Clerk noted that Article 9 of the Bill of Rights 1688 is concerned with what one might do with information that one obtains, it does not prevent that information being obtained in the first place. As the motives of a requester under the OIA are generally irrelevant, Article 9 can present no impediment to information being provided.

The Clerk also said that section 18(c)(ii) of the OIA should be interpreted restrictively:

*Only if the House has clearly declared that certain conduct will be held to constitute a contempt (which it has done in Standing Orders 397 to 400) or if it is nevertheless reasonably clear that other conduct would be held to be a contempt by the House under the general terms of Standing Order 396 should [section 18(c)(ii)] be invoked.*

He concluded that ‘*the House has no interest in maintaining the confidentiality of an earlier version of a reply [to a parliamentary question]*’ after it is given.

#### Other withholding grounds

Section 9(2)(f)(iv) of the OIA usually applies to draft answers to parliamentary questions tendered by officials to Ministers (see case [W45495](#)). ‘*Officials*’ means members of the public service, employed in public service departments. The Chief Ombudsman was not convinced that employees of a crown entity like HNZ were ‘*officials*’ for the purpose of section 9(2)(f)(iv). However, he considered whether section 9(2)(ba)(ii) of the OIA applied for similar reasons.

That section provides good reason for withholding information that is subject to an obligation of confidence, where disclosure would damage the public interest. The Chief Ombudsman accepted that the draft answer was confidential, just as one prepared by an official would be. That this was due to a mutual understanding rather than a ‘*constitutional convention*’ did not diminish the confidentiality.

While it is common for agencies to prepare draft answers to parliamentary questions, it is the Minister who must answer the question in Parliament and the Minister who makes the final decision as to the content of that answer. If an alternative answer was released, Ministers would be less likely to seek such assistance in the future. This would undermine

the ability of Ministers to answer parliamentary questions, which would undermine the quality of accountability to Parliament. Such a result would damage the public interest. In addition, if the alternative answer was released, HNZ would be placed in the political arena. As a result, the Minister would likely lose confidence in the impartiality of the organisation. This outcome would also damage the public interest.

The Ombudsman did not consider that the need to withhold the information was outweighed by the public interest. There was no particular public interest in the content of the information, and the public interest in promoting accountability was met because the *'parliamentary process had sufficiently held the Minister to account for the answer he gave or chose not to give'*.

The Ombudsman formed the opinion that section 9(2)(ba)(ii) provided good reason to withhold the alternative answer. You can read the full case note [here](#).

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### Case W45495 (2001)—Draft answer to parliamentary question tendered by DPMC officials

An MP asked the Department of the Prime Minister and Cabinet (DPMC) to release a draft answer to a parliamentary question prepared for the Prime Minister. DPMC refused this request under s 9(2)(f)(iv) of the Act. It considered that releasing such draft responses would impair a Minister's ability to answer parliamentary questions effectively.

DPMC explained that Ministers routinely change draft answers provided by departments, for a variety of reasons. This can be for reasons of personal presentation and style and because it is a Minister's task to determine how a particular question should be answered. DPMC submitted that:

*If departmental drafts were routinely released, Ministers would immediately be questioned on the reasons for changes. Very quickly, Ministers would stop asking departments to help prepare answers. The result would be that the quality of information provided to the House would diminish. The quality of accountability would be reduced.*

*The same result would be achieved if only drafts which were effectively the same as the final replies were released. The adverse inference that could be drawn from refusal to release a draft answer (ie, that the Minister had altered the response) would produce questions. Ministers would quickly stop asking for assistance in order to avoid pointless questions."*

#### **Section 9(2)(f)(iv)**

Section 9(2)(f)(iv) of the OIA applies where withholding is necessary to maintain the constitutional convention protecting the confidentiality of advice tendered by Ministers and officials.

The information at issue had to be viewed within the context of the parliamentary question process that takes place in the House of Representatives. Only MPs may ask questions and only Ministers may answer those questions. It is the Minister who is ultimately accountable for the response he or she decides to give (or not give, as the case may be).

In deciding how to answer a particular question, a Minister is free to seek advice from any quarter. Normally, departmental officials provide a Minister with the information and advice necessary to enable the Minister to answer the parliamentary question. Such advice is frequently tendered in the form of a draft answer. As it is the Minister who must answer the question in Parliament, the Minister makes the final decision as to the content of that answer.

The Chief Ombudsman concluded that draft answers to parliamentary questions clearly constitute advice tendered in confidence by officials to Ministers as to how they might wish to answer the parliamentary questions at issue. He agreed that release would undermine the ability of Ministers to answer parliamentary questions, and this would in turn undermine the quality of accountability to the House.

### **Public interest**

The Chief Ombudsman noted that all Ministers are accountable to Parliament for answers given to questions asked pursuant to parliamentary procedures. If a reply is deemed unsatisfactory, MPs can ask further questions or call for a debate on the answer given. Generally speaking, the parliamentary process will be sufficient to hold Ministers to account for the answers provided to parliamentary questions. There was nothing about the content of the draft answer in this case that gave rise to a public interest in disclosure sufficient to outweigh the need to withhold.

The Chief Ombudsman formed the opinion that section 9(2)(f)(iv) of the OIA provided good reason to withhold the draft answer. You can read the full case note [here](#).

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