



## Request for political consultation emails

<b>Legislation</b>	Official Information Act 1982, ss 9(2)(f)(ii), 9(2)(f)(iv), 9(2)(g)(i) (see <a href="#">appendix</a> for full text)
<b>Agency</b>	Minister of State Services
<b>Ombudsman</b>	Peter Boshier
<b>Case number(s)</b>	483129
<b>Date</b>	21 June 2019

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### Summary

The Minister of State Services refused to provide two emails that revealed the comments provided by the Green Party in response to consultation on a proposed Cabinet paper. The information was refused on the basis that withholding was necessary to maintain the constitutional convention protecting the confidentiality of advice to Ministers (section 9(2)(f)(iv) of the Official Information Act 1982 (OIA)).

For the reasons set out below, my final opinion is that the Minister was entitled to refuse the request in order to maintain the effective conduct of public affairs through the free and frank expression of opinions (section 9(2)(g)(i) of the OIA), and that section 9(2)(f)(iv) is not applicable in the circumstances of this particular case.

## Complaint and investigation

1. The complainant raised concerns with me about the decision of the Minister of State Services to withhold two emails under section 9(2)(f)(iv) of the OIA. The complainant had sought all relevant information that the Minister held in relation to a Cabinet Paper proposing to remove a cap on government administration staff.
2. During the course of this investigation, I reviewed the unredacted information, as well as comments from the Minister of State Services. Due to the nature of the information, the Office of the Prime Minister also provided substantive comments on the reasons for withholding this information.

## Analysis and findings

3. Two emails were withheld, between the Minister's Office and the Green Party prior to a paper being presented to Cabinet, for the purpose of consultation. The emails reveal the comments that the Minister's Office received from the Green Party.
4. The Cabinet Paper has been released publicly,<sup>1</sup> and the consultation email from the Minister's Office to the Green Party, which was sent prior to the two withheld emails, was released to the requester.
5. In investigating and reviewing a decision under the OIA, it is my role to assess whether any withholding ground under the OIA applied to the information at issue. I am not limited to considering just the withholding ground that was relied upon in the circumstances.
6. I will first address why I consider that there was good reason to withhold this information, and then go on to discuss the other withholding grounds that were raised in this investigation.

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

7. I consider that the most relevant withholding ground to consider in this particular case is [section 9\(2\)\(g\)\(i\) of the OIA](#).

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<sup>1</sup> See <http://www.ssc.govt.nz/sites/all/files/future-of-capping-core-govt-admin.pdf>.

8. Section 9(2)(g)(i) is about maintaining the effective conduct of public affairs through the free and frank expression of opinions by, or between, or to, Ministers of the Crown or members of an organisation.<sup>2</sup>
9. A common misconception is that the information at issue has to be in the nature of ‘*free and frank opinion*’ to be withheld. Rather, what matters is that there is reason to believe that release would prejudice the future generation and expression of free and frank opinions that are necessary for the effective conduct of public affairs.
10. It is not uncommon for different withholding grounds to arise as the public policy making process progresses, most commonly sections 9(2)(g)(i) and 9(2)(f)(iv). My Office has published a guide on this very issue, which details the process and the various grounds that can arise at different points along that process.<sup>3</sup> Effective consultation on proposed public policy is an important part of this process.
11. The Prime Minister’s Office is concerned that the release of this nature of political consultation would lead political parties to consider oral consultation. There is also concern that political parties would be less free and frank in providing their opinion if they were concerned that their views would be aired publicly. This would undermine the political relationships of the government of the day, and make the policy development process more difficult.
12. For the current government, the coalition, and confidence and supply agreements include commitments to consultation procedures, and both agreements outline relationships that operate on a good faith and ‘*no surprises*’ approach. These procedures are endorsed in the Cabinet Office circular CO (17) 10: *Labour-New Zealand First Coalition, with Confidence and Supply from the Green Party: Consultation and Operating Arrangements*.<sup>4</sup>
13. The Prime Minister’s Office has commented:

*Political consultation is at the heart of the Cabinet decision-making processes. It requires a considerable amount of careful communication between the coalition caucuses, supporting parties and the various other parties represented in Parliament. Choices have to be made about who should be consulted on particular issues, and the order in which consultation with different parties might occur. The timing, nature and outcome of the*

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<sup>2</sup> Office of the Ombudsman ‘Free and frank opinions’ March 2018. Retrieved from <http://www.ombudsman.parliament.nz/resources-and-publications/documents/free-and-frank-opinions>.

<sup>3</sup> Office of the Ombudsman ‘The OIA and the public policy making process’ March 2018. Retrieved from <http://www.ombudsman.parliament.nz/resources-and-publications/documents/the-oia-and-the-public-policy-making-process>.

<sup>4</sup> Cabinet Office circular ‘CO (17) 10: Labour – New Zealand First Coalition, with Confidence and Supply from the Green Party: Consultation and Operating Arrangements’ 20 December 2017. Retrieved from <https://dpmc.govt.nz/publications/co-17-10-labour-new-zealand-first-coalition-confidence-and-supply-green-party>.

*consultation is highly sensitive and the disclosure of that information risks undermining the stability of those relationships.*

*[...]Previous Ombudsmen have observed that the environment of a coalition government under MMP heightens the need for confidentiality where the Government of the day is reliant on negotiating sufficient political support to further its initiatives. Confidentiality over political consultation permits the airing of differences in opinion, the modification of policies to accommodate a party's concerns and reaching compromises prior to a final consensus being reached.*

14. There is a strong interest in maintaining the Government's ability to undertake effective and efficient political consultation with political parties, and to receive free and frank opinions from the political parties that are being consulted. This interest is heightened in the MMP environment, where the relationships and agreements between parties are complex. It is vital in this environment that these parties are able to conduct free and frank discussions in a relationship of trust and confidence, and in a timely manner. The Cabinet Circular recognises at paragraph 20:

*Timely consultation between portfolio Ministers and between parties is essential to the successful operation of the Cabinet decision-making system and the coalition and confidence and supply agreements.*

15. Maintaining the integrity of this process is clearly in the interests of the effective conduct of public affairs.
16. If this type of information were to be released, it would lead to political parties becoming reluctant to express their views in an open and forthright manner, a necessary feature of the effective conduct of public affairs. Political consultation may also not be carried out in writing, thereby harming the effective conduct of public affairs by not having a good record of the views expressed. This would slow the consultation process, and make it more difficult for views to be shared and the issues properly debated. This is particularly important for parties who may be outside of Cabinet.
17. This would ultimately undermine the quality of the advice produced in the policy development process, and thereby the quality of the final decision reached. It could also have the effect of undermining the working relationship between political parties, the maintenance of which is essential to the effective conduct of public affairs in a coalition government.
18. For these reasons, I am satisfied that section 9(2)(g)(i) applied to the information at issue.

### **Public interest in the release—section 9(1)**

19. I must also consider whether there are public interest considerations that favour release of the information that outweigh the need to withhold under section 9(2)(g)(i) of the OIA (section 9(1) of the OIA).

20. There is a general public interest in promoting the transparent conduct of public affairs. This is particularly important in the development of government policy, as it promotes public understanding for the decisions that are made, as well as promoting public sector accountability.
21. However, I do not consider that the public interest in the release of the information at issue in this case outweighs the strong interest in withholding under section 9(2)(g)(i). The information does not shed light on the advice and options considered, or the reasons for the decision ultimately made by Cabinet. The relevant cabinet papers, and details of the decisions made, have been released publicly in this case, which enable the public to understand the reasons for the decisions made, promoting public sector accountability and transparency.
22. I am therefore satisfied that section 9(2)(g)(i) provided good reason to withhold the information requested.

### **Other withholding grounds considered**

23. As other withholding grounds were raised during this investigation, for the sake of completeness, I will explain why I consider that these do not apply in the circumstances.

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

24. The Minister's Office withheld the information under [section 9\(2\)\(f\)\(iv\) of the OIA](#), in order to maintain the constitutional conventions, for the time being, which protect the confidentiality of advice tendered by Ministers of the Crown and officials.
25. The primary purpose of section 9(2)(f)(iv) is to protect the orderly and effective conduct of executive government decision making processes. Official information regimes across the world recognise that sometimes governments need some private time and space in which to be able to deliberate and decide on the advice they receive.<sup>5</sup>
26. Section 9(2)(f)(iv) usually applies:
  - a. to advice related to executive government decision making processes;
  - b. that has or will be tendered to Minister or Cabinet;
  - c. by Ministers or officials;
  - d. where disclosure would harm the orderly and effective conduct of the relevant decision making process; and

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<sup>5</sup> For further information on this withholding ground, see my Office's guide, found at <http://www.ombudsman.parliament.nz/resources-and-publications/documents/confidential-advice-to-government>.

- e. most often on a temporary basis—while the advice remains under active consideration.
27. There have been instances, however, where, in exceptional circumstances that go to the heart of the effective operation of executive government policy and decision making processes, Ombudsmen have accepted that the convention of confidentiality may endure even after the advice is no longer under active consideration. This has been the case for some specific scenarios,<sup>6</sup> including for the details of the outcome of political consultation recorded on the formerly used CAB100 forms.<sup>7</sup>
28. The Prime Minister's Office explained:

*...conventions coordinate the practices of government and provide means for cooperation between its components. Although not laws, 'conventions are recognised forms of political behaviour that are regarded as obligatory. They engender in politicians and officials an 'internal viewpoint'; that the rule they are following lays down the correct standard of political or official conduct' (Phillip Joseph, Constitutional and Administrative Law in New Zealand (4<sup>th</sup> Ed) p229).*

*The consultation arrangements that each government adopts are a core component of Cabinet decision-making processes, and essential to the maintenance and stability of multi-party government. Consultation is constitutionally required for the government to obtain sufficient political support to further the government's initiative and proposals. For this reason, previous Ombudsmen have agreed that confidentiality extends for at least as long as the relationships that support the government's durability and stability last.*

29. While I acknowledge the constitutional importance of political consultation and where it sits in the continuum of advice to government, I do not see that section 9(2)(f)(iv) applies to this type of information in the current context.
30. The information is not in the nature of advice **tendered** by Ministers or officials to executive government. It is an email between ministerial staffers, providing views on a proposed paper.
31. The Prime Minister's Office argued that there is a clear connection between emails that detail the outcome of political consultation, and the advice tendered to Ministers or Cabinet. The position expressed through consultation is then communicated to Cabinet. The Prime Minister's Office argued that previous Ombudsmen had accepted that CAB100 forms could constitute advice in terms of section 9(2)(f)(iv), therefore it follows that

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<sup>6</sup> See page 5/6 of the above guide.

<sup>7</sup> CAB100 forms were used by previous governments to accompany all Cabinet and Cabinet Committee submissions. The CAB100 form, among other things, recorded the political consultation that had occurred on the relevant paper.

emails revealing the substance of political consultation must also be considered as advisory in nature.

32. In this case, however, I consider that the nature of the consultation itself, as well as the content, cannot be construed as advice tendered by Ministers or officials. The consultation does form an important part of the process of the development of advice to Cabinet, however, it is distinct from CAB100 forms. These forms accompanied all Cabinet and Cabinet Committee submissions, and formed part of the actual advice provided to Cabinet. The forms were advice to Cabinet about who had been consulted on the relevant issue.
33. In this case, these emails may have been a necessary prerequisite to the tendering of advice to Cabinet, but they were not, themselves, part of that advice, nor did they reveal the content of that advice.
34. For these reasons, it is my final opinion that section 9(2)(f)(iv) did not apply to this information.

### Collective and individual ministerial responsibility—section 9(2)(f)(ii)

35. Section 9(2)(f)(ii) applies where it is necessary to withhold information to maintain the constitutional conventions which protect collective and individual ministerial responsibility.
36. The Prime Minister's Office considered that the confidentiality of political consultation is also required to uphold the constitutional convention of collective responsibility. It advised:

*The convention protects the ability of Cabinet to present a united front when it has made a decision and to allow issues to be debated freely and frankly in Cabinet without fear that positions held prior to reaching a consensus would be disclosed. The ability to debate issues free from public scrutiny extends to political parties participating in consultation processes as a component of Cabinet decision-making.*

37. In relation to the harm in release of this type of information, the Prime Minister's Office advised:

*Political parties can hold a position during the consultation process that may have changed by the time a consensus is reached on a proposal, or may have altered the outcome. There will be times when a party disagrees with a proposal in a Cabinet paper at the early stages, and a subsequent negotiation leads to an agreement, or an amendment to the proposal. The disclosure of the detail of those discussions would compromise the united front that parties are bound to adopt once Cabinet has reached a decision on the matter: it is untenable for a Minister to maintain support for a proposal when it has been publicly disclosed that his or her party raised objections at the party consultation stage.*

38. I agree that section 9(2)(f)(ii) could apply to the details of political consultations, however, it will need to be shown in each case how the release of the particular information at issue could undermine the convention of collective or individual ministerial responsibility.
39. For the particular information at issue, I am not satisfied that this was the case. I therefore do not see that section 9(2)(f)(ii) applied.

## Chief Ombudsman's final opinion

40. For the reasons set out above, and having carefully considered the further comments put forward in this case, it is my final opinion that the Minister was entitled to refuse the request, not under the stated withholding ground of section 9(2)(f)(iv), but under section 9(2)(g)(i) of the OIA.



## Appendix 1. Relevant statutory provisions

### Official Information Act 1982

#### 4 Purposes

The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—

- (a) to increase progressively the availability of official information to the people of New Zealand in order—
  - (i) to enable their more effective participation in the making and administration of laws and policies; and
  - (ii) to promote the accountability of Ministers of the Crown and officials,—  
and thereby to enhance respect for the law and to promote the good government of New Zealand:
- (b) to provide for proper access by each person to official information relating to that person:
- (c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

#### 9 Other reasons for withholding official information

- (1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.
- (2) Subject to sections 6, 7, 10, and 18, this section applies if, and only if, the withholding of the information is necessary to—
  - (f) maintain the constitutional conventions for the time being which protect—
    - (i) the confidentiality of communications by or with the Sovereign or her representative:
    - (ii) collective and individual ministerial responsibility:
    - (iii) the political neutrality of officials:
    - (iv) the confidentiality of advice tendered by Ministers of the Crown and officials; or
  - (g) maintain the effective conduct of public affairs through—

- (i) the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty; or
- (ii) the protection of such Ministers, members of organisations, officers, and employees from improper pressure or harassment;