

# Request for Associate Minister's letter to the Minister of Transport regarding the *Let's Get Wellington Moving* indicative package

<b>Legislation</b>	Official Information Act 1982, ss 2(1), 4, 5, 9(2)(f)(ii), 9(2)(g)(i), 9(1), 16 (see <a href="#">Appendix 1</a> for full text)
<b>Requester</b>	Nicola Willis MP / Matthew Hooton
<b>Agency</b>	Associate Minister of Transport / Minister of Transport
<b>Ombudsman</b>	Peter Boshier
<b>Case number(s)</b>	507227, 509750
<b>Date</b>	30 October 2019

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## Summary

The Hon Julie Anne Genter, Associate Minister of Transport (Associate Minister) sent a letter to the Hon Phil Twyford, Minister of Transport (Minister) during pre-consultation on the *Let's Get Wellington Moving* (LGWM) indicative package draft Cabinet paper.

Both Ministers refused requests for this letter on the basis that withholding was necessary to maintain:

- the constitutional convention protecting collective ministerial responsibility (section 9(2)(f)(ii) of the Official Information Act 1982 (OIA)); and
- the effective conduct of public affairs through the free and frank expression of opinions between Ministers of the Crown (section 9(2)(g)(i) of the OIA).

For the reasons set out below, my opinion is that the Ministers were entitled to withhold a copy of the letter in order to maintain the effective conduct of public affairs through the free and frank expression of opinions between Ministers, and between Ministers and political parties. However, I also consider that there was a public interest in disclosure that warranted the release of some information.

I have outlined the specific information (from and about the letter) which I consider should be released to satisfy the public interest in this case. I have also advised Ministers that if they wish to add additional background to the proposed release they can do so. As the Ministers have agreed to release the proposed statement, it has not been necessary for me to make any recommendations.

## Background

1. On 12 June 2019, Nicola Willis, National List MP, asked the Associate Minister for *'a copy of any letters in your name, draft or otherwise, addressed to any other Minister in relation to potential or actual proposals for transport investment in Wellington'*. Matthew Hooton asked the Minister for a copy of the letter on 12 August 2019.
2. Both Ministers refused the requests under sections 9(2)(f)(ii) and 9(2)(g)(i) of the OIA.
3. Ms Willis complained to me about the Associate Minister's decision on 16 July 2019. I received Mr Hooton's complaint about the Minister's decision on 19 August 2019.

## Investigation

4. I notified the Associate Minister and the Minister of my investigations on 6 and 22 August 2019 respectively. During the course of the investigations, I reviewed the letter and a report from the Office of the Associate Minister. I met with the Associate Minister and discussed the complaint with the Minister. I also considered a report from the Prime Minister's Office (PMO).

5. On 30 September 2019, I sent my provisional opinion to the Ministers for comment. Comments were received from the Associate Minister and the PMO.
6. On 15 October 2019, I sent my provisional opinion to the complainants.
7. On 21 October 2019, Nicola Willis responded to my provisional opinion on behalf of herself and Matthew Hooton.

## Comments made by complainants

8. When making her complaint, Ms Willis commented on the decision as follows:

*Decisions on this policy have been made and publically announced, and so release of this information would not jeopardise the decision making process.*

*Cabinet made decisions on this package after Minister Genter wrote this letter so release of the letter would not impact on conventions relating to Cabinet collective responsibility.*

*There is significant public interest in this matter and the decision making process that led to the final 'Let's Get Wellington Moving' transport package, Minister Genter's letter is relevant to that and should be made public.*

9. Mr Hooton considered that there was very significant media and public interest in the letter. He noted that:

*...much of the media coverage suggests not only that the public is interested in the contents of the letter but that it is in the public interest for the letter to be released. This is because the letter clearly influenced major funding decisions [the Minister of Transport] made and also that the controversy that has emerged around the letter has created speculation that it may have improperly influenced [him].*

*The full release of the letter is therefore now necessary to enhance respect for the law and to promote the good government of New Zealand.*

## Analysis and findings

### Jurisdiction

10. The first question for me to determine was whether the document contained information which was 'official information' within the meaning of the OIA.
11. 'Official information' is defined in section 2(1) of the OIA as including any information held by a Minister of the Crown 'in his [or her] official capacity'.

12. There was some debate about whether the letter was held by Ms Genter as Associate Minister or as Green Party transport spokesperson.<sup>1</sup> However, the Associate Minister did not refuse the OIA request for the letter on the basis that the information requested was not ‘official information’; nor was that argument open to the Minister, who clearly held the letter in his official capacity.
13. Importantly, Ms Genter signed the letter as Associate Minister, wrote it on ministerial letterhead and addressed it to the Minister of Transport. The letter was generated in response to a request for feedback on the LGWM indicative package draft Cabinet paper. The letter related to a policy development process with which the Associate Minister was fully involved. In answer to Parliamentary Question 21886 (2019), the Minister of Transport stated that ‘*Minister Genter, as associate Minister of Transport, was fully across the Let’s Get Wellington Moving work from the outset until the announcement*’.
14. Clearly, the letter was held by both the Ministers in their official capacity, and is therefore ‘official information’. This being the case, my jurisdiction to investigate the decision to refuse the letter under the OIA is established and the principle of availability applies, meaning that the information must be ‘*made available unless there is good reason for withholding it*’.<sup>2</sup>

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

15. Section 9(2)(g)(i) of the OIA applies if the withholding of the information is necessary to maintain the effective conduct of public affairs through:

*The free and frank expression of opinions by or between or to Ministers of the Crown... or officers and employees of any department or organisation in the course of their duty.*

16. The concern here is that release of the letter would prejudice the future free and frank exchange of opinions between participants in the public policy making process. The context in which the information was generated is key here and this is explained below.

### **Context**

#### **Pre-consultation**

17. The letter provided feedback to the Minister on the draft Cabinet paper ‘*Let’s Get Wellington Moving*’ as part of a pre-consultation process, prior to formal cross-party and Ministerial consultation.
18. Both Ministers and the PMO emphasised the importance of the consultation processes undertaken prior to a policy item reaching Cabinet.

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<sup>1</sup> See, for example, Hansard (Debates)—Question No 10—Transport—Sitting date: 6 August 2019.

<sup>2</sup> See s 5 OIA.

19. The PMO commented:

*Consultation procedures undertaken prior to a policy item reaching Cabinet are vital for the efficient and effective development of government policy in an MMP environment. The majority of papers considered at Cabinet and Cabinet Committees by the government each week would have prior changes made to them as a result of another Minister or political party's view.*

*...Prior to engagement with the formal consultation processes set out in the circular,<sup>3</sup> significant policy items typically involve more informal pre-consultation discussions with the most interested parties or Ministers.*

*This preliminary testing of views among the government partners supports the efficiency and effectiveness of government policy development by ensuring that a Cabinet paper later sent out for formal consultation takes into account all relevant issues and does not require significant redrafting.*

*...These pre-consultation discussions are especially common for transport portfolio items given the significance of the portfolio to all three parties in Government.*

20. In the House, the Minister on behalf of the Associate Minister, confirmed the nature of the discussions:<sup>4</sup>

*...the way that we run the transport portfolio is to have frank and robust exchanges of views on all these things. I'll say this about the Minister. He doesn't always agree with the views of the Green Party, he often doesn't agree with his own officials, but he does make sure we have a frank exchange of views to inform the best possible decision-making.*

21. During my discussions with the Minister, he confirmed that the Ministers had worked closely together, and in forwarding the draft Cabinet paper for comment he was communicating with a Minister with a shared portfolio interest at the same time as undertaking consultation with the Green Party spokesperson for transport. Therefore, there are two types of pre-consultation involved here, political and ministerial.

### **POLITICAL CONSULTATION**

22. When explaining the decision to refuse Ms Willis' request, the Associate Minister provided the following background. She noted that on the morning of 26 March 2019, she held a meeting with the Green Party Co-leader James Shaw, Green Party spokesperson for Wellington issues Gareth Hughes, a Green Party policy advisor, and her ministerial adviser. Those present discussed the indicative package and it was as a result

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<sup>3</sup> The circular referred to here is *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> Hansard (Debates) Question No.11—Transport—Sitting date: 1 August 2019.

of that meeting that Julie Anne Genter wrote to the Minister of Transport later that same day.

23. The Associate Minister therefore considered the letter to be part of the political consultation process between the Green Party and the Minister of Transport. This accounted for the fact that the email which forwarded the letter to the Minister was copied to the Green Party's Deputy Chief of Staff, who is responsible for policy negotiations between the parties, and the relevant policy advisor in the Green Party Leaders' office.
24. The Associate Minister acknowledged that the letter could have been clearer that it reflected the view of the Green Party: *'Nonetheless, in the context in which the letter was sent it was assumed that it would be clear to the recipient that this letter reflected both the views of Julie Anne Genter and other Green MPs'*.
25. In the House, both Ministers acknowledged that the capacities in which Julie Anne Genter was acting in this case were *'not easy to separate'*.<sup>5</sup> I agree, and accept that the letter also represented the view of the Green Party and was part of the political consultation process.
26. My recently published opinion on a request for political consultation emails (case [483129](#)) explains why section 9(2)(g)(i) may apply to information documenting political consultation with coalition parties during the development of public policy.

#### MINISTERIAL CONSULTATION

27. In the context of pre-consultation discussions between a Support Party Minister (with specific delegated responsibilities) and a Cabinet Minister, affording the opportunity for a safe space for robust debate on draft policy is equally important to the effective conduct of public affairs.
28. The Cabinet Office circular (17)(10): *Labour-New Zealand First Coalition, with Confidence and Supply from the Green Party: Consultation and Operating Arrangements* states:
  27. *It is the responsibility of the lead portfolio Minister when submitting Cabinet papers to ensure that timely consultation occurs with Ministers who have portfolio responsibilities potentially affected by the matters in the Cabinet papers that they are submitting.*
29. Timely and effective consultation was particularly important in this case because the Associate Minister does not sit on the Cabinet Economic Development Committee or in Cabinet.

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<sup>5</sup> Hansard (Debates)—Question No.8 Transport—Sitting date: 8 August 2019.

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

30. In my opinion, the withholding of this letter was necessary to maintain the effective conduct of public affairs.
31. The PMO has explained that a significant amount of preliminary consultation on proposed Cabinet items currently occurs in writing. This is in part due to the complexity of issues involved and the importance of accurately recording feedback on a policy or paper. The PMO commented:

*This preliminary testing of views at an early stage ensures that a Cabinet paper later sent out for formal consultation takes into account all relevant issues and does not require significant redrafting.*
32. The Associate Minister commented:

*Disclosing the content of the letter would have a chilling effect on the free and frank expression of opinion during political consultation between Ministers and between Ministers and political parties, in an MMP government. The letter puts forward frank opinions about the [LGWM] indicative package. These views would not have been communicated in this way if it was assumed the letter would later be made public.*
33. The PMO expressed a concern and this was echoed by the Ministers themselves, that the disclosure of this letter would likely lead to *‘an increased reliance on sharing views orally, or consultation could be moved into an entirely political sphere, to avoid disclosing party positions or opinions on a Cabinet proposal’*.
34. In my opinion, disclosure of the letter would discourage political parties and Ministers from expressing their views on draft policy papers in writing or as clearly and frankly as they might do in an environment of trust and confidence. It may also mean that consultation is delayed until a matter enters the Cabinet process where it can be discussed confidentially. In my opinion, these changes would adversely affect the efficient and effective development of government policy in an MMP environment.
35. It would also be of concern if disclosure of this letter caused this consultation process to move *‘into an entirely political sphere’*. The continued application of the OIA to discussions of this nature is important. Recognising a presumption of protection which is subject to override in the public interest in a particular case is consistent with the broadly stated objects of the OIA. It avoids providing a disincentive to what are beneficial governance arrangements. At the same time, it maintains an ultimate right to have access to information if the public interest impels this for reasons of transparency and accountability.
36. Of course, the parties involved may waive the confidentiality that attaches to these discussions and waiver will be a relevant factor when assessing the likelihood of harm that release would pose to a protected interest. This is pertinent here because Ministers discussed the communication in the House. In particular, in answer to an oral question in the House, the Associate Minister stated she had *‘expressed [her] concerns at the time*

*that the indicative package had not yet been sequenced to deliver the optimal benefits to help people get around Wellington. This was resolved in the final package*.<sup>6</sup> The Associate Minister also clarified that her concerns about the lack of sequencing included *'the Mount Vic tunnel, but includes all of the projects in the package, the order in which they are to be sequenced'*.<sup>7</sup> Therefore, to a certain extent, the confidentiality of this communication has not been maintained and this is a relevant factor when assessing the strength of the protected interest and balancing that against the public interest in release.

## Public interest

37. Having accepted that section 9(2)(g)(i) applies to the letter, I must consider whether there are public interest considerations that favour release of the information that outweigh the need to withhold (section 9(1) of the OIA).

## The complainants' submissions

38. The complainants argued that this was a case where *'the public interest in release of this information outweighs other considerations'*.
39. They noted that:
- a. *It involves the expenditure of [a] significant amount of Government capital spending over a large number of years;*
  - b. *It involves transport decisions about our country's capital city and affecting hundreds of thousands of people;*
  - c. *It specifically involves the sequencing of key projects as part of this plan;*
  - d. *The decision has now been made.*
40. The complainants placed considerable emphasis on the last point: that the decision on funding and sequencing had now been made and therefore the public interest balance shifted to disclosure because the *'concern about chilling inter-Minister correspondence largely evaporates when a decision has been made as it has been here'*.
41. The complainants also argued that there was an absence of information about the basis for key decisions, and that release of the letter could provide more insight into the decision making process.
42. Lastly, they said that release of the letter would address the public interest in promoting individual accountability of Ministers for their impact on the policy making process.

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<sup>6</sup> Hansard (Debates)—Question No.10—Transport—Sitting date: 31 July 2019.

<sup>7</sup> See above.



## My view of the public interest

43. As noted in this Office's [Public interest](#) guide, there is a public interest in disclosure of information that illuminates government, ministerial and administrative decision making processes, including the advice and options considered, and the reasons for the decision. Disclosure of this letter would provide insight into government and ministerial decision making processes.
44. On the other hand, I consider that the need to protect effective ministerial and political consultation on proposed public policy, and the working relationships necessary to develop a consensus view within an MMP environment, is very strong.
45. This is not a case about the withholding of the advice tendered to the Minister or Cabinet. That advice was released following the Cabinet decision. This is important because it addresses the public interest in promoting accountability for the decisions taken collectively by the Cabinet.
46. This case is about the withholding of opinions exchanged between a Support Party Minister/Green Party spokesperson and the Minister during the development of the advice to Cabinet.
47. As the Committee that recommended the enactment of the OIA noted:<sup>8</sup>

*If the attempt to open processes of government inhibits the offering of blunt advice or effective consultation and arguments, the net result will be that the quality of decisions will suffer, as will the quality of the record. The processes of government could become less open and, perhaps, more arbitrary.*
48. The ongoing protection of a safe space for robust discussion during political and ministerial consultation on proposed public policy ensures that Ministers and parties are able to work together effectively in future in order to run the Government and develop and implement policy. The release of a copy of this letter would adversely affect how they are able to do that in future.
49. Having assessed the relative weight of the competing interests, I have concluded that the public interest in favour of disclosure does not outweigh the interest in withholding a full copy of the letter itself.
50. However, there are certain factors specific to this case, which are highly relevant to the balancing exercise that section 9(1) requires, and which in my opinion warrant the release of some information from and about the letter.
51. First, statements made in the House about the capacity in which the document is held have created confusion. Ms Genter stated that the letter was written in her capacity as the Green Party transport spokesperson and relied upon my opinion in case [483129](#) as a reason for not releasing it. This gave the impression that the letter was solely party political information. However, Ms Genter and the Minister subsequently confirmed that

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<sup>8</sup> Committee on Official Information. *Towards Open Government: General Report* (December 1980) at 19.

the letter was written on Ministerial letterhead and signed by her as the Associate Minister and that the capacities were not easy to separate.

52. Second, the Associate Minister made comments in the House regarding the concerns she expressed in the letter. By way of this disclosure, the Associate Minister has partially waived the confidentiality that would otherwise have attached to this pre-consultation communication. The Associate Minister has disclosed the fact that she shared views with the Minister about the sequencing of the indicative package which were resolved in the final package. To the extent of that disclosure, there is a public interest in releasing information contained in the letter. This will promote the transparency of government and ministerial decision making processes, and help to address the perceived absence of information about the basis of the decisions.
53. Third, the Associate Minister's comments about her concerns were somewhat vague. What does raising concerns about the '*sequencing of the projects*' actually mean? Clarity is important when the information relates to the policy development of an initiative that, as the complainants note, affects a large number of people and involves a significant amount of public money.
54. The statements in the House generated significant public and parliamentary debate, as well as confusion, public disquiet and speculation.<sup>9</sup>
55. I note that the OIA requires that information must be released in the way preferred by the person requesting it unless to do so would prejudice a protected interest and, in the case of the interests protected by section 9, there is no countervailing public interest.
56. For the reasons outlined above, I am satisfied that release of a copy of the letter would prejudice the effective conduct of public affairs which is protected in section 9(2)(g)(i). However, section 16 provides for the release of summaries or excerpts where release would prejudice a protected interest and in my opinion, some information from and about the letter must be released in order to inform public understanding about the matter, provide clarity and promote public trust and confidence.

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

57. As I have accepted that section 9(2)(g)(i) applies in this case, it is not necessary for me to consider the application of section 9(2)(f)(ii). I would prefer to traverse the application of this section in a context where that is plainly required.

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<sup>9</sup> In respect of the latter, see for example – <https://eveningreport.nz/2019/08/09/bryce-edwards-political-roundup-julie-anne-genter-and-the-case-of-the-secret-letter/> and speculation about whether a resignation was threatened in the letter.

## Chief Ombudsman's opinion

58. For the reasons set out above, I have formed the opinion that the Minister and Associate Minister of Transport were entitled to withhold a copy of the letter under section 9(2)(g)(i) of the OIA, but that some information should have been released in the public interest.
59. I have outlined the specific information which I consider should be released to satisfy the public interest in this case. This information is set out in [Appendix 2](#). I have also advised the Ministers that if they wish to add additional background to the proposed release they can do so. As the Ministers have agreed to release the proposed statement, it has not been necessary for me to make any recommendations.

## 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.

#### 5 Principle of availability

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

#### 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;

## **16 Documents**

- (1) Where the information requested by any person is comprised in a document, that information may be made available in 1 or more of the following ways:
  - (a) by giving the person a reasonable opportunity to inspect the document; or
  - (b) by providing the person with a copy of the document; or
  - (c) in the case of a document that is an article or thing from which sounds or visual images are capable of being reproduced, by making arrangements for the person to hear or view those sounds or visual images; or
  - (d) in the case of a document by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the form of shorthand writing or in codified form, by providing the person with a written transcript of the words recorded or contained in the document; or
  - (e) by giving an excerpt or summary of the contents; or
  - (f) by furnishing oral information about its contents.
- (1A) Subject to subsections (2) and (3), information made available in any of the ways listed under subsection (1) may be made available in electronic form or by electronic means.
- (2) Subject to section 17, the department or Minister of the Crown or organisation shall make the information available in the way preferred by the person requesting it unless to do so would—
  - (a) impair efficient administration; or

- (b) be contrary to any legal duty of the department or Minister of the Crown or organisation in respect of the document; or
  - (c) prejudice the interests protected by section 6 or section 7 or section 9 and (in the case of the interests protected by section 9) there is no countervailing public interest.
- (3) Where the information is not provided in the way preferred by the person requesting it, the department or Minister of the Crown or organisation shall, subject to section 10, give to that person—
  - (a) the reason for not providing the information in that way; and
  - (b) if that person so requests, the grounds in support of that reason, unless the giving of those grounds would itself prejudice the interests protected by section 6 or section 7 or section 9 and (in the case of the interests protected by section 9) there is no countervailing public interest.

## Appendix 2. Information which should be released in the public interest

- On 21 March 2019, the Minister of Transport, Phil Twyford (the Minister), sent a Ministry of Transport briefing dated 20 March 2019 to Julie Anne Genter, the Associate Minister of Transport and Green Party spokesperson for transport.
- Attached to the briefing was a draft of the Let's Get Wellington Moving (LGWM) indicative package Cabinet Paper. The Ministry of Transport's briefing sought the Minister's consideration and feedback prior to cross-party consultation.
- On 26 March 2019, Julie Anne Genter sent a letter to the Minister on ministerial letterhead and she signed in her capacity as Associate Minister.
- The Associate Minister noted that she was providing her feedback on the draft prior to it going out for cross-party consultation.
- The Associate Minister expressed views on the indicative package of investments outlined in the draft Cabinet paper. These regarded the alignment of the package with the goals of the LGWM programme and the Government's Policy Statement on Land Transport. The Associate Minister was concerned about inducing traffic and the resulting increased congestion, greenhouse gas emissions and undermining of demand for public transport. The Associate Minister was also concerned to ensure there was sufficient funding available for public transport.
- The Associate Minister advised that she was comfortable supporting this package if a number of matters were clarified, including that the public transport, and walking and cycling components of the package would be completed as soon as practicably possible and that work on rapid transit be prioritised ahead of the second Mount Victoria tunnel.
- The indicative package, ultimately approved by Cabinet, included this sequencing of the projects.
- The letter did not issue any ultimatums nor threaten a resignation.