

## The OIA and draft documents

A guide to how the OIA applies to requests for draft documents

*This guide explains some of the most common reasons why it can sometimes be necessary to withhold draft documents.*

*These reasons relate to the withholding grounds in sections 9(2)(g)(i) (free and frank opinions) and 9(2)(ba) (confidentiality) of the OIA.<sup>1</sup>*

*The guide contains general principles and case studies to illustrate the application of these withholding grounds to draft documents.*

*There are some related guides that may help as well:*

- *Our guide on [section 9\(2\)\(g\)\(i\)](#).*
- *Our practice guidelines on [section 9\(2\)\(ba\)](#).*
- *Our guide on the [public interest test](#).*
- *Our guide on [The OIA and the public policy making process](#), which discusses draft documents generated in that particular context.*

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<sup>1</sup> References to the OIA should be taken as references to the LGOIMA; references to s 9(2)(g)(i) of the OIA should be taken as references to s 7(2)(f)(i) of the LGOIMA; and references to s 9(2)(ba) of the OIA should be taken as references to s 7(2)(c) of the LGOIMA.

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## What is a draft document?

A draft document is a **preliminary** or **unfinished** version of a piece of writing. The drafting process generally involves prewriting,<sup>2</sup> drafting, revising, editing, approval and publication (to one or more persons). It is important to go through all these stages to end up with an accurate and polished piece of writing.

The wide range of documents that agencies produce or receive will be in draft form at some stage. This includes things like strategies, policies, guidelines, work plans, minutes, internal reports, reports by external consultants, investigation, audit or inquiry reports, ministerial briefings and Cabinet papers, press releases, correspondence and responses to OIA requests.

## Are draft documents official information?

Yes. All information held by an agency is official information, subject to only limited exceptions.<sup>3</sup> Draft documents must be released on request unless there is a *'good reason'* to withhold them.

There is no special exemption for draft documents under the OIA. None of the withholding grounds relate specifically to draft documents.

There are some withholding grounds that apply reasonably commonly to draft documents (they are the subject of this guide), but whether they apply in a particular case will depend on:

- a close analysis of the document at issue;
- the [harm that will flow from its disclosure](#); and
- the countervailing [public interest in release](#).

As with any request, agencies must be guided by the *'principle of availability'*. Draft documents can often be released without harm, particularly where they are clearly labelled as drafts, and appropriate contextual information is provided about their status and any limitations.

### Are draft documents captured by the request?

Draft documents will be captured by a request if they are expressly included, or if they fall within the terms of a reasonable interpretation of the request. If it is not clear whether the requester is seeking draft documents, agencies should consult with them to find out. If draft documents have been excluded based on a reasonable interpretation of the request, agencies should be transparent about this with the requester.

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<sup>2</sup> Prewriting is anything that precedes writing, and includes things like thinking, taking notes, talking to others, brainstorming, outlining and gathering information.

<sup>3</sup> See s 2(1) OIA and LGOIMA, definition of *'official information'*.

## Requests received during the drafting process

It can be tricky dealing with a request for a document that is still in the process of being drafted. Agencies can explain to the requester that the document only exists in draft form at that time. They can clarify the process that is underway, the estimated timeframe for completion of the document, and whether it will be published.

If the requester really wants the final document, and simply expected that it would have been completed by now, they may be willing to withdraw their request. Agencies can build goodwill if they offer to let the requester know when the document has been published, or to reconsider the request once it has been finalised.

If the requester does not want to withdraw their request, find out exactly what it is they want: is it the final document, or the draft material that exists at the time?

### If the requester wants the final document

In this scenario, agencies can consider the following options:

- Trying to finalise the document so it can be released within the maximum 20 working day timeframe. Agencies will need to be reasonably certain that the document can be finished in time. They will also need to keep a close eye on the timeframe, and be ready to change tack and consider one of the other options if it looks likely that they will not be able to meet the statutory deadline.
- Granting the request as soon as reasonably practicable and within 20 working days,<sup>4</sup> and releasing the document once it is finalised, but without *'undue delay'*.<sup>5</sup>
- Refusing the final document under section 18(e), because it does not yet exist, or section 18(g), because it is not held. Note, this ground cannot apply [if the requester is seeking the draft document](#), which clearly does exist / is held (see case [375243](#)).
- Refusing the final document under section 18(d), because it will soon be publicly available. Note, this ground cannot apply [if the requester is seeking the draft document](#), and the draft is likely to be different to the final document that is eventually published. The agency must be **reasonably certain** that the final document will be published in the **near future** (as a general rule of thumb, within eight weeks). See our [Publicly available information](#) guide for more advice.

Also note that agencies cannot extend the timeframe for responding to an OIA request in order to enable them to finalise the requested document. The only permissible reasons for extension are specified in the legislation,<sup>6</sup> and they do not include finalising the requested information.

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<sup>4</sup> As required by s 15(1) OIA / s 13(1) LGOIMA.

<sup>5</sup> As required by s 28(5) OIA / s 27(5) LGOIMA.

<sup>6</sup> Section 15A(1)(a) and (b) OIA and s 14(1)(a) and (b) LGOIMA.

## If the requester wants the draft document

In this scenario, the agency needs to decide whether:

- To release the draft, clearly labelled, and with appropriate contextual information about its status and any limitations. It may also be possible to release the draft subject to conditions (such as limits on further dissemination, or use of the document only in conjunction with the associated contextual statement), if there would otherwise be good reason for withholding it.<sup>7</sup>
- To withhold the draft document for substantive reasons, such as section 9(2)(g)(i) or section 9(2)(ba). The need to withhold draft documents for substantive reasons related directly to their status as drafts is the subject of this guide. [Other withholding grounds](#) may also be relevant.

## The need to withhold

The most common withholding ground that applies to draft documents is section 9(2)(g)(i) of the OIA ([free and frank opinions](#)). Section 9(2)(ba) of the OIA ([confidentiality](#)) can also apply to some kinds of drafts.

### Other relevant withholding grounds

Section 9(2)(f)(iv) of the OIA (confidentiality of advice tendered by Ministers and officials) may apply to draft advice to Ministers or Cabinet. More information about section 9(2)(f)(iv) and draft policy advice can be found in our guides:

- [Confidential advice to Government: A guide to section 9\(2\)\(f\)\(iv\) of the OIA](#); and
- [The OIA and the public policy making process: A guide to how the OIA applies to information generated in the context of the public policy making process](#).

Any of the other withholding grounds in the OIA may apply to some or all of the information contained in a draft document (for example, section 9(2)(h) may apply to draft material that is legally privileged). Guidance on the application of other withholding grounds can be found [here](#).

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<sup>7</sup> You can read more about conditions at page 32 of our guide [The OIA for Ministers and agencies](#) / page 31 of our guide [The LGOIMA for local government agencies](#).

## Free and frank opinions

Release of draft documents may inhibit the exchange of free and frank opinions between people involved in drafting processes. For example, agencies might be concerned that:

- people would be cautious about whether, or how, they record initial and untested views;
- people would decide to defer the drafting process until their thinking is more developed;
- people would delay the circulation of early drafts to those who could offer valuable input;
- those who could offer valuable input might, in turn, be reluctant to express or record free and frank opinions on the quality of the draft material; they might prefer less transparent verbal exchanges or more formal methods of communication;
- decision makers or signatories might be less inclined to ask for the assistance of others in drafting material for their consideration or signature; and/or
- decision makers or signatories might try to exert greater control over the drafting process.

Effects such as these would undermine the efficiency of the drafting process and the quality of the end product.

The effective conduct of public affairs requires that Ministers and agencies are able to develop timely, accurate, and high quality written work, in order to underpin decisions and other governmental processes.

The need to withhold draft documents is likely to be strongest during the drafting process. However, it may persist after the drafting process has concluded, if release is likely to inhibit the expression of free and frank opinions in closely analogous situations in future.

The withholding ground that is relevant in this regard is section 9(2)(g)(i) of the OIA, which provides good reason to withhold official information if, and only if:

1. it is necessary to maintain the effective conduct of public affairs through the free and frank expression of opinions between Ministers and officials; and
2. the need to withhold is not outweighed by the [public interest in release](#).

Detailed information about the application of this withholding ground can be found in our guide [Free and frank opinions](#).

## Confidentiality

Some draft investigation reports are subject to an obligation of confidence owed to the person or people implicated in the investigation (or audit, inquiry, or other similar term).

Draft investigation reports are usually provided to the implicated individual(s) to enable them to comment before the reports are amended and/or finalised. The purpose is to ensure that the facts have been established correctly, and the findings and conclusions are warranted.

An obligation of confidence owed to the participants in the process, or people implicated in the investigation, arises out of the duty of fairness and natural justice, which are important legal tenets.

Release of draft material that is inaccurate or unwarranted may be unfair to them. It may make them less likely to cooperate and share information with investigators in future, which would impede the proper conduct of the investigation. It may also call into question the fairness and integrity of both the process and the outcome of the investigation. This would damage the public interest in having fair and effective investigation processes.

The withholding ground that is relevant in this regard is section 9(2)(ba) of the OIA, which 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](#).

Detailed information about the application of this withholding ground can be found in our Practice Guideline: [Confidentiality](#).

#### Part 4 requests by corporate entities for their personal information

Agencies should be aware that special rules apply to requests by corporate entities for their personal information.<sup>8</sup> These rules are contained in [Part 4](#) of the OIA. The reasons for refusing such requests are more limited, and **do not include** sections 9(2)(g)(i) or 9(2)(ba) of the OIA. For more information about Part 4 requests see our guide [Requests by corporate entities for their personal information](#).

## The public interest in release

Very often, the public interest in release can be met by disclosure of the final document (for example, see cases [420972](#), [419690](#), [376156](#), [372993](#), [326782](#), [306385](#), [304081](#), [302193](#) and [301085](#)). Agencies should consider releasing the final document if it is not already available. If the final document is not yet complete, agencies should consider releasing it proactively, to the requester or the public at large, once it is complete.

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<sup>8</sup> That is, information about the corporate entity that is making the request.

However, there may still be a public interest in disclosure of a draft document even if the final is available. Ombudsmen have long recognised the public interest in disclosure of drafts that reveal some *'impropriety in process or practice'* (see, for example, cases [376156](#), [312348 / 313008](#) and [295743](#)). Disclosure of drafts can also promote transparency, accountability and public participation by:

- promoting public understanding of the various inputs that influence decision making;
- enabling the public to examine the process by which an agency has come to a final decision or position;
- enabling the public to understand the reasons for a decision, and the background or contextual information that informed that decision;
- revealing the full range of matters considered, the differing views that were taken into account, and the reaction to those views; and
- revealing matters that were overlooked in the final document, or information that is additional to, or different from, what is contained in the final document.

Agencies should compare and contrast the draft and final versions, and consider whether there are any substantive differences between them that give rise to a public interest in disclosure of the draft.

Depending on the subject matter, there may also be a public interest in disclosure of a draft document, or some information about the contents of a draft document, where the drafting process has become unreasonably protracted. For example, in case [173840](#), the Chief Ombudsman commented that *'the longer a review process goes on without disclosure of the final investigation report, the greater the public interest in disclosure of at least an interim statement'*. And in case [312348 / 313008](#), the Ombudsman commented that *'the public interest in disclosure of information pertaining to a policy process increases as time goes by without a decision being made'*.

Lastly, there may be a public interest in disclosure of a draft document that has never been superseded by a final document. Such a draft is, effectively, the most complete version of the document that exists, because no further work is intended to be done on it. The public interest will be strongest where the draft document has informed decisions, or otherwise been acted on. For example, see case [387942](#).

## Misleading or inaccurate information

Sometimes agencies are concerned about releasing information that is unfinished or incomplete because it will create a misleading or inaccurate impression. However, this argument does not usually carry significant weight. Members of the public are readily capable of understanding the tentative quality of draft documents, and (provided they are clearly labelled) distinguishing them from final documents. Any risk of misunderstanding can be addressed by disclosing drafts with appropriate contextual information explaining their limitations. For example:



- in case [375243](#), the Department of Corrections released a draft literature review with a contextual statement outlining the purpose of the document, and the limitations it carried in its current form;
- in case [176296](#), the Ministry of Economic Development's concern that the public might waste time in absorbing and commenting on a draft discussion document could be addressed by disclosure of contextual information; and
- in case [C5151](#), a draft District Plan was released with a contextual statement outlining its relationship to the completed District Plan.

## General principles

Some general principles that apply to requests for draft documents are described below.

### Important note

The application of these principles still depends on the facts of the specific case. Agencies must consider the content and context of the draft document at issue. Particular factors to take into account include:

- The extent to which the information is publicly available. Release of such information is unlikely to prejudice the future exchange of free and frank opinions (see case [446128](#)).
- The extent to which the draft contains opinion material. Release of information that is not in the nature of an opinion may be less likely to have an inhibiting effect (see cases [408884](#), [382375](#), [375243](#) and [C5151](#)).
- The extent to which the opinion material is free and frank or expressed in measured and moderate terms. Release of opinions that are not free and frank in nature may be less likely to have an inhibiting effect (see cases [382375](#) and [C5151](#)).
- The seniority of the author. Junior people may feel more inhibited than senior and experienced people. Senior people can be expected to stand by their opinions, and to continue to express themselves freely and frankly in future (see case [382375](#)).

These factors can mean that the information at issue is not of a confidential nature, or that disclosure would not be likely to prejudice the free and frank expression of opinions.

Further advice can be found in our detailed guide on [section 9\(2\)\(g\)\(i\)](#), and our practice guidelines on [section 9\(2\)\(ba\)](#).

More information on the public interest test, including alternative ways of addressing the public interest, can be found our [Public interest](#) guide.

Information / situation	Ombudsman position
<p><b>Early stage drafts</b></p> <p>Relevant provision: <b>Section 9(2)(g)(i)</b></p>	<ul style="list-style-type: none"> <li>• It is more likely to be necessary to withhold early stage drafts in order to maintain the free and frank expression of opinions in the context of the drafting process.</li> <li>• Release of such material may cause the people involved in that process: <ul style="list-style-type: none"> <li>- to be cautious about whether, or how, they record initial and untested views;</li> <li>- to defer the drafting process until their thinking is more developed; and/or</li> <li>- to delay the circulation of early drafts to those who could offer valuable input.</li> </ul> <p>Effects such as these would undermine the efficiency of the drafting process and the quality of the end product.</p> </li> <li>• Some obvious characteristics of early stage drafts include: <ul style="list-style-type: none"> <li>- the document is labelled draft ;</li> <li>- the document is numbered as an early version;</li> <li>- the document is unfinished;</li> <li>- the document contains editorial markings, deletions, annotations, comments and queries as to the content; and</li> <li>- the document is not signed.</li> </ul> </li> <li>• Agencies should be able to advance evidence that a document is an early stage draft, and explain the predicted impact of disclosing that draft on the future expression of free and frank opinions.</li> <li>• The need to withhold early stage drafts is likely to be strongest while they are <a href="#">still in development</a>, but it may persist after the drafting process has concluded, if release is likely to inhibit the expression of free and frank opinions in closely analogous situations in future.</li> <li>• See cases <a href="#">463895</a> (draft internal review of the International Visitor Survey), <a href="#">442484</a> (draft venue development strategy), <a href="#">436251</a> (draft job sizing reports), <a href="#">338921</a> (draft document on Starting Price Adjustment Input Methodology), <a href="#">326782</a> (draft</li> </ul>

Information / situation	Ombudsman position
	<p>alternatives paper on CBD rail link), <a href="#">306385</a> (draft advice on establishing a mātaítai reserve at Anatori and Kaihoka), <a href="#">301085</a> (draft ministerial inquiry report), and <a href="#">312348 / 313008</a> (draft response to a Law Commission discussion paper).</p>
<p><b>Late stage drafts</b></p> <p>Relevant provision: <b>Section 9(2)(g)(i)</b></p>	<ul style="list-style-type: none"> <li>• The closer a draft is to completion, the less likely it will be necessary to withhold it in order to maintain the free and frank expression of opinions in the context of the drafting process. The more polished and developed the document, the less likely its release would cause those involved in the drafting process to feel inhibited. In cases <a href="#">468905</a> and <a href="#">176296</a>, the Ombudsman found there was no good reason to withhold draft documents in ‘near final’ form, even though they were not ‘completed’ in the eyes of the agency.</li> <li>• It is possible to argue for the protection of late stage drafts while they are <a href="#">still in development</a>. However, agencies will need to substantiate that the drafts are still in development, and potentially subject to further substantive refinement, and that disclosure would inhibit the free and frank expression of opinions in the context of the drafting process.</li> <li>• Ombudsmen have often rejected the withholding of late stage drafts that are substantially the same as the publicly available final documents. See cases <a href="#">391052</a>, <a href="#">382375</a>, <a href="#">291959</a> and <a href="#">176579</a>.</li> </ul>
<p><b>Drafts still in development at the time of the request</b></p> <p>Relevant provision: <b>Section 9(2)(g)(i)</b></p>	<ul style="list-style-type: none"> <li>• It is more likely to be necessary to withhold drafts that are still in development in order to maintain the free and frank expression of opinions in the context of the drafting process.</li> <li>• Release of such material may cause the people involved in that process: <ul style="list-style-type: none"> <li>- to be cautious about whether, or how, they record initial and untested views;</li> <li>- to defer the drafting process until their thinking is more developed;</li> <li>- to delay the circulation of early drafts to those who could offer valuable input; and/or</li> <li>- to be cautious about expressing free and frank opinions</li> </ul> </li> </ul>

Information / situation	Ombudsman position
	<p>on the quality of the draft material.</p> <p>Effects such as these would undermine the efficiency of the drafting process and the quality of the end product.</p> <ul style="list-style-type: none"> <li>• Agencies will need to substantiate that the draft is still in development, and potentially subject to further substantive refinement, and that disclosure would inhibit the free and frank expression of opinions in the context of the drafting process.</li> <li>• In cases <a href="#">420972</a> (DHB Commissioner’s draft work plan) and <a href="#">419690</a> (draft guidelines on religious instruction in schools), the Ombudsman found there was good reason to withhold draft documents that were still in development, because release would inhibit the expression of free and frank opinions and adversely affect the progress of completing the draft.</li> <li>• The need to withhold may diminish once the drafting process has concluded, and with the <a href="#">passage of time</a>.</li> </ul>
<p><b>Drafts never superseded</b></p> <p>Relevant provision: <b>Section 9(2)(g)(i)</b></p>	<ul style="list-style-type: none"> <li>• For the reasons discussed above, it may be necessary to withhold an <a href="#">early stage draft</a> that is never superseded by a final document. It is less likely to be necessary to withhold a <a href="#">late stage draft</a> that is never superseded.</li> <li>• An agency cannot avoid releasing information under the OIA simply by deciding never to finalise a draft document it does not agree with. The fact that an agency does not agree with a draft document does not, on its own, provide good reason for withholding the draft. In such circumstances, it is open to the agency to release the draft document with a contextual statement explaining its concerns.</li> <li>• There may be a public interest in disclosure of a draft document that is never superseded. Such a draft is, effectively, the most complete version of the document that exists, because no further work is intended to be done on it. The public interest will be strongest where the draft document has informed decisions, or otherwise been acted on.</li> <li>• See cases <a href="#">446128</a>, <a href="#">387942</a>, <a href="#">176296</a> and <a href="#">175782</a>.</li> </ul>

Information / situation	Ombudsman position
<p><b>Comments on draft documents</b></p> <p><b>Relevant provision:</b> Section 9(2)(g)(i)</p>	<ul style="list-style-type: none"> <li>• Depending on the content and context of the information, it may be necessary to withhold comments on draft documents in order to maintain the free and frank expression of opinions between those involved in the drafting process.</li> <li>• Release of such material may inhibit people from expressing or recording free and frank opinions on the quality of the draft material. People might prefer less transparent verbal exchanges or more formal methods of communication. This would undermine the efficiency of the drafting process and the quality of the end product.</li> <li>• For example, in case <a href="#">346844</a>, the Chief Ombudsman found that release of handwritten comments on a draft walking and cycling strategy would <i>‘be detrimental to the future willingness of Council staff to provide free and frank opinions on drafts circulated by colleagues, or to test the content and recommendations of such documents’</i>, and this would <i>‘undermine the accuracy and value of the material that eventuates’</i>. See also cases <a href="#">434175</a> and <a href="#">302966</a>.</li> </ul>
<p><b>Drafts for someone else’s signature or adoption</b></p> <p><b>Relevant provision:</b> Section 9(2)(g)(i)</p>	<ul style="list-style-type: none"> <li>• It may be necessary to withhold documents that are drafted for the signature or adoption of another person where that person may wish to (and must be free to) amend, or even decline to sign or adopt the document.</li> <li>• Release of such material may inhibit the free and frank expression of opinions between those involved in the drafting process. Decision makers or signatories may be less inclined to ask for the assistance of others in drafting material for their consideration or signature, or they may try to exert greater control over the drafting process, out of concern that disclosure of someone else’s opinion about what they should say will undermine what they ultimately choose to say. This would impede the efficiency of the drafting process and the quality of the end product.</li> <li>• See cases <a href="#">407773</a> and <a href="#">302193</a> (draft correspondence), <a href="#">318463</a> (draft press releases), <a href="#">295743</a> (draft report to the Ombudsman), and <a href="#">174357</a> (draft responses to OIA requests).</li> </ul>

Information / situation	Ombudsman position
<p><b>Drafts prepared by external consultants</b></p> <p><b>Relevant provision:</b> Section 9(2)(g)(i)</p>	<ul style="list-style-type: none"> <li>• Ombudsmen are generally sceptical of the argument that releasing opinions of external consultants commissioned to provide their views in an area of their expertise would make them any less willing to continue to provide their opinions in future (see cases <a href="#">468905</a>, <a href="#">408884</a> and <a href="#">175782</a>).</li> <li>• However, Ombudsmen have accepted that releasing <a href="#">early stage drafts</a> and <a href="#">drafts still in development</a>, that have been prepared by external consultants, could undermine the drafting process and the quality of the end product in the same way as releasing similar information prepared within an agency.</li> <li>• Releasing such material could inhibit the exchange of early drafts and free and frank opinions between agencies and external consultants, which is essential to the development of a robust piece of work that meets the agency's requirements.</li> <li>• It is less likely to be necessary to withhold <a href="#">late stage drafts</a>, and <a href="#">drafts never superseded</a>, that have been prepared by external consultants.</li> <li>• As noted above, an agency cannot avoid releasing information under the OIA simply by deciding never to finalise a draft document it does not agree with. The fact that an agency does not agree with a draft document prepared by an external consultant does not, on its own, provide good reason for withholding the draft. In such circumstances, it is open to the agency to release the draft document with a contextual statement explaining its concerns.</li> <li>• There was good reason for withholding draft external consultants' reports in cases <a href="#">442484</a> (although a summary statement was released in the public interest), <a href="#">436251</a> and <a href="#">326782</a>. There was no good reason for withholding in cases <a href="#">468905</a>, <a href="#">446128</a>, <a href="#">408884</a> and <a href="#">175782</a>.</li> </ul>

Information / situation	Ombudsman position
<p><b>Draft investigation reports provided to implicated individual(s) for comment</b></p> <p><b>Relevant provision:</b> Section 9(2)(ba)</p>	<ul style="list-style-type: none"> <li>• It may be necessary to withhold draft investigation (or audit or inquiry) reports that are provided to implicated individual(s) for comment.</li> <li>• Draft investigation reports are usually provided to the implicated individual(s) to enable them to comment before the reports are amended and/or finalised. The purpose is to ensure that the facts have been established correctly, and the findings and conclusions are warranted.</li> <li>• An obligation of confidence owed to the participants in the process, or people implicated in the investigation, arises out of the duty of fairness and natural justice, which are important legal tenets.</li> <li>• Release of draft material that is inaccurate or unwarranted may be unfair to them. It may make them less likely to cooperate and share information with investigators in future, which would impede the proper conduct of the investigation. It may also call into question the fairness and integrity of both the process and the outcome of the investigation. This would damage the public interest in having fair and effective investigation processes.</li> <li>• Draft investigation reports may be prepared within an agency, or by external parties, including independent reviewers and consultants. The obligation of confidence is not generally owed to the author of the reports, but, as stated above, to the participants and parties implicated in the report. In case <a href="#">442484</a>, the Ombudsman rejected the assertion that an obligation of confidence was owed to the external consultants who prepared a draft venue development strategy.</li> <li>• See cases <a href="#">376156</a> (draft investigation report into spending by Mayor Len Brown), <a href="#">304081</a> (draft audit report in relation to a hospice), and <a href="#">173840</a> (draft investigation report into GRSA outbreak at Wellington Hospital's neonatal unit).</li> </ul>
<p><b>Passage of time</b></p>	<ul style="list-style-type: none"> <li>• The passage of time can diminish the need to withhold draft documents under section 9(2)(g)(i) (for example, see cases <a href="#">446128</a>, <a href="#">408884</a>, <a href="#">387942</a> and <a href="#">175782</a>). In contrast, section 9(2)(g)(i) applied in case <a href="#">301085</a>, even though the draft at issue was by then nine years old.</li> </ul>

Information / situation	Ombudsman position
<b>Stalled processes</b>	<ul style="list-style-type: none"> <li>It is important that the drafting process is timely as well as robust. Depending on the subject matter, there may be a public interest in disclosure of a draft document, or some information about the contents of a draft document, where the drafting process has become unreasonably protracted. See cases <a href="#">173840</a> and <a href="#">312348 / 313008</a>.</li> </ul>

## Further information

[Appendix 1](#) of this guide has case studies illustrating the application of sections 9(2)(g)(i) and 9(2)(ba) to draft documents. Related Ombudsman guides include:

- [Free and frank opinions](#)
- [Confidentiality](#)
- [Public interest](#)
- [The OIA and the public policy making process](#)

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).

You can also contact our staff with queries about the application of the OIA to draft documents 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.



## Appendix 1. 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.

### Cases illustrating the application of the ‘free and frank’ withholding ground

Case number	Year	Subject	Outcome
468905	2018	<a href="#">Draft report prepared by PwC on Auckland Stadium</a> <i>Section 7(2)(f)(i) LGOIMA did not apply—release of near final draft would not inhibit expression of free and frank opinions—public interest in partial release to promote transparency and public participation</i>	Release in part
463895	2018	<a href="#">Redactions to draft internal review of the International Visitor Survey</a> <i>Section 9(2)(g)(i) OIA applied—release of preliminary comments by individual would be likely to prejudice the willingness and ability of staff to generate and express free and frank opinions on the review</i>	Good reason to withhold
442484	2017	<a href="#">Draft venue development strategy prepared by consultants</a> <i>Section 7(2)(f)(i) LGOIMA applied—release would prejudice the future exchange of early drafts and expression of opinions by staff and external consultants, which would impact on the way reports are developed and the quality of the end product—public interest in disclosure of summary information</i>	Release summary
419690	2018	<a href="#">Draft guidelines on religious instruction in schools</a> <i>Section 9(2)(g)(i) OIA applied—disclosure of the draft guidelines while still in the process of being drafted would inhibit the free and frank expression of opinions and the progress of the drafting process—public interest in promoting public participation would be met by the planned public consultation process</i>	Good reason to withhold
436251	2017	<a href="#">Draft job sizing reports prepared by Alma Consulting</a> <i>Section 9(2)(g)(i) OIA applied—release of draft job sizing reports would inhibit the willingness of officials and consultants to tender a wide range of preliminary options, and to canvass issues in comprehensive written form, to the detriment of prudent and effective decision making—compare with <a href="#">408884</a>, draft financial performance analysis prepared by Alma Consulting</i>	Good reason to withhold

Case number	Year	Subject	Outcome
434175	2017	<a href="#">Peer review comments</a> <i>Section 9(2)(g)(i) OIA applied—release of free and frank comments made in the context of peer reviewing a draft annual report would inhibit the expression of similar comments in future</i>	Good reason to withhold
420972	2016	<a href="#">DHB Commissioner’s draft work plan</a> <i>Section 9(2)(g)(i) OIA applied—release of draft work plan would be likely to prejudice the willingness and ability of staff to generate and express free and frank opinions on that plan</i>	Good reason to withhold
408884	2016	<a href="#">Draft financial performance analysis prepared by Alma Consulting</a> <i>Section 9(2)(g)(i) OIA did not apply—release of financial analysis would not inhibit DHB from engaging consultants, or staff from engaging with those consultants—nor would it inhibit consultants from expressing free and frank opinions to the DHB—public interest in disclosure of information about DHB’s financial position—compare with <a href="#">436251</a>, draft job sizing report prepared by Alma Consulting</i>	Release in full
407773	2016	<a href="#">Draft ministerial correspondence</a> <i>Section 9(2)(g)(i) OIA applied—disclosure of draft ministerial correspondence and associated emails between officials would inhibit future expression of free and frank opinions</i>	Good reason to withhold
391052	2016	<a href="#">Draft terms of reference</a> <i>Section 9(2)(g)(i) OIA did not apply—draft terms of reference largely the same as publicly available final ones—release would not inhibit the future free and frank expression of opinion or provision of advice to the Prime Minister</i>	Release in full
387942	2016	<a href="#">Draft audit report regarding extended supervision orders</a> <i>Section 9(2)(g)(i) OIA did not apply—‘draft’ label insufficient to invoke protection of section 9(2)(g)(i)—audit report had been submitted to senior management which accepted and implemented the findings—it was a high-level report over a year old at the time of the request—release would not be likely to deter department from conducting internal audit activities</i>	Release in part
346844	2015	<a href="#">Comments on draft walking and cycling strategy</a> <i>Section 7(2)(f)(i) LGOIMA applied—release would inhibit willingness of Council staff to provide free and frank opinions on drafts circulated by colleagues, or to test the content and recommendations of such documents, which would undermine the accuracy and value of the material that eventuates</i>	Good reason to withhold

Case number	Year	Subject	Outcome
382375	2014	<p><a href="#">Secretary for Local Government's draft response to the Local Government Commission</a></p> <p><i>Section 9(2)(g)(i) OIA did not apply—the draft and final version were substantially the same—information was a careful and considered critique by a very senior official—unlikely they would be deterred from expressing free and frank opinions in future</i></p>	Release in full
375243	2014	<p><a href="#">Draft literature review on youth desistance</a></p> <p><i>Section 9(2)(g)(i) OIA did not apply—information summarised existing research and was not in the nature of free and frank opinions—release would not deter staff from contributing to such reviews in the future—the Department's concerns about reputational risk could be addressed by release of a contextual statement explaining the document's limitations</i></p>	Release with contextual statement
372993	2014	<p><a href="#">Draft report on NZX compliance with general obligations</a></p> <p><i>Section 9(2)(g)(i) OIA applied—release would inhibit the free and frank expression of opinions by officials during the drafting process, and the exchange of opinions between the NZX and FMA</i></p>	Good reason to withhold
326782	2014	<p><a href="#">Draft 'Alternatives Paper' prepared by consultants on CBD rail link</a></p> <p><i>Section 7(2)(f)(i) LGOIMA applied—release would inhibit exchange of drafts and views between staff and consultants, which would undermine the drafting process</i></p>	Good reason to withhold
338921	2013	<p><a href="#">Draft document on Starting Price Adjustment Input Methodology</a></p> <p><i>Section 9(2)(g)(i) OIA applied—disclosure of early and annotated draft document would inhibit future expression of free and frank opinions between Commerce Commissioners and staff</i></p>	Good reason to withhold
306385	2013	<p><a href="#">Draft advice on establishing a mātaimai reserve at Anatori and Kaihoka</a></p> <p><i>Section 9(2)(g)(i) OIA applied—release of early and annotated advice would inhibit the free and frank exchange of opinions between officials drafting advice</i></p>	Good reason to withhold
302193	2013	<p><a href="#">Draft ministerial and chief executive correspondence</a></p> <p><i>Section 9(2)(g)(i) OIA applied—release of draft ministerial and chief executive correspondence would inhibit the free and frank expression opinions</i></p>	Good reason to withhold

Case number	Year	Subject	Outcome
318463	2012	<a href="#">Draft press releases</a> <i>Section 9(2)(g)(i) OIA applied—release would impact on the effectiveness of the process of drafting press releases in future, because officials would be reluctant to be candid or to openly express their initial thoughts in writing</i>	Good reason to withhold
302966	2012	<a href="#">Comments on draft correspondence and draft assessment report</a> <i>Section 9(2)(g)(i) OIA applied—release of comments on draft correspondence and draft assessment report would inhibit the free and frank expression of opinions</i>	Good reason to withhold
301085	2012	<a href="#">Draft ministerial inquiry report</a> <i>Section 9(2)(g)(i) OIA applied—release of early and annotated draft would inhibit ministerial appointees from expressing free and frank opinions in future and sharing drafts with the Ministry of Justice—public interest met by availability of final report</i>	Good reason to withhold
295743	2012	<a href="#">Draft report to the Ombudsman</a> <i>Section 9(2)(g)(i) OIA applied—release of draft report to Ombudsman would inhibit the free and frank expression of opinions</i>	Good reason to withhold
312348 & 313008	2011	<a href="#">Draft response to a Law Commission discussion paper</a> <i>Section 9(2)(g)(i) OIA applied—disclosure of draft documents would inhibit future expression of free and frank opinions by officials</i>	Good reason to withhold
291959	2011	<a href="#">Draft public consultation document</a> <i>Section 9(2)(g)(i) OIA did not apply—only minor differences between draft and final consultation document—final consultation document was publicly available—release would not inhibit the free and frank expression of opinions necessary for the effective conduct of public affairs</i>	Release in full
176579	2010	<a href="#">Draft audit report on JobPlus scheme</a> <i>Section 9(2)(g)(i) OIA did not apply—draft audit report was identical to final audit report—as there was no good reason to withhold the final audit report, there was no good reason to withhold the draft</i>	Release in full
176296	2008	<a href="#">Draft public discussion document regarding auditor regulation</a> <i>Section 9(2)(g)(i) OIA did not apply—close-to final draft containing limited evidence of opinion material—risk of public misunderstanding of the status of this draft document did not justify withholding and could be addressed by disclosure of contextual information—strong public interest in transparency of the policy development process given full-scale public consultation no longer intended</i>	Release with contextual statement

Case number	Year	Subject	Outcome
175782	2007	<p><a href="#">Draft report on Department of Labour internal controls prepared by KPMG</a></p> <p><i>Section 9(2)(g)(i) OIA did not apply—document labelled ‘draft’ really a final—author was a consultant who would not be deterred from expressing free and frank opinions in future</i></p>	Release in full
174357	2007	<p><a href="#">Draft responses to OIA requests</a></p> <p><i>Section 9(2)(g)(i) OIA applied—releasing draft OIA responses would be likely to inhibit the future free and frank expression of opinions</i></p>	Good reason to withhold
173358	2006	<p><a href="#">Draft briefings to the incoming government</a></p> <p><i>Section 9(2)(g)(i) OIA applied—disclosure of draft briefings to the incoming government would make officials reluctant to be so free and frank in expressing their initial and untested views and cause them to prefer less efficient and transparent verbal exchanges</i></p>	Good reason to withhold
C5151	1999	<p><a href="#">Draft District Plan</a></p> <p><i>Section 7(2)(f)(i) LGOIMA did not apply—release of draft district plan would not prejudice the future free and frank expression of opinions by Council or stakeholders—draft released with contextual statement</i></p>	Release with contextual statement

### Case 468905 (2018)—Draft report prepared by PwC on Auckland Stadium

A journalist asked Auckland Council for a copy of a report concerning a potential downtown stadium commissioned by Regional Facilities Auckland (RFA) and prepared by PricewaterhouseCoopers (PwC). The Council responded that the report would not be made public as it was still in draft form, and much of the detail was commercially sensitive. The requester complained to the Ombudsman.

The Ombudsman accepted that parts of the report could be withheld under:

- section 7(2)(b)(ii) LGOIMA, because release would be likely unreasonably to prejudice the commercial position of third parties; and
- section 7(2)(c)(i) LGOIMA, because release of information that would identify stakeholders who had supplied information for the report would be likely to prejudice the ongoing supply of confidential information by those stakeholders.

However, he did not accept that there was good reason to withhold the report in full by virtue of its 'draft' status.

The Council explained that an initial draft was received in June 2017 and referred back to PwC for further work. The report was still in draft form when the request was received in November 2017. The draft was provided to the RFA Board in March 2018, but even so, it remained, in the Council's view, in draft form. The Council further advised that the timeline for finalisation of the report was uncertain and depended on other work.

The Council relied on section 7(2)(f)(i) of the LGOIMA, and submitted that:

*...the ability of local authorities and their CCOs to freely explore options for strategies, projects and all relevant activities would be severely constrained if they are unable to procure advice from consultants on a confidential basis, accepting that there will be an appropriate point at which the advice should be made public.*

The Ombudsman noted that there is no basis for a blanket withholding of drafts under the LGOIMA until they are completed and finalised. There are withholding grounds that can apply to protect draft documents, most commonly sections 7(2)(c)(i) and 7(2)(f)(i) of the LGOIMA. However, their application depends on a close analysis of the information at issue, and the harm that would flow from its release. Not all drafts are the same.

The draft at issue here was in near final form and had been submitted to the RFA Board. From PwC's perspective the report had been completed, subject to the RFA's feedback. The Ombudsman was not persuaded on the facts of this case that release of the 'draft' report would inhibit PwC or any other external assessor from providing free and frank opinions in the future. This is clearly the purpose for which the PwC report was commissioned, and it had significant time to develop the analysis provided to the Council at the time of the request.

The Ombudsman also considered that there was a strong public interest in transparency of what expert advice the Council had received to inform its future decisions on a

possible national stadium. If the project progressed, it would involve significant public expenditure, either through the Council or central government.

There was also a strong public interest in the release of information within the report to enable more effective participation by the public in the decision making by Council concerning a possible national stadium.

Planned opportunities for public consultation at a later stage in the project were not necessarily an adequate alternative to release of information as early as possible to enable more effective participation by the public. The 'pre-feasibility' phase would seem to be an entirely appropriate time for the public to have an opportunity to consider the issue, and the advice that the Council had received.

The Ombudsman concluded that the release of parts of the report could satisfy the public interest, while particularly sensitive information could be redacted to prevent the specific harms that the Council had identified. The Council accepted the Ombudsman's opinion and released the report in part.

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### Case 463895 (2018)—Redactions to draft internal review of the International Visitor Survey

A requester sought an internal review of the International Visitor Survey. Statistics New Zealand released the review, with some redactions under section 9(2)(g)(i). The requester complained to the Ombudsman.

Statistics New Zealand explained that the review was still in draft form, and quality assurance processes had not yet been carried out. The redactions were an individual's conclusions formed prior to consultation and final analysis. Release would affect the willingness of others to commit such conclusions to writing in future, which would undermine the agency's ability to carry out its work effectively.

The Ombudsman confirmed the draft nature of the review, and that the redacted comments comprised the preliminary views of an individual within the agency, and were not subject to scrutiny prior to the request. He was satisfied that release of this information would be likely to prejudice the willingness and ability of staff to generate and express free and frank opinions on the review. Any reluctance by staff to express their preliminary views in documents such as this would prejudice the effective conduct of public affairs.

The Ombudsman could not identify anything in the preliminary comments that gave rise to an overriding public interest in disclosure, and concluded that the balance of the public interest lay in facilitating the development of a robust review. He formed the opinion that section 9(2)(g)(i) provided good reason for the redactions.

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### Case 442484 (2017)—Draft venue development strategy prepared by consultants

Auckland Mayor Phil Goff stated on NewsTalk ZB that Eden Park required upgrades worth \$250 million in the next 15 years. A journalist requested a copy of the analysis supporting this figure. Auckland Council advised that it was based on an oral briefing provided by Regional Facilities Auckland (RFA), which was in turn based on a draft venue development strategy prepared by consultant architects and quantity surveyors. The Council declined to make the draft strategy available on the basis that it was commercial and confidential, and the requester complained to the Ombudsman.

The Council relied on section 7(2)(c)(i) of the LGOIMA (see [below](#) for discussion of section 7(2)(c)(i) in this case), but the Ombudsman considered that section 7(2)(f)(i) applied.

The analysis was contained in an early draft of the strategy, which had been shared with RFA for the purpose of receiving comments and feedback. The analysis was preliminary and high-level. The Ombudsman accepted that the drafting and feedback process the RFA was engaged in required the free and frank expression of opinions by staff and external consultants, and that *‘the protection of this ability to express ideas in draft form [was] necessary to maintain the effective conduct of public affairs’*. Release of the information would prejudice the future exchange of early drafts and the expression of free and frank opinions on early drafts, which would impact on the way reports are developed and the quality of the end product.

However, the Ombudsman also acknowledged the public interest in promoting accountability of the Mayor and the Council.

The Mayor had publicly referred to the \$250 million figure and used this to back a new waterfront stadium for Auckland. The Mayor’s statement was based on a preliminary analysis, but created the impression that it was based on something more concrete. The public were entitled to know more about the basis for this figure, which the Mayor then relied on in advocating for a new stadium.

The Ombudsman concluded that the public interest did not require disclosure of the draft strategy, but would in this case be addressed by disclosure of a summary statement explaining the preliminary nature of the analysis and putting the Mayor’s comments in context. The Council agreed and released a summary statement to the Ombudsman’s satisfaction.

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### Case 419690 (2018)—Draft guidelines on religious instruction in schools

The Ministry of Education withheld draft guidelines on religious instruction and observance in schools under section 9(2)(f)(iv) of the OIA, and the requester complained to the Ombudsman.

While the Ombudsman did not consider that section 9(2)(f)(iv) applied, he formed the opinion that section 9(2)(g)(i) did. Releasing the draft guidelines, while officials were still



in the process of drafting them, would inhibit the free and frank expression of opinions, and adversely affect the progress of completing the draft.

The Ombudsman recognised a strong public interest in promoting public participation in the decision making process surrounding the adoption of guidelines. The guidelines related to an issue of public significance, potentially affecting the majority of New Zealand children. The subject was also highly controversial, and had generated much public debate.

For these reasons, the Ministry had always accepted that the public would be given the opportunity to participate in the production of the guidelines, for which publication of the draft for consultation would be necessary. It was therefore only a matter of time before the information would be released to allow public consultation on the draft guidelines.

The Ombudsman concluded that the public interest in promoting public participation was best met through disclosure of the completed draft in the context of the planned public consultation process. Premature disclosure in advance of the planned public consultation process was not in the overall public interest.

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### Case 436251 (2017)—Draft job sizing reports prepared by Alma Consulting

The same requester in case [408884](#) made a further request to the Southern District Health Board (DHB) for reports by Alma Consulting. She complained to the Ombudsman about the DHB's decision to withhold the following three *'joint working documents'* under section 9(2)(g)(i):

- *Service Alignment – Surgical Directorate – Dunedin Theatre Analysis Paper;*
- *Draft Orthopaedics Job Sizing Analysis Paper;*
- *Draft Plastics Job Sizing Analysis Paper.*

The reports were generated to inform management on potential system and process efficiencies and improvements. They remained in draft form at the time of the request, and were compiled by the collation of raw data and staff interviews.

The DHB said it needed a reasonable period in which to review and consider the content of the reports. At the time of the request, the DHB had not had the opportunity to consider the implications for staff, or any aspects that required amendment or clarification.

The DHB made similar arguments to case [408884](#); that it needed to be free to engage in *'early and frank discussions'* in reviewing service delivery and developing any necessary processes for change, and that disclosure of draft and preliminary reports would *'severely curtail'* its ability to continue to engage in such discussions in the future. It suggested that staff would not feel free to advance information and opinions to advisers

and one another, and this would alter the manner in which the information is provided, and the content of the opinions sought and recorded.

The Ombudsman noted that the reports *'form[ed] an early stage of developing options for consideration and consultation'*. They remained in draft and subject to consideration and amendment or correction as necessary. They did not represent a policy position, or final recommendations for adopting such a position. In addition, the reports were based on information and data provided by staff and interpreted by the DHB and Alma Consulting.

The Ombudsman considered that disclosure of draft assessments of this nature at this stage would likely inhibit the willingness of officials and consultants to tender a wide range of preliminary options, and to canvass issues in comprehensive written form, to the detriment of prudent and effective decision making. This would prejudice the effective conduct of public affairs by undermining the decision making process and impairing the ability of the DHB to ensure that the most appropriate course of action was taken.

The Ombudsman distinguished the information at issue in case [408884](#). In this instance, the reports did not rely primarily on financial figures, and there had not been a similar level of prior disclosure. The subject matter of these reports, and the stage of the decision making process to which they related, were such that the likely effect of disclosure at that stage was not comparable the previous complaint.

The Ombudsman accepted that levels of service delivery by the DHB were a matter of public interest, and that the disclosure of information elucidating the DHB's performance in that respect may be useful. There was also a public interest in transparency and accountability for the expenditure of public money on consultancy services. Further, there was a public interest in promoting public debate and participation in decisions regarding service delivery.

However, the information at issue here comprised preliminary drafts of material in anticipation of developing options for consideration. The information would do little to further the interests identified above. The Ombudsman considered the appropriate balance lay in protecting the interests contemplated by section 9(2)(g)(i), and the value of such information in preliminary decision making processes.

The Ombudsman concluded that section 9(2)(g)(i) provided good reason to withhold the draft reports.

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### Case 434175 (2017)—Peer review comments

A requester asked Superu for its peer review of a draft annual report by the Family Violence Death Review Committee. Superu provided the email that contained comments and suggestions made by a staff member on the draft annual report. However, it

redacted two paragraphs under section 9(2)(g)(i) of the OIA. The requester complained to the Ombudsman.

Superu argued that releasing the redacted comments would hinder its peer review activities, which are a core part of its business. Staff would feel inhibited in terms of the kinds of comments they could provide in peer review situations in future. They would not communicate such free and frank opinion material in future, or only do so over the phone or face to face.

The Ombudsman agreed that section 9(2)(g)(i) provided good reason for the redactions. The redacted comments were free and frank expressions of opinion, and the sort made in an informal review that could be misconstrued if taken out of context.

Given the nature of the comments and the context of how the feedback was provided, the Ombudsman considered that if the comments were to be publicly disclosed, there was a real and substantial risk that this would make those involved reluctant in the future to be so free and frank in expressing their opinions. As part of a peer review process, Superu staff should be able to freely express any criticisms or reservations about draft documents, and provide any suggestions for amendment, without feeling inhibited by any concern that their comments might be made public. Release of the comments would prejudice the effective conduct of public affairs, as it would adversely affect Superu staff's ability to provide feedback in this context in a free and frank manner.

The Ombudsman did not consider that the comments gave rise to a public interest in disclosure that would outweigh the need to withhold. In his view, the countervailing public interest had already been met with the release of the majority of the comments.

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### Case 420972 (2016)—DHB Commissioner's draft work plan

A journalist requested the detailed work plan submitted by the Commissioner of the Southern District Health Board (DHB) to the Minister of Health. The DHB said the work plan was not finalised and was subject to further discussion, and withheld it under section 9(2)(g)(i). The requester complained to the Ombudsman.

The DHB explained that the draft work plan remained under development, and had been subject to '*comprehensive internal review and amendment*'. It provided the Ombudsman with a schedule of meetings relevant to the draft work plan as evidence of this. It advised that meetings in respect of the draft work plan would continue in the coming months.

The DHB argued that disclosure would result in those responsible for developing and contributing to the work plan feeling inhibited from including preliminary or undeveloped thoughts and ideas that may be unpopular. It would also severely curtail the Commissioner's ability to work in an open and frank environment with senior managers at the DHB in continuing to develop the work plan.

The Ombudsman formed the opinion that section 9(2)(g)(i) provided good reason to withhold the draft work plan. He stated that *'successive Ombudsmen have often considered that draft materials, or comments made by officials regarding draft materials, fall within the contemplation of this provision'*.

The work plan was in draft form and subject to ongoing consultation and amendment. It did not represent the final position of the DHB, the Commissioner, or the Minister, and the accompanying documentation provided by the DHB evidenced ongoing meetings in respect of the content. That content, in its current form, was the result of ongoing internal discussion regarding what the appropriate strategy for the DHB should look like.

The Ombudsman was satisfied that disclosure of this information, without it having been finalised or adopted by the Minister, would be likely to prejudice the willingness and ability of staff to generate and express free and frank opinions on that plan, because of potential criticism of the draft material, or an expectation that the draft represented the Commissioner's ultimate plan.

Any reluctance by staff to draft and consult on documents such as this would prejudice the effective conduct of public affairs by restricting the context in which the Commissioner prepared strategies for the future of the DHB.

The Ombudsman acknowledged the public interest in the governance of the DHB and the future plans of the Commissioner, however in this case, the public interest lay in facilitating the development of well-informed planning. Components of the plan, once confirmed, were to be included in the 2016/17 annual plan, and there was no overriding public interest in disclosure of the contents prior to this.

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### Case 408884 (2016)—Draft financial performance analysis prepared by Alma Consulting

In July 2015, the Southern District Health Board (the DHB) withheld a March 2015 report prepared by Alma Consulting titled *'Southern District Health Board Financial Performance Analysis'* under section 9(2)(g)(i) of the OIA, and the requester complained to the Ombudsman.

The DHB submitted that *'some draft reports do not progress to a final form and/or may not be further developed'* and that the report at issue was *'not finalised and contain[ed] only the preliminary views of the consultant'*.

The DHB said it needed to be free to engage in early and frank discussions with others while reviewing its process as needed, and that disclosure of draft and preliminary reports would *'severely curtail'* its ability to continue to engage in such discussions in the future. It suggested that staff would not engage as freely with consultants or be inhibited from sharing information with them, and that management would be *'reluctant to generate any underlying or incomplete documents for discussion'*.

The Ombudsman noted that draft and preparatory material will often be protected, where it is prepared for the purpose of discussion or comment, and premature disclosure would frustrate that process. However, *‘the status of a document as “draft” is insufficient alone for the purposes of section 9(2)(g)(i)’*.

The draft report in this case was a financial analysis prepared by a consultant on the DHB’s forecast and planned figures submitted to the Ministry of Health. The report was some four months old at the time the request was refused, and any limitations on the information and consequent recommendations were noted. Six high-level recommendations were made, based on the analysis of those figures and the consultant’s experience in working with other DHBs. There was minimal reference to the involvement of staff or provision of information by officials for the purposes of the report. Although there was reference to a meeting with Directorate Managers, the report did not include any comments or information from those meetings.

The Ombudsman was not persuaded that release of the report would be so likely to prejudice the future free and frank expression of opinions that it was necessary to withhold it. He did not accept that the DHB would be deterred from commissioning draft reports, or that staff would be reluctant to engage with consultants.

With regard to any effect on the future willingness of Alma Consulting to express free and frank opinion to the DHB, the Ombudsman commented that *‘this is a commercial service provided by Alma’*. He did not accept that *‘the disclosure of figure-based analysis [was] likely to affect the future of willingness of Alma to provide such services in future’*.

The Ombudsman also considered that there was a strong public interest *‘in availability of a report commissioned by the SDHB to review its financial position, and the requisite recommendations and responses to those findings’*. The report was then 10 months old, and the scale of the DHB’s forecast deficit was well known. In the Ombudsman’s view, those concerns magnified the public interest of disclosing information such as this draft report.

After considering the Ombudsman’s comments, the DHB agreed to release the report, and the complaint was resolved.

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### Case 407773 (2016)—Draft ministerial correspondence

The requesters sought information held by the Ministry of Justice about their request to the Minister of Justice to establish a Commission of Inquiry into the Peter Ellis case. The Ministry released some information, but withheld drafts of a letter sent to the requesters by the Minister, and emails about the draft. The requesters complained to the Ombudsman, suggesting they were entitled to see the draft of a letter to them.

The Ministry explained the rationale for withholding was *‘to allow a safe forum for officials to debate and put forward various ideas on topical issues for the Minister to consider, thereby ensuring the Minister receives robust and frank advice from officials’*.

The Chief Ombudsman observed that the emails showed officials going about their work in an open and frank way, ultimately settling on the form of the wording to be sent to the requesters, reflecting the Minister’s opinion that there was no justification for a Commission of Inquiry. The Chief Ombudsman was satisfied that the release of the information would inhibit the future free and frank expression of opinions by officials to Ministers. You can read the full opinion [here](#).

The Chief Ombudsman’s approach in this case reflects a well-established line on draft ministerial correspondence—see, for example, case [302193](#). It is a proper and everyday function of public servants to draft ministerial correspondence, and it is important that officials do not feel constrained in the provision of such advice, and that Ministers continue to seek the advice of their departments. Releasing such advice would be likely to prejudice the freedom of Ministers to determine the manner in which their correspondence should be answered. Primary accountability for the correspondence rests with the Minister.

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#### Case 391052 (2016)—Draft terms of reference

A requester sought information concerning the Terms of Reference (TOR) for an inquiry into allegations regarding the former Minister of Justice and former Director of the Serious Fraud Office. The Department of the Prime Minister and Cabinet (DPMC) withheld four documents, including the draft TOR, and the requester complained to the Ombudsman.

The Chief Ombudsman concluded there was no good reason to withhold the draft TOR. The final TOR had been released. The draft TOR were largely the same. They included minimal corrections, none of which was substantive. In this context, the Chief Ombudsman was not convinced that disclosure of the draft TOR would inhibit the future free and frank expression of opinion or provision of advice to the Prime Minister.

DPMC agreed to release the draft TOR and the complaint as it related to their withholding was resolved.

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#### Case 387942 (2016)—Draft audit report regarding extended supervision orders

The Department of Corrections withheld a draft audit report titled *‘Individual Residential Reintegration Programme: Offender Management Review’* under section 9(2)(g)(i), and the requester complained to the Ombudsman.

This report summarised an internal audit carried out in respect of the Department's Individual Residential Reintegration Programme (IRRP) contract management services. The audit had been presented to senior management.

The fact that the document stated that it was a draft was insufficient alone to invoke the protection of section 9(2)(g)(i). It was clear from the material that the audit report had been submitted to senior management, who accepted its findings and recommendations; and reference was made elsewhere to the implementation of those recommendations.

The Chief Ombudsman was not satisfied that disclosure of the majority of the audit report was likely to prejudice the future exchange of free and frank opinions. It is the purpose of the internal audit team to conduct such activities and generate this information, and there is significant motivation for the Department to ensure that service providers are delivering the services for which they are contracted, and in the manner contracted. It was a reasonably high-level report, the content of which had been accepted by management, and it was over one year old at the time of the request. The Department had taken corrective steps for the deficiencies identified.

The Chief Ombudsman also concluded that even if section 9(2)(g)(i) applied, there were significant public interest considerations in favour of disclosure. Failure to adequately manage the IRRP posed a very real risk to public safety, and the Department must be held accountable to the public for its management of those functions, and the compliance of service providers. It was also important that the public be made aware of the corrective steps taken in such circumstances.

However, the Chief Ombudsman did accept that reference to the particular agencies reviewed, and the specific details of findings in respect of them, would be likely to prejudice the willingness of staff to detail such concerns and findings, for fear that disclosure (without the accompanying comment of those affected parties) would cause difficulties in the relationship between the Department and service providers, and reduce the willingness of those parties to discuss their conduct with officials. The free and frank discussion of matters was necessary to the effective conduct of public affairs in that it was a crucial aspect of the audit process and the ability of the Department to question the adequacy of its programmes. The Ombudsman recommended the release of the audit report with deletions to the names and detailed findings in respect of individual service providers.

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### Case 346844 (2015)—Comments on draft walking and cycling strategy

A requester asked the Upper Hutt City Council for a copy of its draft walking and cycling strategy. The Council replied that the strategy was not complete, and refused the request under section 7(2)(f)(i) of the LGOIMA.

The requester already had a draft that had been prepared by a transportation consultancy. He wanted the Council draft prepared after this. The only information at issue was the original draft with the addition of handwritten comments.

The handwritten comments at issue had been generated through a process of consultation amongst staff, or in editing and undertaking quality assurance. Many of the comments related to suggested editorial changes, and the remainder were in the nature of questions and suggestions regarding content.

Section 7(2)(f)(i) contemplates the effect that disclosure could have on the future generation of free and frank expressions of opinion. Release may affect the future willingness and ability of officials to canvas and test the full range of options and ideas, which is crucial to ensuring that the best and most considered advice is ultimately tendered to Council.

The Chief Ombudsman was satisfied that disclosure of the comments at issue would be detrimental to the future willingness of Council staff to provide free and frank opinions on drafts circulated by colleagues, or to test the content and recommendations of such documents. To inhibit this process would be to undermine the accuracy and value of the material that eventuates. In this case, the document in preparation was a strategy for presentation to the Council and for public consultation. The effective conduct of public affairs in this respect relied on accurate and comprehensive documentation, with well-founded propositions. To impair the quality of that advice would be to prejudice the basis on which the public was to engage.

The Chief Ombudsman concluded that the public interest in disclosure of the handwritten comments did not outweigh the need to withhold: *'The internal deliberation process and ongoing modification and refinement of documents such as this ensure that the Council receives well-documented recommendations and advice'*.

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### Case 382375 (2014)—Secretary for Local Government's draft response to the Local Government Commission

A requester asked the Minister of Local Government for advice received concerning proposed local government amalgamations in Northland and Hawke's Bay. The Minister withheld an appendix to a briefing containing the Secretary for Local Government's draft response to the Local Government Commission in reliance on section 9(2)(g)(i). The requester complained to the Ombudsman.



The Minister argued that withholding was necessary *‘to protect the interests in the provision of blunt advice and effective consultation’*. The Chief Ombudsman did not accept this. Although the advice was provided to the Minister in draft form, the draft and final versions of the document were substantially similar. The advice was in the nature of a careful and considered critique provided by the Secretary for Local Government. The Chief Ombudsman found it difficult to believe a person in such a senior position would be deterred from providing free and frank advice in the future should the advice in this instance be made publicly available. This was particularly so because the Local Government Commission was obliged to seek the Secretary’s advice under the Local Government Act 2002.

After considering the Chief Ombudsman’s comments, the Minister agreed to release the Secretary’s draft response to the Local Government Commission, and the complaint was resolved.

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### Case 375243 (2014)—Draft literature review on youth desistance

A requester asked the Department of Corrections for the literature review on youth desistance. The Department declined the request on the basis that staff were still working on it and it was not complete.

The requester queried this advice, noting her understanding, based on tender documents published on the GETS website, that the literature review had been completed and would be available to the successful tenderer. The Department replied that a draft literature review had been provided to the successful tenderer, but this was incomplete. A completed literature review would form part of the successful tenderer’s final report.

The requester asked the Department for the OIA grounds it was relying on. The Department advised that, as the literature review was still being drafted, the request was refused under section 18(e) of the OIA, because the document alleged to contain the information did not exist. The requester complained to the Ombudsman.

The Ombudsman’s staff explained to the Department that while the final literature review might not exist, the draft clearly did, and the requester had made her desire to obtain the draft quite clear. In these circumstances, section 18(e) of the OIA could not apply.

The Department maintained in the alternative that it was necessary to withhold the draft under section 9(2)(g)(i) of the OIA. It explained that the draft was *‘not yet in a complete enough state to be released’*. It needed fleshing out in some areas, reorganising of material in other areas, and had not been edited. The Department argued that withholding the draft document was important to ensure the free and frank expression of opinions within the literature review, which would result in a more robust document. The Department also noted the reputational risk if the draft was released.

The Chief Ombudsman was not persuaded that section 9(2)(g)(i) of the OIA applied.

The information at issue was a draft literature review prepared by the Department's Research Unit. This document was provided to the successful tenderer as a starting point for an external research project. The researcher would engage in additional research, and further develop the draft literature review into a final document.

Much of the literature review simply summarised the findings of various studies, and existing research into the subject of youth desistance. This information was not in the nature of free and frank opinions.

The Chief Ombudsman was not persuaded that disclosure would inhibit the generation and expression of free and frank opinions so as to deter Department staff from contributing to such reviews in the future.

The Chief Ombudsman considered that the Department's concerns could be managed through the provision of a contextual statement explaining the purpose of the document, and the limitations it carried in its current form. This statement could accompany the Department's release of the draft literature review.

After considering the Chief Ombudsman's opinion, the Department agreed to release the draft literature review, and the complaint was resolved.

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### Case 372993 (2014)—Draft report on NZX compliance with general obligations

The Chief Ombudsman investigated a complaint about the Financial Markets Authority's (FMA's) decision to withhold *'draft copies of the FMA's report into NZX's general obligations – a report released publicly in June'*.

The requested report was produced during the FMA's annual review of whether the NZX (New Zealand Stock Exchange) was meeting its general obligations in respect of registered markets. This process was mandated by the now repealed Securities Markets Act 1988 (sections 36YB and 36YC). Under that process, the FMA was required to provide a draft report to the NZX and to consider its submissions before providing a final report to the Minister, which would thereafter be published. The FMA maintained that this process underscored the importance of *'a robust exchange of opinions and fair consideration of the views developed'* prior to the publication of the FMA's final report.

The Chief Ombudsman concluded that section 9(2)(g)(i) provided good reason to withhold the draft report. It was in the interests of the *'effective conduct of public affairs'* for the process for reviewing the NZX's compliance with the general obligations to be robust and conducted in a manner that supported the FMA's main objective of promoting and facilitating the development of fair, efficient and transparent markets. Both the NZX and FMA emphasised how important the free and frank exchange of information and views between the parties was to the quality of the review.

The Chief Ombudsman had no doubt that if the draft report was publicly disclosed, this would be foremost in the minds of FMA officials when they came to draft the next report, and would stifle the drafting process. Release would also inhibit the free and frank exchange of opinions between the NZX and FMA. Any inhibition on the part of the FMA or the NZX at this stage of the process would mean that the quality of the review would suffer.

After comparing the draft and final reports, the Chief Ombudsman concluded there was nothing in the draft that gave rise to a public interest sufficient to outweigh the need to withhold.

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### [Case 326782 \(2014\)—Draft ‘Alternatives Paper’ prepared by consultants on CBD rail link](#)

Auckland Transport (AT) withheld a draft ‘Alternatives Paper’ prepared by a consortium of external consultants in relation to the CBD rail link under section 7(2)(f)(i) of the LGOIMA, and the requester complained to the Ombudsman.

AT explained that the paper at issue was a preliminary draft distributed for discussion purposes between the clients and the consultant group. The paper, and an associated workshop at which it was discussed, were part of the alternatives assessment and drafting process, which were still very much underway at the point the draft was distributed. The final report, which had been peer reviewed by the Ministry of Transport, Treasury and the New Zealand Transport Agency was available on AT’s website.

AT argued that release of the draft would inhibit *‘individuals and consultant organisations in the future [from] properly recording and sharing with Auckland Transport evolving thinking, processes, assessments and discussion in the form of draft documents’*, and that *‘sharing such information and the ability to discuss this in a free and frank manner is a critical part of good decision making’*.

The Chief Ombudsman concluded that section 7(2)(f)(i) provided good reason to withhold the draft paper. Officials and consultants would become reluctant to be candid or to openly express their initial thoughts in writing if information such as this were to be released. The effective conduct of public affairs is promoted when discussions can take place to accept and/or reject particular approaches in a free and frank manner, without being concerned that preliminary opinions and ideas could be made publicly available. The public interest had been met by the release of the final report and the peer reviews by relevant agencies.

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### Case 338921 (2013)—Draft document on Starting Price Adjustment Input Methodology

The Electricity Networks Association (ENA) requested the Commerce Commission’s draft methodology for adjusting the starting price for electricity lines and gas pipeline services. The ENA complained to the Ombudsman when this request was refused under section 9(2)(g)(i).

The Ombudsman noted that the document at issue was still in draft form, containing over 400 annotations, some of which related to formatting and typographical errors, and some of which were more significant, reflecting the annotators’ differences of opinion about whether the draft was appropriately or correctly expressed. It was clear from the annotations that Commission staff members were freely and frankly expressing their opinions to each other on the draft. They were still in the process of refining that document. Such refinement was necessary for the effective conduct of public affairs. It enabled better drafting of documents, and could reasonably be expected to lead to better decisions by the Commission on matters of very significant public interest.

The Ombudsman was satisfied that the release of the information at issue would have an inhibiting effect on the free and frank expression of opinions by and between members of the Commission and staff in the course of their duties. The Ombudsman acknowledged the public interest in the ENA and gas and electricity consumers being able to participate in the Commission’s decision making process. However, he was not persuaded that this outweighed the need to withhold the information because:

- the draft had not been approved by the Commission; it represented expressions of opinion by staff members, not the Commission’s own opinion;
- Commission staff should be able to exchange views among themselves on draft documents and contribute without inhibition to the final document that emerges after Commission consideration; and
- the information was still very much in a draft form and would have required considerable refinement before it was in a form suitable for approval by the Commission.

The Ombudsman formed the final opinion that section 9(2)(g)(i) of the OIA provided good reason to withhold the draft. You can read the full opinion [here](#).

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### Case 306385 (2013)—Draft advice on establishing a mātaimai reserve at Anatori and Kaihoka

In 2011, the Minister for Primary Industries established a mātaimai reserve at Anatori and Kaihoka. The advice on which that decision was based (called the ‘Final Advice Paper’ or FAP) was published. A requester sought information relating to the development of the FAP. The Ministry of Primary Industries released the technical documents considered in

developing the FAP, but withheld *'internal correspondence and advice'* under section 9(2)(g)(i). The requester complained to the Ombudsman.

The information at issue comprised approximately 80 annotations on draft copies of the FAP, made by Ministry staff, together with exchanges of emails between Ministry officials concerning the drafting of the FAP. The annotations were in the form of tracked changes within the word document used in drafting the FAP. Some of those annotations suggested improvements to the formatting of the document and noted typographical errors. However, numerous annotations and emails reflected the officials' differences of opinion about whether the draft was, for example, appropriately or correctly expressed.

It was clear from the annotations made by Ministry staff on the draft FAP that they were expressing free and frank opinions to each other on that draft. They were still in the process of refining the document. The Ombudsman said *'It is in the public interest that such discussions and iterations take place. Such a process promotes better drafting of documents and, can reasonably be expected to lead to better decisions by the Ministry on matters of significant public interest'*.

The Ombudsman was satisfied that release of the information at issue would inhibit the free and frank expression of opinions by and between members of Ministry staff in the course of their duties, resulting in less robust internal debate between officials and ultimately in reduced quality of advice to the Minister. He concluded that section 9(2)(g)(i) applied.

The Ombudsman also accepted that it was in the public interest that persons whose ability to take fish, or aquatic life, or whose ownership interest in quota may be affected by the proposed mātaimai reserve, have an opportunity to comment on a proposed mātaimai reserve. In this case, interested parties including the requester had an opportunity to comment on the proposed mātaimai reserve.

It was also in the public interest for the Ministry's processes to be transparent. The Ombudsman stated: *'the Ministry's processes must not be hidden from public view and scrutiny any more than the public interest itself requires'*.

However, the Ombudsman considered that Ministry staff should be able to exchange views on draft documents such as the information at issue and to contribute in an uninhibited manner to the development of the final document for the Minister. In this instance, the general public interest in transparency had been met by disclosure of the technical papers that formed the basis of the advice to the Minister, together with a copy of the FAP. The annotations and exchanges at issue in this case were not of sufficient significance to tip the balance in favour of disclosure.

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### Case 302193 (2013)—Draft ministerial and chief executive correspondence

The Ministry for Culture and Heritage withheld a range of information relating to the funding and review of the orchestral sector, and the requester complained to the Ombudsman.

The information at issue included an outline of a draft letter from the Minister to Creative New Zealand and the New Zealand Symphony Orchestra (NZSO), and several draft versions of that letter. A draft letter from the Ministry to the NZSO was also withheld. The Ministry advised that release of the drafts would inhibit the way in which it created drafts for the Minister and the Chief Executive in future.

The Chief Ombudsman commented that is a proper and everyday function of public servants to draft correspondence for Ministers and Chief Executives. It is important that officials do not feel constrained in the provision of such advice and that Ministers and Chief Executives continue to seek the advice of their departments.

The Chief Ombudsman was satisfied that release of the drafts would inhibit the way in which the Ministry created drafts for the Minister and the Chief Executive in future. Further, the release of such advice may prejudice the freedom of Ministers and Chief Executives to determine the manner in which their correspondence should be answered.

While there was a public interest in disclosure of information related to the drafting of correspondence, the overall public interest was not served by disclosure of information that would undermine the ability of Ministers and Chief Executives to obtain the best possible sources of assistance in this task. Primary accountability for the responses lay with the Minister and Chief Executive, and the final letters from each had been released.

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### Case 318463 (2012)—Draft press releases

Auckland District Health Board (ADHB) issued a press release in response to a journalist's request for information about assaults at Te Whetu Tarewa mental health unit. The journalist then sought information about the handling of his request, including drafts of the press release. The ADHB released a range of information, but withheld the draft press release on the basis that it was '*a working document*'. The journalist complained to the Ombudsman.

The information at issue was two versions of the press release. ADHB explained that press releases are an important mechanism for communicating with its patients, staff, and the wider public. Such statements have the capacity to influence public expectations and behaviour, as well as damage the confidence those parties have in the ADHB. This means that the wording of the statements is very important, and often involves rigorous debate and multiple drafts of the language to be used.

As a result, the ADHB stated that it was essential that accurate and effective media statements are carefully prepared through discussion and consultation. The ADHB said

that it is through this process of sharing advice and opinions that media releases are created. In addition, the ADHB advised that drafts are always subject to approval and sign off by the responsible ADHB manager.

The ADHB noted that it receives enquiries from the media several times a day, and therefore, media statements are drafted on a daily basis. This often requires statements to be prepared quickly, and at short notice, by busy professionals who may have to liaise with staff across different sites.

The ADHB stated that staff involved in the process of drafting media statements expect discussions surrounding the organisation's response to be confidential, and would be cautious about participating if they were aware that their views (whether or not they were adopted) could be released to the media. This would undermine the purpose of consulting, the quality of the press releases would suffer, and the ADHB's ability to respond to the media in a timely manner would be impaired.

The ADHB also submitted that the public interest in release had been met by the disclosure of other information about its handling of the request.

The Ombudsman agreed that releasing the draft material would impact on the effectiveness of the process of drafting press releases in future, because officials would be reluctant to be candid or to openly express their initial thoughts in writing. The effective conduct of public affairs is promoted when officials can discuss, accept and/or reject particular approaches in a free and frank manner, without being concerned that their preliminary opinions and ideas could be made publicly available.

While there was an accountability interest in the disclosure of information about the safety of the ADHB's mental health unit, this did not require disclosure of the draft press releases. The public interest had been met through the information already provided by the ADHB.

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### Case 302966 (2012)—Comments on draft correspondence and draft assessment report

A requester sought information about the Ministry of Social Development's (MSD's) assessment of a community organisation as an Approved Community Service. MSD released most of the information, but withheld some emails in which staff discussed draft correspondence in reply to the community organisation, and the draft assessment report. The requester complained to the Ombudsman.

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

In respect of comments on the draft correspondence, the Ombudsman noted that it is a core function of officials to brief colleagues on correspondence from the public and to provide advice and opinions on how the agency should respond, and it is in the interests



of the effective conduct of public affairs that officials do not feel inhibited in what they say and how they record what they say.

In respect of comments on draft reports, the Ombudsman noted that draft and preparatory material will often be protected by section 9(2)(g)(i) where the final version of a report has been released. Drafts are prepared for the purpose of discussion or comment. The circulation of such drafts and the exchange of comments is in the public interest, in that it assists in achieving a degree of accuracy and completeness that might not otherwise be possible. Public disclosure of such information would undermine the process that the circulation of draft reports is generally intended to achieve.

The Ombudsman could not identify any particular public interest in release of the comments contained in the emails.

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### Case 301085 (2012)—Draft ministerial inquiry report

In 2001, Sir Thomas Eichelbaum made his report on the ministerial inquiry into the reliability of the convictions against Peter Ellis for child abuse. In 2010, a requester sought a copy of Sir Thomas's draft report. The Ministry of Justice withheld the draft report under section 9(2)(g)(i), and the requester complained to the Ombudsman.

The Ministry explained that the draft report was an early version prepared prior to the receipt of reports from the international experts appointed to advise on whether there were any features of the investigations and/or interviews of the complainant children which may have affected the reliability of the children's evidence. The draft contained a number of notations and requests for further advice.

The Ministry was concerned that if the draft report was released, it would inhibit ministerial appointees from providing the Ministry with drafts in the future. This would limit the Ministry's involvement in the development of advice with consequent implications for the quality of the record and the advice ultimately produced.

The Chief Ombudsman agreed with the Ministry's characterisation of the report as an early version, containing a number of notations and requests for further advice. She said it was important that a Ministerial appointee appointed by a Minister of the Crown to inquire into specified matters, feels able to revise the content of a draft report, without concern that the draft report could later be made publicly available. This was particularly so in this case, where the draft report at issue was prepared by Sir Thomas prior to his receipt of reports from two internationally recognised experts chosen to assist him in his inquiry, whose opinions he was required to '*seek and evaluate*', in accordance with the terms of reference which the Minister had set for his inquiry.

The Chief Ombudsman concluded that release of the draft report would prejudice the interest which section 9(2)(g)(i) is meant to protect, which is that officials, and in this case, a Ministerial appointee, can express their opinions in a free and frank manner in order to maintain the effective conduct of public affairs, and not be inhibited in doing so



in the knowledge that their draft advice and/or reports will become publicly available.

As regards the countervailing public interest in disclosure, the Chief Ombudsman commented that Sir Thomas was accountable for his final report as presented to the Minister of Justice who appointed him to conduct this inquiry. He was not publicly accountable for earlier drafts of his report. The final report had been publicly available for many years, and the Chief Ombudsman was not persuaded that the interest in withholding the draft report was outweighed by the public interest in disclosing that report.

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### Case 295743 (2012)—Draft report to the Ombudsman

The Department of Labour refused a request for access to a draft report to the Ombudsman on a complaint made under the Ombudsmen Act (OA), and the requester complained to the Ombudsman.

The draft report was never sent, and so it was not captured by the exclusion to the definition of official information in relation to *‘correspondence or communications between’* agencies and the Ombudsman relating to an investigation.<sup>9</sup>

However, the Ombudsman considered that there was good reason to withhold the draft report under section 9(2)(g)(i) of the OIA.

The draft report was prepared by an official for consideration by senior colleagues and contained free and frank expressions of opinion about how to respond to the complaint under the OA, and went into some detail regarding the issues raised in the investigation.

The Ombudsman accepted in this case that disclosure would likely result in officials being reluctant to express their initial and untested opinions in detailed written form due to a fear that these may subsequently be made public.

Further, officials would likely be inhibited in providing comments on the work of staff and colleagues and would prefer to conduct their exchanges of such matters in a less efficient and transparent manner.

The Ombudsman formed the opinion that it was necessary to withhold the information at issue to ensure the quality of correspondence with an Ombudsman was not prejudiced by a future unwillingness on the part of its staff to provide free and frank opinions on how to respond to an Ombudsman’s investigation.

Unless the information either suggested a course of action that was contrary to law or some other impropriety on the part of an agency in responding to an Ombudsman’s requirement, there were sufficient safeguards available under the OA to promote the

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<sup>9</sup> See paragraph (i) of the definition of *‘official information’* in s 2(1) OIA / paragraph (b)(iii) of the definition of *‘official information’* in s 2(1) LGOIMA.

accountability of an agency and any public interest would be met through the process of an Ombudsman's independent investigation of the substantive complaint.

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### Cases 312348 & 313008 (2011)—Draft response to a Law Commission discussion paper

These cases concerned the Minister of Veterans' Affairs' decision to withhold information relating to the development of the Government's response to a Law Commission discussion paper on a review of the War Pensions Act 1954. The information at issue included the draft responses prepared by Veterans' Affairs New Zealand (VANZ).

The Ombudsman formed the provisional opinion that section 9(2)(g)(i) applied. Release of VANZ's drafts would affect the future willingness and ability of officials to canvass and test the full range of options and ideas that are crucial to ensuring that the best and most considered advice is ultimately tendered to Cabinet.

The Ombudsman commented that in assessing the countervailing public interest in disclosure, it must be remembered that decision makers are accountable for the advice that is tendered to them and that they act upon. Early drafts generated in preparation of that advice will often not have been seen by them. Usually, it would only be in circumstances where disclosure of such papers would reveal some impropriety in process or practice that the public interest in release would outweigh valid interests in protecting information under the OIA. The Ombudsman could not identify any impropriety in this case.

The Ombudsman noted:

*...the policy process relating to the Law Commission Review is still underway and in my view exploratory discussions warrant a higher degree of protection than discussions involving proposals which are at a more advanced stage. The interest protected by section 9(2)(g)(i) creates the space for measured decision making to take place.*

In response to the Ombudsman's provisional opinion, the requester noted that it had been 18 months since the Law Commission reported, and the public was entitled to have some information about the progress of the Government's response.

The Ombudsman agreed that the public interest in disclosure of information pertaining to a policy process increases as time goes by without a decision being made. He commented that if the information at issue had been Cabinet papers relating to the progress of the review or to decisions taken on it, then the public interest in the disclosure of some information would likely be strong. However, the information was not of this nature. The Ombudsman formed the final opinion that section 9(2)(g)(i) of the OIA provided good reason to withhold the draft documents at issue.

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### Case 291959 (2011)—Draft public consultation document

In response to a request for information about the SuperGold Card review, the Minister of Transport withheld a draft public consultation document under section 9(2)(g)(i). The requester complained to the Ombudsman.

The Ombudsman noted that the final public consultation document, with only minor wording changes from the withheld draft, was publicly available. In these circumstances, he was not persuaded that release would inhibit the free and frank expression of opinions necessary for the effective conduct of public affairs.

After considering the Ombudsman's comments, the Minister agreed to release the draft public consultation document and the complaint was resolved.

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### Case 176579 (2010)—Draft audit report on JobPlus scheme

A requester sought draft and final versions of an internal audit of the JobPlus scheme. The Ministry of Social Development (MSD) withheld the reports under sections 9(2)(ba)(i) and 9(2)(g)(i) of the OIA, and the requester complained to the Ombudsman.

The Chief Ombudsman was not persuaded that there was good reason to withhold the final audit report. She commented that, in the current environment, including the approach taken by other government departments to the release of audit reports, staff at MSD should have little expectation that audit reports will automatically be withheld under the OIA. In this case, the information in the final report was generated from a variety of sources, including paper records, and interviews with various businesses and MSD staff. It was not possible to attribute any of the information in the report to particular staff members and so the Chief Ombudsman did not see how release of the report would prejudice the future supply of confidential information, or the expression of free and frank opinions.

The Chief Ombudsman noted that the draft audit report was identical to the final, and '*no distinction [could] be made in this case between the reasons for withholding the final report and the reasons for withholding the draft report*'. Accordingly, there was no good reason to withhold the draft audit report either.

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### Case 176296 (2008)—Draft public discussion document regarding auditor regulation

After consulting a range of public and private agencies, the Ministry of Economic Development (MED) prepared a discussion document on the subject of auditor regulation. However, auditor regulation was deemed a priority in the wake of the financial crisis. The Minister therefore opted to pursue targeted consultation of key

stakeholders based on a ‘think piece’, rather than full-scale public consultation based on the discussion document. As a result, the discussion document was never finalised.

In this context, a requester sought a copy of the discussion document, in the understanding that it was *‘an historical document of only academic interest’*. He complained to the Ombudsman when MED refused his request under section 9(2)(g)(i) of the OIA.

MED described the discussion document as a draft containing the preliminary views, ideas and opinions of officials on the issue of auditor regulation and liability. It said that officials were unconstrained in developing the document and that it was important that ideas and proposals could be developed without fear that such an unfinished draft would be released before stakeholder engagement occurred.

The Ombudsman formed the provisional opinion that section 9(2)(g)(i) of the OIA did not provide good reason to withhold the discussion document.

While he accepted it was a draft, it was one in close-to-final form: *‘it ... has the hallmarks of a carefully-prepared document with only limited evidence of free and frank expressions of opinion, in textual or contextual terms’*. The draft was developed in consultation with a range of agencies, including some that were subject to the OIA. Given this content and context, the Ombudsman struggled to accept that release would be likely to inhibit the future expression of free and frank opinions by officials.

The Ombudsman also identified a strong public interest in *‘as much transparency as possible [being] given to policy on auditor regulation, including the processes by which that policy is developed, particularly as full-scale public consultation is no longer intended’*.

In response to the Ombudsman’s provisional opinion, MED argued that it would be contrary to the public interest to release the draft discussion document before a document summarising the final package. There were inconsistencies between the original draft discussion document and the final package being developed, with some of the options in the original document having been dropped or modified. MED was concerned that the requester might waste time in absorbing and commenting on an incomplete document.

The Ombudsman was not persuaded to change his opinion. The requester was clearly aware that the draft discussion document was of *‘academic interest’* only. Any risk of public misunderstanding of the status of the draft discussion document could be addressed by disclosure of contextual information. The Ombudsman recommended that MED release the draft discussion document, with an appropriate contextual statement.

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### Case 175782 (2007)—Draft report on Department of Labour internal controls prepared by KPMG

The former Department of Labour’s 2005/06 annual report noted that:

*An external review of internal controls was commissioned and completed in 2005/06. The results contributed to the development of an internal assurance and risk management framework.*

A requester sought a copy of the ‘external review’, and complained to the Ombudsman when it was withheld under section 9(2)(g)(i). The Department described the information as a draft report prepared by KPMG in 2006. It said the report was expressed in blunt terms, identifying gaps and recommendations for improvement.

The Ombudsman noted the document was indeed marked ‘draft’, but this characterisation was inconsistent with the entry in the Department’s annual report which referred it as a ‘commissioned and completed’ report that had been acted upon by the end of the 2005/06 year.

The Ombudsman ascertained that the report was completed by KPMG more than a year before. As far as KPMG was concerned it was finished. To that extent, the annual report was correct when it described the report as having been ‘completed’.

Even if the report was a ‘draft’, that was not what this case turned on: ‘No special status is given under the [OIA] to “draft” documents in terms of ability to withhold’. Nor is it sufficient that the report was expressed in ‘blunt’ terms: ‘the test for the application of section 9(2)(g)(i) ... is not whether the information itself consists of “free and frank expression of opinions”, but whether disclosure would inhibit such expression in the future’.

In this case, KPMG was commissioned and prepared the report under contract. The Ombudsman did not consider that disclosure of the report would prevent KPMG (or any similar contractor) from preparing a similar report in the future if one was commissioned. Professional persons are expected to be frank and robust in their work, and state their opinions to the best of their ability. While the report contained some comments that were critical of the Department, the fact that information might cause embarrassment is not a reason for withholding it.

The Ombudsman formed the provisional opinion that section 9(2)(g)(i) did not apply to the report. The Department agreed to release the report and the complaint was resolved.

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### Case 174357 (2007)—Draft responses to OIA requests

A requester sought information about the handling of their earlier request for official information. The information at issue included two draft responses to their OIA request,

which the Securities Commission withheld under section 9(2)(g)(i) of the OIA. The requester complained to the Ombudsman.

The Chief Ombudsman noted that the drafts at issue were prepared by one employee for the purposes of discussion with another employee to ensure that an appropriate approach was taken in response to the OIA request.

It is important to the operation of the OIA that officials are able to consult relevant parties and seek free and frank comments on requests for information. Release of correspondence addressing how to respond to an OIA request would impact on the free and frank nature of discussions around responding to requests. This would negatively impact the ability of agencies to respond properly to requests, thereby prejudicing the effective conduct of public affairs.

The Chief Ombudsman did not identify a public interest in disclosure that outweighed the need to withhold the drafts.

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### Case 173358 (2006)—Draft briefings to the incoming government

The Treasury proactively published its 2005 post-election briefing to the incoming government. This prompted a request for draft versions of the document, which the Treasury refused under section 9(2)(g)(i) of the OIA. The requester complained to the Chief Ombudsman.

The Chief Ombudsman formed the opinion that section 9(2)(g)(i) provided good reason to withhold the draft versions. He was in no doubt that if the drafts were disclosed this would be foremost in the minds of officials when they came to draft the next post-election briefing. There was a real and substantial risk that this would:

- make officials reluctant to be so free and frank in expressing their initial and untested views, particularly where those views had an element of sensitivity or controversy; and
- cause officials to prefer less efficient and transparent verbal exchanges (at least in the initial stages), and to thereby delay the formal drafting process until consensus had been reached on the overall direction and content of the briefing.

Disclosure would have an unacceptably chilling effect on the process of drafting future post-election briefings to incoming Ministers.

It is in the interests of the effective conduct of public affairs for the process of drafting briefings to incoming Ministers to be as robust as possible. Post-election briefings to incoming Ministers provide a valuable opportunity for government departments. It is generally accepted that they represent the one time in the three-yearly electoral cycle where departments are able express their opinions independently of requests for advice from Ministers, and across the entire sphere of their policy and legislative influence. It is important that officials feel able to debate and accept or reject particular approaches in a

free and frank manner, without being concerned that their early and untested opinions and draft briefings could be made publicly available. If officials feel inhibited in this process, then ultimately the quality of the end product and the quality of the record will suffer. This would prejudice the effective conduct of public affairs. The Chief Ombudsman accepted that a degree of confidentiality in the drafting process was necessary to protect the willingness and ability of officials to canvass and rigorously test the full range of options and ideas, and then to work through these in order to produce their best and most considered advice for the incoming Minister.

There was nothing in the drafts or the progression of the drafting process that gave rise to a public interest in disclosure sufficient to outweigh the need to withhold.

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### Case C5151 (1999)—Draft district plan

A journalist sought a copy of a draft District Plan while it was out for targeted consultation with community groups and individuals who had objected to an earlier version. The District Council withheld the draft plan under section 7(2)(f)(i) of the LGOIMA, and the journalist complained to the Ombudsman.

The Ombudsman was not persuaded that release of the draft District Plan would prejudice the future free and frank expression of opinions. The Council had a duty to prepare District Plans under the Resource Management Act 1991. The draft contained factual information and well-formed comment and opinions. Release of the draft would not prejudice the future free and frank expression of opinions by Council members or employees; nor was it likely to prejudice the free and frank expression of opinions by stakeholders involved in the targeted consultation.

After considering the Ombudsman's comments, the Council released the draft District Plan, together with a contextual statement outlining the relationship between the information at issue and the completed Draft District Plan.

You can read the full case note on our website.<sup>10</sup>

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<sup>10</sup> Search for 'C5151' using our online library [Liberty](#).



## Cases illustrating the application of the ‘confidentiality’ withholding ground

Case number	Year	Subject	Outcome
474094	2018	<p><a href="#">Draft report prepared by NZIER on moving the car import trade</a></p> <p><i>General observations on application of section 7(2)(c)(ii) LGOIMA to draft documents—it usually applies where a draft has been prepared as part of a review, investigation or enquiry into matters affecting an individual (or group), and it is shared with the implicated individual(s) to enable them to comment on the provisional findings and conclusions before the draft is amended and/or finalised</i></p>	NA (comments on section 7(2)(c)(ii) were observations only)
446128	2018	<p><a href="#">Draft reports prepared by EY on Information Services department</a></p> <p><i>Section 7(2)(c)(ii) LGOIMA did not apply—parts of the information at issue were in the public domain—while marked ‘draft’ they were in effect the final reports—they represented the professional opinion of external consultants—they were not the result of an investigative or audit-type process where natural justice considerations would be relevant—the Council had adequate opportunity to consider them</i></p>	Release in full
442484	2017	<p><a href="#">Draft venue development strategy prepared by consultants</a></p> <p><i>Section 7(2)(c)(i) LGOIMA did not apply—no obligation of confidence owed to consultants paid to prepare the strategy</i></p>	Good reason to withhold (but not under section 7(2)(c)(i))
376156 etc	2015	<p><a href="#">Draft investigation report into spending by Mayor Len Brown</a></p> <p><i>Section 7(2)(c)(i) LGOIMA applied—draft investigation report subject to an obligation of confidence owed to the Mayor, who was the subject of / participant in the investigation—release would prejudice the ongoing supply of information from subjects or participants in similar investigations in the future—there is a public interest in encouraging full participation in this process to ensure the most accurate report possible</i></p>	Good reason to withhold
304081	2012	<p><a href="#">Draft audit report in relation to hospice</a></p> <p><i>Section 9(2)(ba)(i) and (ii) OIA applied—draft audit report was prepared for the purpose of discussion or comment, on the understanding that it would be retained in confidence—release would prejudice the provision of similar information to the agency concerned in future, or otherwise undermine the process that the circulation of draft reports is generally intended to achieve</i></p>	Good reason to withhold



Case number	Year	Subject	Outcome
173840	2006	<p><a href="#">Draft investigation report into GRSA outbreak at Wellington Hospital's neonatal unit</a></p> <p><i>Section 9(2)(ba)(ii) OIA applied—draft investigation report subject to an obligation of confidence while investigation was ongoing—release would compromise or undermine the investigation process, and diminish staff confidence, and willingness to participate, in the investigation process in future—public interest in knowing what went wrong and what steps have been taken to prevent it happening again in future—this would generally be met by disclosure of the final investigation report—public interest was heightened by the length of the investigation process—this might have required disclosure of at least an interim statement, but that would serve no usual purpose because disclosure of the final report was then imminent</i></p>	Good reason to withhold

### Case 474094 (2018)—Draft report prepared by NZIER on moving the car import trade

In an investigation under the Ombudsmen Act 1975, the Chief Ombudsman considered the reasonableness of Auckland Council’s processing of a LGOIMA request for a draft NZIER report on the impact of moving the used car import trade.

In the course of that investigation, the Chief Ombudsman made some observations on the application of section 7(2)(c)(ii) of the LGOIMA to draft documents. He acknowledged the preference to release final documents rather than drafts. However, *‘preference does not come into it when a request is received under the LGOIMA’*, as this *‘triggers an obligation to release the requested information unless there is “good reason” to withhold it’*.

There is no blanket basis for withholding draft documents under the LGOIMA until they are completed and finalised. There are withholding grounds that can apply to protect draft documents, including, most commonly, sections 7(2)(c) and 7(2)(f)(i) of the LGOIMA. However, their application depends on a close analysis of the information at issue, and the harm that would flow from its release. Not all drafts are the same.

Section 7(2)(c)(ii) of the LGOIMA applies if withholding is necessary to *‘protect information which is subject to an obligation of confidence ... where the making available of the information ... would be likely otherwise to damage the public interest’*.

Two elements must be satisfied. First, the information must be subject to an obligation of confidence. This may be express or implied, but there must be a mutual understanding and reliance as between the parties that the information will be held in confidence. Secondly, there must be reason to believe that release of the draft, or part of it, poses a serious or real and substantial risk of damage to the public interest.

The Council withheld the draft report because it was *‘yet to be finalised and [was] subject to fact checking and further feedback to the consultant’* and it was provided to ACIL *‘as a confidential draft for this purpose’*. It relied on an excerpt from the Ombudsman’s opinion in case [376156](#) as support for this decision. However, the application of section 7(2)(c)(ii) of the LGOIMA to draft documents was more nuanced than that excerpt suggested.

The Chief Ombudsman stated:

*Section 7(2)(c)(ii) usually applies where a draft has been prepared as part of a review, investigation or enquiry into matters affecting an individual (or group), and it is shared with the implicated individual(s) to enable them to comment on the provisional findings and conclusions before the draft is amended and/or finalised.*

The obligation of confidence arises out of the duty of fairness and natural justice, which are important legal tenets. Release of draft findings and conclusions would defeat the purpose of allowing the implicated individuals to comment, and call into question the

fairness and integrity of both the process and the outcome of the review, investigation or enquiry. This would damage the public interest.

Case [376156](#) provided a good example of this, because it concerned the withholding of a draft report by Ernst & Young into the spending of former Mayor Len Brown, and had been provided to him in confidence to enable him to comment on the proposed findings and conclusions.

The Chief Ombudsman when on to say:

*This is the kind of context in which section 7(2)(c)(ii) is likely to apply to a draft document. The fact that an agency or its staff do not agree with a report that has been commissioned will not, on its own, generally give rise to a reason for refusal under section 7(2)(c)(ii) or any other ground. In such circumstances, it is open to the agency to release the report with a contextual statement explaining its concerns.*

You can read the Chief Ombudsman's full opinion [here](#).

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### Case 446128 (2017)—Draft reports prepared by EY on Information Services department

In December 2016, a requester asked Auckland Council for the 'independent review of the [Information Services (IS)] department' prepared by Ernst & Young (EY). The Council refused the request under sections 7(2)(f)(i) (free and frank) and 7(2)(i) (negotiations) of the LGOIMA, and the requester complained to the Ombudsman.

The information at issue was two draft EY reports, dated 26 June 2015 and 29 February 2016 respectively. The Council stated that, upon reflection, section 7(2)(f)(i) was unlikely to be relevant, as the reports were expert reports commissioned by the Council and it could not be said that their withholding was necessary to maintain the effective conduct of public affairs.

However, the Council considered that section 7(2)(c)(ii) (confidentiality) of the LGOIMA applied. It noted that the reports were marked as confidential drafts for discussion and were provided to the Council to check them for accuracy. The Council said it was in the public interest to be able to obtain specialist advice from third parties and have drafts of that advice provided in confidence, without having to release them under the LGOIMA. The Council advised that no final reports were produced by EY.

The Council acknowledged that there is a public interest in the expenditure of public money on ICT systems and that release of the information would promote the accountability of the Council. However, the Council considered that the public interest did not outweigh the need to withhold the draft reports. The Council noted that a large part of the information contained in the 29 February 2016 draft report was made publicly available in the 17 March 2016 addendum agenda for a meeting of the Finance Performance Committee. The Council considered that this satisfied the public interest.

The Ombudsman stated that while section 7(2)(c)(ii) can apply to draft documents, it did not apply to these drafts. Confidentiality can be vitiated by subsequent publication. The Council had made public a large part of the content of the 29 February 2016 draft report. It was not necessary to withhold those parts of the 29 February 2016 draft report made publicly available in order to protect information subject to an obligation of confidence.

Further, the Ombudsman did not consider that the release of the two draft reports would damage the public interest. While the reports were marked draft, no final reports were ever produced by EY. Therefore, the draft reports were in effect EY's final reports, although the Council may not necessarily have agreed with their content.

In addition, the draft reports represented the professional opinion of external consultants in relation to the Council's ICT processes. They were not the result of an investigative or audit-type process where natural justice considerations would be relevant. Further, by the time of the request in December 2016, the Council had had adequate time to consider the drafts and decide what action to take in respect of its ICT processes.

The Ombudsman concluded that section 7(2)(c)(ii) did not apply, and that in any event, there was a significant public interest in release of the reports to promote transparency of the Council's decision making processes in respect of its ICT issues, and accountability for the expenditure of ratepayer money on ICT systems.

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#### Case 442484 (2017)—Draft venue development strategy prepared by consultants

Auckland Council withheld an early draft venue development strategy prepared by consultant architects and quantity surveyors under section 7(2)(c)(i) of the LGOIMA, and the requester complained to the Ombudsman. The Ombudsman did not consider that section 7(2)(c)(i) applied. While the analysis was high level and preliminary, it nevertheless reflected the professional opinion and expertise of the consultants who prepared it. The Ombudsman was not convinced that an obligation of confidence was owed to the private consultants who were paid to prepare the strategy, or that release of the draft strategy would prejudice the supply of similar information from private consultants in the future. However, the Ombudsman did accept that withholding was necessary to maintain the free and frank expression of opinions necessary for the effective conduct of public affairs. The application of section 7(2)(f)(i) of the LGOIMA is discussed [above](#).

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#### Case 376156 (2015)—Draft investigation report into spending by Mayor Len Brown

In late 2013, Auckland Council commissioned Ernst & Young (EY) to do an external audit into spending by then-Mayor, Len Brown. EY's final report was released, but a requester

sought the draft report provided to the Mayor for comment. He argued there was a public interest in knowing what information was taken out of the final report and for what reasons. The Council withheld the draft report in reliance on section 7(2)(c)(i) of the LGOIMA, and the requester complained to the Ombudsman.

The Council explained that the process of providing the Mayor with an opportunity to comment on the draft report was conducted confidentially. Circulation of the draft report was very limited, and subject to express obligations of confidence on the Mayor, the Council and EY. The Council argued that, without confidentiality, the Mayor's opportunity to comment as the subject of the report would be rendered valueless, and the natural justice entitlement that Council was endeavouring to meet would be undermined. It also noted that release could expose erroneous or unjustified material after the Mayor had successfully sought to correct this. Disclosure of drafts such as this would be likely to prejudice the Council's ability to obtain comment from any subject of a report on a draft, and damage the public interest, which requires the observation of fair process and natural justice by providing persons that are the subject of reports with an opportunity to comment.

The Chief Ombudsman formed the opinion that section 7(2)(c)(i) provided good reason to withhold the draft report. She stated:

*Ombudsmen have generally taken the approach that documents, which are the end product of a deliberative drafting process and are labelled 'Draft', and then circulated to third parties for comment before being finalised, can be withheld under this section if there had been an understanding that such a process would be carried out on a confidential basis.*

*[I]t [is] in the public interest that such a process be undertaken in that it would likely assist in achieving a more accurate final report by providing an opportunity for mistakes or misunderstandings to be corrected. Not only does it seem to be a sound administrative practice in that sense, but it also recognises the importance of people having the opportunity of commenting on potential adverse comment in the interests of fair process and natural justice.*

*By not recognising confidentiality in this process, I am inclined to the view that it would be likely that the supply of similar information in the future would be prejudiced should participants in the process be aware that confidentiality assurances may not necessarily be upheld. In the operations of local authorities it seems inevitable that, from time to time, issues will emerge where the commissioning of these types of independent reports will be necessary. I consider that there is a public interest in encouraging full participation in this process to ensure the most accurate report possible.*

While there was a strong public interest in disclosure of information about the external audit in order to promote transparency and accountability, that interest had been met by the release of the final report. There was nothing in the draft report (such as information that might reveal some impropriety in practice or process) that required disclosure in the public interest.

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### Case 304081 (2012)—Draft audit report in relation to hospice

Central Region’s Technical Advisory Services Ltd (TAS) (a shared services agency for the six central District Health Boards) withheld a draft audit report in relation to a hospice, under sections 9(2)(b)(ii), 9(2)(ba)(ii) and 9(2)(i) of the OIA. The requester complained to the Ombudsman.

TAS explained:

*We declined to release a copy of the draft report because by its very nature, a draft report may be inaccurate and contain various errors or omissions. We believe that the release of a draft report to any third party is therefore a breach of natural justice.*

*A draft report has not been subjected to scrutiny by the affected parties, there has been no opportunity to supply additional evidence, or to correct errors and omissions, and a draft report does not necessarily take the reader to the correct place from which to draw accurate conclusions...*

*...TAS has a formal process for the examination and assessment of provider (and DHB) feedback to ensure any additional evidence or suggested correction is given due consideration.*

*From a process perspective, it is particularly important to note that the audit is still in progress at the draft reporting phase, and is only complete once the final report has been issued...*

*At a programme level, our well-established approach to drafting audit reports offers both parties (the DHB and the provider) the opportunity to ensure that the final report is a true, accurate and fair reflection of performance.*

*This experience has ensured that providers have confidence in our processes which in turn has enabled TAS to add greater value to the process for those providers...*

*Release of draft reports to unrelated third parties risks undermining provider confidence and ultimately the effectiveness of our programme to the region's DHBs while exposing TAS to a breach of natural justice.*

The Ombudsman concluded that section 9(2)(ba)(i) and (ii) of the OIA provided good reason to withhold the draft audit report.

The draft was prepared for the purpose of discussion or comment, on the understanding that it would be retained in confidence. It would not normally be envisaged that a draft report containing provisional conclusions or assumptions would be distributed to parties other than those directly involved in the first instance.

The preparation and circulation of such drafts is in the public interest, in that it assists in achieving a degree of accuracy and completeness that might not otherwise be possible.

The limited distribution of confidential drafts for comment has long been considered a sound administrative practice in the public sector.

Public disclosure of such information would either prejudice the provision of similar information to the agency concerned in future, or otherwise undermine the process that the circulation of draft reports is generally intended to achieve.

The Ombudsman also concluded that the public interest was met through disclosure of the final audit report. There was no particular public interest in disclosure of the draft report.

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### Case 173840 (2006)—Draft investigation report into GRSA outbreak at Wellington Hospital’s neonatal unit

In June 2005, the Capital & Coast District Health Board (the DHB) launched an investigation into an outbreak of GRSA at Wellington Hospital’s Neonatal Intensive Care Unit. A reporter submitted numerous requests during the following months for a copy of the investigation report. In March 2006, she complained to the Ombudsman after being told it was *‘not appropriate to forward a draft paper prior to it going to the board for sign off after which time it will be in the public domain’*.

The DHB clarified that the report was withheld because it was incomplete, not because it had not been *‘signed-off’*. The terms of reference (TOR) for the investigation contemplated a two-stage process—internal review, followed by external peer review. The draft at issue represented the findings of the internal review. However, that review was potentially incomplete until the external peer review was finished.

The Ombudsman concluded that section 9(2)(ba)(ii) of the OIA provided good reason to withhold the draft investigation report.

#### **Obligation of confidence**

*The TOR stated that ‘the investigation [was] confidential’, and that it would be ‘conducted strictly in accordance with the [TOR]’, which specified the two-stage process discussed above. The Ombudsman stated:*

*Generally speaking, there is an expectation that while audit / investigation processes are ongoing, confidentiality will attach to related information. This is in the interests of fairness to the individuals implicated in the audit / investigation processes, and to ensure the accuracy and validity of the findings and conclusions ultimately reached.*

She concluded that the *‘participants in the investigation would have expected confidentiality to be maintained, at least until the conclusion of that process’*.

### **Damage to the public interest**

The Ombudsman stated that premature disclosure of the draft investigation report posed a number of risks.

There was a risk that the investigation process would be compromised or undermined by disclosure of the draft findings and recommendations. Although the DHB hoped the report would remain substantially the same following completion of the external peer review, this was by no means certain. The external peer review may have required changes to be made, and those changes may have required further consultation with affected parties. The potential for this was reflected in the TOR, which noted the *'external review report shall be made available as appropriate to allow supplementary comment by the Outbreak Control Team'*. In addition, disclosure of the draft investigation report may have negatively affected the external peer review team's processes and recommendations—ie, if they had to look at the issues while the matter was the subject of public debate—as well as DHB's ability to consider and assimilate that team's recommendations.

There was also a risk that disclosure of the report prior to the conclusion of the two-stage process set out in the TOR would diminish staff confidence that investigations would follow agreed protocols. The investigation was conducted in accordance with the DHB's serious and sentinel events policy. The DHB advised that it had taken 3-4 years to embed that policy in the operating culture of the DHB. Completing the investigation within the parameters of that policy was key to maintaining staff confidence in it, and hence their continued willingness to cooperate fully with investigations in the future.

The Ombudsman concluded that there was a public interest in the DHB being able to complete a thorough review process, including the external peer review component of that process, while adhering to principles of fairness and natural justice, and without premature disclosure of draft or tentative conclusions. Disclosure of the draft investigation report would be likely to damage that public interest.

### **Public interest**

The Ombudsman noted that *'the information at issue here concerns a serious event in the public health system'*, and said:

*...there is unquestionably a public interest in disclosure of information to show what happened, and what (if any) remedial steps have been identified and taken to prevent it happening again, or to mitigate / manage its effects if it does.*

The Ombudsman also noted that the DHB intended to release the final investigation report, and said that, *'in most cases, disclosure of "final" audit / investigation reports would be sufficient to meet the public interest'*.

However, the report was still not complete nearly one year later. The complainant argued that:



*If hospital management cannot complete all the stages of its report within a reasonable timeframe, in my view they have a responsibility to issue to the public the findings of the first stage of that investigation.*

The Ombudsman agreed with the complainant that it was important for the DHB's review processes to be timely as well as fair and thorough. She commented that:

*...the longer a review process goes on without disclosure of the final investigation report, the greater the public interest in disclosure of at least an interim statement addressing the matters identified above.*

While the Ombudsman might have been minded to recommend release of an interim statement, this would have served no useful purpose at the time because release of the final investigation report was by then imminent. The Ombudsman therefore concluded that section 9(2)(ba)(ii) provided good reason to withhold the draft investigation report.

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