

## Commercial information

A guide to sections 9(2)(b) and 9(2)(i) of the OIA and sections 7(2)(b) and 7(2)(h) of the LGOIMA

*This is a guide to the withholding grounds in the OIA and LGOIMA<sup>1</sup> that relate specifically to commercial information.*

*Section 9(2)(b)<sup>2</sup> protects information that would disclose a trade secret, or be likely unreasonably to prejudice the commercial position of a third party.*

*Section 9(2)(i)<sup>3</sup> protects information where it is necessary to enable the agency that holds it to carry out commercial activities without prejudice or disadvantage.*

*There are some related guides that may help as well. Sections 9(2)(b) and 9(2)(i) are subject to a public interest test. More information about how to apply that test can be found [here](#).*

*If you are concerned about the impact of disclosure on negotiations, commercial or otherwise, see our guide on section 9(2)(j): [Negotiations](#).*

*If you are concerned about disclosing information related to public tender processes, see our guide [The OIA and the public tender process](#).*

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<sup>1</sup> References to the OIA should be taken as references to the LGOIMA.

<sup>2</sup> References to s 9(2)(b) OIA should be taken as references to s 7(2)(b) LGOIMA.

<sup>3</sup> References to s 9(2)(i) OIA should be taken as references to s 7(2)(h) LGOIMA.

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## What the Act says

The starting point for considering any request for official information is the **principle of availability**. That is, information must be made available on request unless there is a good reason for withholding it.<sup>4</sup>

Reasons for refusal fall into three broad categories: conclusive reasons,<sup>5</sup> good reasons,<sup>6</sup> and administrative reasons.<sup>7</sup> There are two ‘good reasons’ that relate specifically to the withholding of commercial information.

Section 9(2)(b) of the OIA applies where withholding is necessary to:

- (b) *protect information where the making available of the information—*
  - (i) *would disclose a trade secret; or*
  - (ii) *would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information.*

Section 9(2)(i) of the OIA applies where withholding is necessary to:

- (i) *enable a Minister [or agency] holding the information to carry out, without prejudice or disadvantage, commercial activities.*

‘Good reasons’ are subject to a ‘public interest test’, meaning that if they apply, agencies must consider the countervailing public interest in release. If the public interest in release outweighs the need to withhold, the information must be released. See our [Public interest](#) guide for detailed information on how to do the public interest test.

It should also be noted that agencies may refuse to confirm or deny that requested information even exists where the very act of doing so would itself prejudice the interest protected by section 9(2)(b)(ii).<sup>8</sup>

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<sup>4</sup> See s 5 OIA and LGOIMA.

<sup>5</sup> See ss 6 and 7 OIA and s 6 LGOIMA. ‘Conclusive’ reasons are not subject to a ‘public interest test’, meaning that if they apply, there is no need to consider any countervailing public interest in release.

<sup>6</sup> See s 9 OIA and s 7 LGOIMA. ‘Good’ reasons are subject to a ‘public interest test’, meaning that if they apply, agencies must consider the countervailing public interest in release.

<sup>7</sup> See s 18 OIA and s 17 LGOIMA. ‘Administrative’ reasons for refusal are not subject to a ‘public interest test’, meaning that if they apply, there is no need to consider any countervailing public interest in release.

<sup>8</sup> See s 10 OIA and s 8 LGOIMA.

## Glossary

**Necessary** means reasonably necessary.<sup>9</sup>

**Would be likely** means there is a serious or real and substantial risk.<sup>10</sup>

**Prejudice** means to impair.<sup>11</sup>

**Disadvantage** is less adverse than *'prejudice'*, and means an unfavourable outcome.<sup>12</sup>

An entity with a **commercial position** is one that engages in **commercial activities**.

**Commercial activities** are ones carried out for the predominant purpose of generating a profit or gain.

## Other relevant provisions

### Confidentiality

A lot of commercial information will also be confidential. If the commercial information is subject to an obligation of confidence, or was supplied under compulsion, and disclosure would prejudice the ongoing supply of information that is in the public interest, or otherwise damage the public interest, agencies should consider the application of section 9(2)(ba) of the OIA.<sup>13</sup> See our Practice Guidelines for more information on section 9(2)(ba): [Confidentiality](#).

### Confidentiality clauses

Some commercial contracts include confidentiality clauses. However, the parties to these contracts should be aware that they cannot contract out of the OIA (or LGOIMA). As the High Court said in *Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council (Wyatt)*:<sup>14</sup>

*There cannot be allowed to develop in this country a kind of commercial Alsatia beyond the reach of a statute. Confidentiality is not an absolute concept admitting of no exceptions... It is an implied term of any contract between individuals that the promises of their contract will be subject to statutory obligations. At all times the applicant would or should have been aware of the provisions of the Act and in particular s 7, which effectively excludes contracts on confidentiality preventing release of information.*

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<sup>9</sup> This is based on the High Court judgment in *Television New Zealand Ltd v Ombudsman* [1992] 1 NZLR 106 at 118. In 2015, without reference to this earlier judgment, the High Court interpreted *'necessary'* to mean *'essential'* (*Kelsey v the Minister of Trade* [2015] NZHC 2497). However, the Ombudsman prefers a test of reasonable necessity over one of strict necessity.

<sup>10</sup> *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 at 391.

<sup>11</sup> *Kelsey v the Minister of Trade* [2015] NZHC 2497 at paragraph 120.

<sup>12</sup> Note [11](#) at paragraph 142.

<sup>13</sup> See s 7(2)(c) LGOIMA.

<sup>14</sup> [1991] 2 NZLR 180 at 191.

## Negotiations

If the information relates to commercial (or other kinds of) negotiations, and withholding is necessary to enable the agency that holds it to carry on those negotiations without prejudice or disadvantage, agencies should consider the application of section 9(2)(j) of the OIA.<sup>15</sup> See our [Negotiations](#) guide for more information.

## What kinds of commercial information can be held by agencies?

With very few exceptions, the official information legislation applies to **all** information held by Ministers and agencies, regardless of its provenance. This means that agencies can end up holding a significant amount of commercial information.

Information may be held about **third party commercial entities** because of:

- **Procurement**—Many agencies will be involved in the purchase of goods and services and will hold a wide range of information relating to the procurement process. This can include information provided during a tendering process, details of a contract with a successful company, and performance information about a contractor.
- **Regulation**—Agencies who undertake regulatory activity may hold commercially sensitive information received in the course of their investigations or related to their functions, for example the issuing of licences.
- **Policy development**—During the formulation or evaluation of policy, an agency may seek information of a commercial nature. For example, if an agency is developing a policy aimed at promoting a particular industry, then it may request information from companies within that sector.
- **Policy implementation**—An agency may obtain commercial information in the process of implementing policy. For example, in order to encourage economic development, an agency may award grants to businesses. It may therefore hold information relating to its assessment of any applications submitted to it.
- **Public private partnerships**—Agencies may work with private sector partners, who may help to finance projects and deliver services. In such circumstances, the agency is likely to hold a significant amount of information about the funding of the partnership, as well as more general information relating to the partner's private business.

In addition, some agencies will hold information about **their own commercial activities**. This includes agencies whose core activities are commercial, such as State-owned enterprises, Crown research institutes, Crown financial institutions and Crown companies. However, even non-commercial agencies can, at times, engage in commercial activities. The committee that

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<sup>15</sup> See s 7(2)(i) LGOIMA.

recommended the enactment of the OIA acknowledged that these agencies should be able to compete on a level playing field:<sup>16</sup>

*Where the activity can be readily related to commercial practice, as in buying and selling, it seems reasonable that government should 'do and suffer', on behalf of its taxpayer-shareholders, no less confidentially than does the private sector.*

## Trade secrets

Subject to the [public interest test](#), section 9(2)(b)(i) provides good reason for withholding information where it is necessary to 'protect information where the making available of the information would disclose a trade secret'.

Put more simply, the test is whether release of the information at issue would disclose a trade secret. This withholding ground can protect the trade secrets of third parties or those of the agency holding the information.

If the trade secret is a third party's, the agency should consider consulting them about the harm that would flow from disclosure. You can find detailed guidance on how to do that, including template letters, in our guide: [Consulting third parties](#).

### A high threshold

Under section 9(2)(b)(i), there is no need to demonstrate that harm will flow from disclosure of a trade secret. Rather, harm is presumed to flow from disclosure of this special and highly secret class of commercial information.

For that reason, there is a high threshold for section 9(2)(b)(i) to apply. Information will only be protected if 'it can properly be classed as a trade secret',<sup>17</sup> and not merely because it is confidential or commercially valuable.

### What is a trade secret?

A 'trade secret' is information that is used (or is capable of being used) in a trade or business. It gives the owner of the information an advantage over their competitors, who do not know or use it. If disclosed, it would be liable to cause them real or significant harm.

As the name suggests, it is usually secret or highly confidential. The owner of the information must have taken steps to limit its dissemination, or at least not encouraged or permitted its widespread publication.<sup>18</sup>

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<sup>16</sup> Committee on Official Information. [Towards Open Government: General Report](#). (December 1980) at 19.

<sup>17</sup> *Faccenda Chicken Ltd v Fowler (Faccenda)* [1987] Ch 117; [1986] 1 All ER 617 at 138 (CA).

<sup>18</sup> *Lansing Linde Ltd v Kerr* (1990) 21 IPR 529 at 536 (CA).

It is not possible to provide a list of matters which will qualify as trade secrets. Examples include processes of manufacture such as chemical formulae, and designs or special methods of construction.<sup>19</sup>

Information does not have to be of a technical or scientific character to be a trade secret. However, the more technical the information, the more likely it will be a trade secret.<sup>20</sup>

There will need to be clear and convincing evidence to persuade the Ombudsman that non-technical business secrets (such as information about pricing, sales and customers) can *‘properly be classed as a trade secret’*. It is therefore better to consider such information under:

- section 9(2)(b)(ii) ([Unreasonable prejudice to a third party’s commercial position](#)); or
- section 9(2)(i) ([Prejudice or disadvantage to an agency’s commercial activities](#)).

## Factors to consider

The following factors can be considered in deciding whether information is a trade secret:<sup>21</sup>

1. the extent to which the information is known outside the owner’s business;
2. the extent to which it is known by persons engaged in the owner’s business;
3. measures taken by the owner to guard the secrecy of the information;
4. the value of the information to the owner and their competitors;
5. the effort and money spent by the owner in developing the information;
6. the ease or difficulty with which others might acquire or duplicate the secret.

The discussion below provides some examples of how these factors applied in cases considered by the Ombudsman.

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<sup>19</sup> Note [17](#) at 136.

<sup>20</sup> *Searle Australia v Public Interest Advocacy Centre (Searle)* (1992) 108 ALR 163 at 174 (FC).

<sup>21</sup> See *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* (1967) VR 37 at 50 (VSCA), citing the American *Restatement of the law of Torts* (1939, Volume 4, paragraph 757); *Re Organon (Australia) Pty Ltd and Department of Community Services and Health* (1987) 13 ALD 588 (AAT); and *Searle* above at note [20](#).

### The formulation of a pesticide

In case [166819](#), the Chief Ombudsman had ‘*no doubt*’ that the formulation of a pesticide was a trade secret. The formula had a major effect on the product’s toxicity, residue behaviour and efficacy, and determined whether it would sell. The owner had invested substantial effort and money in its development. It had taken great care to ensure the formulation did not fall into its competitors’ hands, and had shared the information with the New Zealand Government only in the strictest confidence. Once the formulation was in the public domain, competitors would be in a position to take advantage of it by, for example, developing a copycat product.

### Dispute resolution scheme reviewers’ training manual

In case [397786](#), the Ombudsman found that a dispute resolution scheme’s training manual for reviewers was not a trade secret. The manual was based on publicly available legislation and case law, as well as the principles of natural justice. It was not technical information, and could not be described as the product of ‘*creation or ingenuity*’. There was nothing secret about the reviews, and the content of the manual could be inferred from the way in which they were conducted. An earlier and substantially similar version of the manual was available online.

There was also little in the way of protocol for maintaining secrecy of the document. It was stored in a shared document drive, and not identified in any way as secret or confidential. It was not clear what advantage or value the manual would have for those outside of the organisation. The material did not disclose specialised process or proprietary information, nor did it appear to disclose information that would be beneficial to any entity seeking to compete. While it would be time-consuming to do, there would not be any great difficulty in duplicating the information.

### Test data

In case [165605](#), the Ombudsman found that test data in respect of certain medicines was not a trade secret, because anyone could carry out the same tests and arrive at the same information. Hence, it would be relatively easy to duplicate the supposed ‘*secret*’.

## Unreasonable prejudice to a third party’s commercial position

Subject to the [public interest test](#), section 9(2)(b)(ii) provides good reason for withholding information where it is necessary to ‘*protect information where the making available of the information would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information*’.

This section is directed at protecting the commercial interests of third parties—ie, **parties**



**other than the agency that holds the information.** The commercial interests of the holder of the information are catered for in section 9(2)(i) of the OIA (see [Prejudice or disadvantage to an agency's commercial activities](#)). The third party could, in theory, be another agency (for example, a Minister withholding information to protect the commercial position of a State-owned enterprise), but usually it will be a private entity.

Put simply, the test under section 9(2)(b)(ii) is whether release of the information at issue would be likely unreasonably to prejudice the third party's commercial position. The third party must be either the supplier or the subject of the information.

A mere assertion of prejudice will not be sufficient; nor will vague and unsubstantiated references to '*commercial sensitivity*' or '*confidentiality*'. Agencies must be able to:

1. demonstrate that the third party has a commercial position; and
2. explain how release of the information at issue would be likely unreasonably to prejudice that position.

It is important to consider all the information contained in a document, and not just the document as a whole. Commercial documents, such as contracts, can often be released in part without any prejudice.

The following elements are discussed in more detail below:

- [Commercial position](#)
- [Nature of the prejudice](#)
- [Likelihood of the prejudice](#)
- [Unreasonableness of the prejudice](#)

### Consultation with the third party

As noted above, this withholding ground is about protecting the commercial interests of third parties. Before making the decision on a request, it may be appropriate to consult the third party, or at least give them a heads up. Consultation is about treating the third party **fairly**—ensuring they have a chance to comment before information relating to them is released—and also about making the **best decision** on an OIA request. Third parties may have a better understanding of the sensitivity of the information than the agency. It is therefore important to understand their views, and give them appropriate weight. You can find detailed guidance on how to do that, including template letters, in our guide: [Consulting third parties](#).

## Commercial position

A third party will have a ‘commercial position’ if it engages in ‘commercial activities’.  
Commercial activities are ones carried out for the predominant purpose of generating **profit or gain**.<sup>22</sup>

Profit or gain means surplus over cost.<sup>23</sup> An activity aimed simply at cost recovery is not a commercial activity. To be a commercial activity requires more than a break-even pricing structure. However, it is not essential that a profit or gain is actually made. An activity can make a loss and still be commercial, so long as the generation of profit or gain was the original motivation.

A commercial position is different from a financial position. Third parties must manage their finances and expenditure prudently, but this does not establish that they have a commercial position. A profit motive is a prerequisite for this.

The type of third party does not necessarily determine whether it is engaged in commercial activities. For example, a charitable organisation may be involved in retailing or leasing property for the purpose of generating a profit or gain, which is then applied for charitable purposes. Where it is not obvious, the nature of the commercial activity giving rise to a third party’s commercial position will need to be clearly articulated.

### Non-profit organisations

The requirement for a commercial activity to have a profit motive may mean that section 9(2)(b)(ii) cannot protect information provided by, or relating to, organisations carrying out activities on a not-for-profit basis. However, there may be good reason to withhold such information under [other relevant provisions](#) (for example, see case [176647](#)).

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<sup>22</sup> The Ombudsman’s approach to the meaning of ‘commercial’ is based on dictionary definitions, which refer to the conduct of commerce and trade for the purposes of profit and loss, and case law, which has established that a profit motive is implied by the term ‘commercial’ activities. For example, see *Calgary (City) v Alberta (Assessment Appeal Board)* (1987) 77 AR 23 (QB); *Mayor of Timaru v South Canterbury Electric Power Board* [1928] NZLR 174; *M K Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405; *Commissioner of Inland Revenue v Carey’s (Petone and Miramar) Limited* [1963] NZLR 450; *Commissioner of Inland Revenue v United Dominions Trust Ltd* [1973] 2 NZLR 555 (CA); *Bevan Investments Ltd v Blackhall and Struthers (No 2)* [1978] 2 NZLR 97 (CA); *Lowe v Commissioner of Inland Revenue* [1981] 1 NZLR 326 (CA); *New Zealand Rail Ltd v Port Marlborough New Zealand Ltd* [1993] 2 NZLR 641 (CA); *Controller & Auditor-General, KPMG Peat Marwick & Brannigan v Davison* [1996] 2 NZLR 278 (CA); and *New Zealand Racing Industry Board v Attorney-General* [2003] NZAR 85.

<sup>23</sup> *Lowe v Commissioner of Inland Revenue* [1981] 1 NZLR 326 at 344.

## Nature of the prejudice

Agencies must identify the nature of the predicted prejudice: how precisely would release of the information at issue prejudice or impair the third party's commercial position?

Common ways that prejudice to a third party's commercial position may arise include:

- by disadvantaging them vis-à-vis their direct competitor (for example, by enabling competitors to copy or emulate successful products or strategies; or to undercut their prices and thereby undermine their customer / client base; or to block or pre-empt their marketing or business initiatives);
- by increasing their costs;
- by decreasing their income or profits;
- by damaging their negotiating position;
- by damaging their reputation leading to a loss of business or trade; or
- by damaging shareholder, customer or supplier confidence.

### What kinds of information might be prejudicial?

The following kinds of information might be prejudicial:

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|---|---|
| • Capital and operating expenditures        | • Pending or settled litigation   |
| • Contractor or supplier information        | • Pending contracts   |
| • Employee information                      | • Pending mergers and acquisitions  |
| • Financial arrangements                    | • Proposed new activities, products or business dealings                          |
| • Going concern or solvency issues          | • Sales and marketing plans   |
| • Manufacturing processes                   | • Pricing structures, detailed breakdowns of tenders, contracts or business plans |
| • Profit margins or other financial metrics | • Pending or future transactions or transactions that did not proceed             |
| • Due diligence information                 |   |

The table below has some examples of the types of prejudice that have been accepted by the Ombudsmen in the past.

Case	Type of information	Nature of the prejudice
<a href="#">473515</a>	Cost of digital and touch wall	Damage to negotiating position—other buyers would seek supply on similar terms which would undermine profitability.
<a href="#">454285</a>	Convention Centre business plan	Disadvantage vis-à-vis direct competitors—competitors could copy or adopt the company’s methodology and strategy giving them an advantage in similar tender processes, or in the operation of convention centres and other hospitality venues generally.
<a href="#">438343</a>	Business case and procurement plan	Damage to negotiating position by setting a benchmark for future projects and revealing information about projected costs.
<a href="#">428998</a>	Agreement between Wellington Airport and Singapore Airlines	Advantage to airports seeking to compete with Wellington Airport to negotiate deals with airlines. Advantage to airlines seeking to negotiate similar deals with Wellington Airport.
<a href="#">403242</a>	Last place of drink data	Damage to reputation leading to loss of trade.
<a href="#">357489</a>	Supporting information supplied by successful tenderer	Disadvantage vis-à-vis direct competitors—competitors could copy or adopt successful tenderer’s information in future negotiations or tenders.
<a href="#">350528</a>	Information about petroleum exploration application, including exploration strategy, and projected costs of particular operations	Disadvantage vis-à-vis direct competitors by revealing the locations of particular prospects or reserves. Damage to negotiating position by revealing information about projected costs.
<a href="#">341821</a>	List of commercial buildings requiring structural review	Loss of current and future tenants and adverse valuation and insurance effects.
<a href="#">340849</a>	Consideration for pending transaction	Damage to negotiating position in directly comparable transactions.
<a href="#">339333</a>	Salmon mortality data	Disadvantage vis-à-vis direct competitors by revealing management and husbandry techniques.
<a href="#">315756</a>	Operating costs, growth predictions and business strategy	Disadvantage vis-à-vis direct competitors—release of information such as port fees, fuel costs and labour costs could enable a competitor to better negotiate their own comparative costs, thereby enabling lower operating costs

Case	Type of information	Nature of the prejudice
		and lower customer charges. Release of strategies to grow a business, or minimise losses, would be likely unreasonably to damage a business's commercial position.
<a href="#">309109</a>	Estimated revenue of transport routes	Disadvantage vis-à-vis direct competitors by revealing strategies of successful tenderers.
<a href="#">302561 and 302600</a>	Film production proposals, costs and budgets	Disadvantage vis-à-vis direct competitors by revealing market opportunities.
<a href="#">176901</a>	Information about sales, expenses and revenue	Disadvantage vis-à-vis direct competitors, who could determine underlying product costs and undercut them.
<a href="#">174687</a>	Composition and ingredients of proposed new veterinary medicine	Disadvantage vis-à-vis direct competitors—competitors could bolster the marketing of their competing products, or block the entry of the new product, for example, by loading up distribution channels with special deals. Competitors could develop copycat products before the new product had been established in the market.

## Likelihood of the prejudice

Agencies must explain why the predicted prejudice *'would be likely'* to occur.

*'Would be likely'* means there is a serious or real and substantial risk.<sup>24</sup> Mere possibility or speculation is not sufficient.

The following factors may be relevant to this assessment.

<b>Nature and content of the information</b>	<ul style="list-style-type: none"> <li>• What would the information reveal and how could it be used by competitors?</li> <li>• The information at issue does not have to relate directly to the third party's commercial activities in order to prejudice its commercial position. However, prejudice is more likely to arise where it does.</li> <li>• Release of information that is detailed (for example, detailed pricing structures) is more likely to be prejudicial than release of high-level information (for example, total costs—see cases <a href="#">457760</a>, <a href="#">449159</a>, <a href="#">439321</a>, <a href="#">366653</a> and <a href="#">179073</a>).</li> </ul>
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<sup>24</sup> Note [10](#) at 391.

	<ul style="list-style-type: none"> <li>Release of information that is technical, or has intrinsic commercial value, is more likely to be prejudicial than release of information that is banal or obvious.<sup>25</sup></li> </ul>
<b>Extent to which the information is in the public domain</b>	<ul style="list-style-type: none"> <li>Is the information already in the public domain, for example, in published research papers, annual reports or trade journals (see cases <a href="#">462024</a>, <a href="#">339333</a>, <a href="#">315756</a>, <a href="#">302561/302600</a> and <a href="#">178767</a>)?</li> <li>Is the information already common knowledge among competitors in the particular industry (often referred to as 'know-how')?</li> <li>Is the information readily observable?</li> <li>Information that is already in the public domain, commonly known or readily observable is less likely to prejudice the third party's commercial position.</li> </ul>
<b>Age and currency of the information</b>	<ul style="list-style-type: none"> <li>How old is the information? Is it still current?</li> <li>The commercial sensitivity of information will often diminish with the passage of time, as prices, service delivery methods and market conditions change (see case <a href="#">340849</a>).</li> <li>Information that is old and/or out-of-date is less likely to prejudice the third party's commercial position (see cases <a href="#">462024</a> and <a href="#">315756</a> and <a href="#">178767</a>). For example, the value of information about a one-off transaction may be spent once it is completed.</li> </ul>
<b>Commercial context</b>	<ul style="list-style-type: none"> <li>What is the commercial context in which the third party operates and what is the significance of the information in that context?</li> <li>What is the degree of competition in the industry concerned? Consider the number of suppliers or providers and their market share (supply), and the number of buyers and their influence on the market or provider community (demand).</li> <li>It may be easier to establish the likelihood of commercial prejudice arising from release if the third party operates in a competitive environment (see case <a href="#">350528</a>), than from a monopoly position (see case <a href="#">176175</a>).</li> </ul>

<sup>25</sup> The information at issue in *Wyatt* (note [14](#)) 'seemed to the Court to be banal, and to state nothing above the obvious'. The Court observed, at page 189, that '[i]f a potential competitor was so far behind the applicant it could get benefit from those few simple statements it perforce could present no competitive danger to the applicant in its business'.

## Unreasonableness of the prejudice

It is not sufficient that there is a likely prejudice. The likely prejudice must be unreasonable. The inclusion of this qualifier does two things.

First, it introduces an **objective** test. The prejudice must be unreasonable from an objective standpoint, not just from the subjective point of view of the party whose commercial position is at stake.

Secondly, it introduces a **threshold**. **Minor or insignificant** prejudice may not be unreasonable. For example:

- In case [341821](#), the possibility of *‘some adverse publicity in the short term’* did not meet the threshold of *‘unreasonable’*.
- In cases [302561](#) and [302600](#), release that was potentially *‘unhelpful to business relationships’*, did not meet the threshold of *‘unreasonable’*.

By contrast, in case [174687](#), where a company had spent significant time, money and effort to develop a new product, a projected loss of up to 50 percent of sales was considered unreasonable.

In addition, prejudice that is **warranted or justified** may not be unreasonable. For example:

- In case [287978](#), disclosure of substantiated service breaches following a proper process would not unreasonably prejudice the commercial position of rest homes and hospitals.
- In case [179073](#), disclosure of cost information that would enable future tenderers to compete on an even footing would not unreasonably prejudice the successful tenderer’s commercial position.

By contrast, in case [341821](#), disclosure of unverified information about the structural safety of listed buildings would unreasonably prejudice the commercial position of the building owners, particularly when there was a clear process in place to verify the information, and the building owners had voluntarily agreed to participate in that process at their own cost.

In case [W31971](#), the Ombudsman found that a risk of litigation was not an *‘unreasonable’* prejudice: *‘litigation and the associated costs are an inherent risk of being involved in business’*.

## Prejudice or disadvantage to an agency’s commercial activities

Subject to the [public interest test](#), section 9(2)(i) provides good reason for withholding information where it is necessary to *‘enable a Minister [or agency] holding the information to carry out, without prejudice or disadvantage, commercial activities’*.

The test under section 9(2)(i) is whether withholding is **reasonably necessary** (see [Glossary](#)) to enable the agency to carry out commercial activities without prejudice or disadvantage. This

means there must be reason to believe that release would **prejudice or disadvantage** the agency in carrying out commercial activities. A mere assertion of prejudice or disadvantage will not be sufficient; nor will vague and unsubstantiated references to ‘*commercial sensitivity*’ or ‘*confidentiality*’. Agencies must be able to:

1. demonstrate that they are engaged in commercial activities; and
2. explain precisely how release of the information at issue would prejudice or disadvantage them in carrying out those activities.

It is important to consider the information contained in a document, and not just the document as a whole. Commercial documents, such as contracts, can often be released in part without any prejudice.

The following elements are discussed in more detail below:

- [Commercial activities](#)
- [Prejudice or disadvantage](#)

### Should the request be transferred?

The decision on release is usually best made by the agency carrying out the commercial activities. This is because it is best placed to identify the likely consequences of disclosure.

If the agency that received a request is concerned about another agency’s ability to carry out commercial activities, it should consider whether it is obliged to transfer the request to that agency because the information is more closely connected with that agency’s functions.<sup>26</sup>

## Commercial activities

Commercial activities are ones carried out for the predominant purpose of generating **profit or gain**.<sup>27</sup>

Profit or gain means surplus over cost.<sup>28</sup> An activity aimed simply at cost recovery is not a commercial activity. To be a commercial activity requires more than a break-even pricing structure. However, it is not essential that a profit or gain is actually made. An activity can make a loss and still be commercial, so long as the generation of profit or gain was the original motivation.

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<sup>26</sup> See s 14(b)(ii) OIA and s 12(b)(ii) LGOIMA. For more guidance on transfers see [The OIA for Ministers and agencies](#) or [The LGOIMA for local government agencies](#).

<sup>27</sup> Note [22](#).

<sup>28</sup> Note [23](#).



Commercial activities are different from financial activities. Agencies must manage their finances and expenditure prudently, and try to get best value for money, but this does not establish that they are engaged in commercial activities. A profit motive is a prerequisite for this.

Commercial concerns will be more critical for agencies whose core activities are commercial, such as State-owned enterprises, Crown research institutes, Crown financial institutions and Crown companies. As the committee that recommended the enactment of the OIA stated, *‘the closer the resemblance of the public commercial activity to that of competitive private business, the better the case for following precedents of commercial confidentiality’*.<sup>29</sup>

However, it is the **activity** that matters under section 9(2)(i), not the **type** of agency. Non-commercial agencies can also be engaged in commercial activities. For example, universities, while not traditionally commercial entities, may be involved in commercial activities, such as tendering for research contracts. Where the nature of the commercial activity is not obvious, it will need to be clearly articulated.

The Ombudsmen have found the following activities were not commercial when carried out by the agencies holding the information:

- the purchase of pharmaceuticals ([431098](#));
- providing tertiary education to domestic students ([347237](#));
- waste collection ([326125](#));
- parking enforcement ([179439](#));
- negotiating age-related residential care contracts ([173790](#));
- upgrading and redeveloping hospital buildings ([W41207](#)); and
- tendering for prison escort buses ([W34975](#)).

If the agency is not engaged in commercial activities, then section 9(2)(i) cannot apply. However, there may still be good reason to withhold the information under [other relevant provisions](#).

## Prejudice or disadvantage

*‘Prejudice or disadvantage’* means something more than just *‘unhelpful’*. *‘Prejudice’* means the agency’s ability to carry out the commercial activities would be **impaired**. *‘Disadvantage’* is less adverse than *‘prejudice’*, and in this context means the circumstances or conditions in which the agency carries out its commercial activities would be **less favourable** (see [Glossary](#)).

Agencies must be able to explain how release would prejudice or disadvantage them in carrying out commercial activities. They should identify the nature of the prejudice or

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<sup>29</sup> Note [16](#) at 35.

disadvantage and the likelihood of it coming to pass. The discussion under [Nature of the prejudice](#) and [Likelihood of the prejudice](#) is relevant here also.

Factors to consider in assessing the likelihood of the prejudice or disadvantage include:

- the [nature and content of the information](#);
- the [extent to which the information is in the public domain](#);
- the [age and currency of the information](#); and
- the [commercial context](#).

The table below has some examples of the types of prejudice or disadvantage that have been accepted by the Ombudsmen in the past.

Case	Type of information	Nature of the prejudice
<a href="#">297887</a>	Information re Department of Corrections pre-cast concrete manufacturing operation—names of customers refunded due to quality issues, and amount of refund	Disadvantage vis-à-vis direct competitors—competitors could target the Department’s customers, which could reduce the number and value of contracts won by the Department, and therefore its income and the long-term viability of the operation.  Damage to reputation leading to loss of trade—release could lead to a loss of confidence in the Department’s products, which would detrimentally affect sales.
<a href="#">W38354</a>	Information re Department of Corrections footwear manufacturing operation—asset purchase costs, sales projections, overhead, administrative and production costs, and volume production targets	Disadvantage vis-à-vis direct competitors—disclosure of purchase prices for the assets used to set up the operation would enable competitors to better understand the Department’s product costing methodologies and influence their own marketing strategies to the detriment of the Department’s commercial activities.
<a href="#">W35177</a>	Research done by Crown Research Institute (CRIs) for commercial clients	Damage to reputation / customer confidence leading to loss in trade—disclosure of client’s research to another party without their consent would prejudice CRI’s ability to obtain further contracts.

Case	Type of information	Nature of the prejudice
<a href="#">A12648</a>	TVNZ advertising campaign costs	Disadvantage vis-à-vis direct competitors—release would undermine TVNZ’s strategy to increase advertising revenue by allowing competitors to divert their own promotional funding to compete directly with TVNZ, or to target other areas where TVNZ is placing less emphasis, in an intensely competitive market for free-to-air advertising revenue.
<a href="#">A12172</a>	TVNZ footage	Disadvantage vis-à-vis direct competitors—release would limit value of footage to TVNZ, and other producers could use it, thereby disadvantaging TVNZ in carrying out its commercial activity as a broadcaster of news, current affairs and documentaries.

## The public interest in release

Sections 9(2)(b) and 9(2)(i) are subject to a ‘*public interest test*’ meaning that, if they apply, agencies must consider the countervailing public interest in release. If the public interest in release outweighs the need to withhold, the information must be released.

Some public interest considerations that may be particularly relevant in this context include:

- Transparency in the conduct of public sector procurement practices.
- Accountability for spending public money, in purchasing goods or services, or in awarding contracts, grants or subsidies (see, for example, cases [473515](#), [449159](#), [428998](#) and [366653](#)). As the High Court said in *Wyatt* ‘*it is fundamental that the public are to be given worthwhile information about how the public’s money and affairs are being used and conducted, subject only to the statutory restraints and exceptions*’.<sup>30</sup>
- Accountability for how regulatory agencies perform their functions, including undertaking investigations and awarding licences (see, for example, case [339333](#)).
- Promoting public safety and consumer protection. If an agency is a regulator, it may hold commercially sensitive information about the quality of a product or the practices of an organisation. There are strong public interest arguments in allowing access to information that will help protect the public from unsafe products or practices (see, for example, case [287978](#)).

In relation to commercial activities carried out by agencies, the committee that recommended the enactment of the OIA recognised that these are of a different character. It observed that ‘*not all government business activity has the profit-seeking, competitive colour of private*

<sup>30</sup> Note [14](#) at 190-191.

*enterprise'* and that commercial, social and economic objectives may become conjoined. It stated:<sup>31</sup>

*And where national matters of economic or social moment such as the pursuit of regional development or of fuller employment become objectives, taxpayers who are called upon to subsidise such quasi-commercial activities should be informed about strategies and costs.*

The result of the public interest balancing exercise will not always be full and unrestricted disclosure of the information at issue. There may be other ways that the competing interests favouring withholding and disclosure can be met, including partial release, release of summary information, and release of other information.

Detailed guidance on the application of the public interest test, and alternative ways of addressing the public interest, is available here: [Public interest—A guide to the public interest test in section 9\(1\) of the OIA and section 7\(1\) of the LGOIMA](#).

## Further information

Appendix 1 of this guide has a [step-by-step worksheet](#).

Appendix 2 has [case studies](#) illustrating the application of sections 9(2)(b) and 9(2)(i).

Other related guides include:

- [Confidentiality](#)
- [Negotiations](#)
- [The OIA and the public tender process](#)
- [Consulting third parties](#).

You can also contact our staff with any queries about commercial information on [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 an OIA request.

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<sup>31</sup> Note [16](#) at 19.

## Appendix 1. Commercial information work sheet

### Note:

This work sheet is about the commonly used grounds for withholding commercial information—sections 9(2)(b)(ii) (unreasonable commercial prejudice) and 9(2)(i) (commercial activities). Other withholding grounds may be relevant, including sections 9(2)(b)(i) (trade secrets), 9(2)(ba) (confidentiality) and 9(2)(j) (negotiations).

<b>1. Whose interests are at stake?</b>	<ul style="list-style-type: none"> <li>• If you are concerned about the commercial position of a third party other than the agency, go to step 2.</li> <li>• If you are concerned about the commercial activities of the agency, go to step 3.</li> </ul>
<b>2. Does section 9(2)(b)(ii) apply?</b>  <b>Relevant part of guide:</b> <a href="#">Unreasonable prejudice to a third party's commercial position</a>	<ul style="list-style-type: none"> <li>• Was the information supplied by the third party, or is it about them?</li> <li>• Does the third party have a <a href="#">commercial position</a>? To have a commercial position they must be engaged in commercial activities. Commercial activities are ones carried out for the predominant purpose of generating profit or gain.</li> <li>• Would release be likely unreasonably to prejudice their commercial position?             <ul style="list-style-type: none"> <li>- Identify the <a href="#">nature of the prejudice</a>.</li> <li>- Consider the <a href="#">likelihood of the prejudice</a>. There must be a serious or real and substantial risk. Relevant factors include the <a href="#">nature and content of the information</a>, the <a href="#">extent to which the information is in the public domain</a>, the <a href="#">age and currency of the information</a>, and the <a href="#">commercial context</a>.</li> <li>- Consider whether the prejudice would be <a href="#">unreasonable</a>. Prejudice that is minor or insignificant may not be unreasonable. Prejudice that is warranted or justified may not be unreasonable.</li> </ul> </li> <li>• Consider consulting the third party before making a decision. Find detailed advice and template letters in our <a href="#">Consulting third parties</a> guide.</li> <li>• Consider whether it is possible to release the information in part.</li> <li>• If section 9(2)(b)(ii) applies, go to step 3. Otherwise release the information (unless another withholding ground applies).</li> </ul>

<p><b>3. Does section 9(2)(i) apply?</b></p> <p><b>Relevant part of guide:</b></p> <p><a href="#">Prejudice or disadvantage to an agency's commercial activities</a></p>	<ul style="list-style-type: none"> <li>Is the agency engaged in <a href="#">commercial activities</a>? Commercial activities are ones carried out for the predominant purpose of generating profit or gain.</li> <li>Would release of the information at issue <a href="#">prejudice or disadvantage</a> them in carrying out those activities? <ul style="list-style-type: none"> <li>Identify the <a href="#">nature of the prejudice</a> or disadvantage.</li> <li>Consider the <a href="#">likelihood of the prejudice</a> or disadvantage. It should be so likely that withholding is reasonably necessary. Relevant factors include the <a href="#">nature and content of the information</a>, the <a href="#">extent to which the information is in the public domain</a>, the <a href="#">age and currency of the information</a>, and the <a href="#">commercial context</a>.</li> </ul> </li> <li>Always consider whether it is possible to release the information in part.</li> <li>If section 9(2)(i) applies, go to step 4. Otherwise release the information (unless another withholding ground applies).</li> </ul>
<p><b>4. Apply the public interest test</b></p> <p><b>Relevant part of guide:</b></p> <p><a href="#">The public interest in release</a></p>	<ul style="list-style-type: none"> <li>Identify any public interest considerations in favour of disclosure, for example, transparency in procurement processes, accountability for spending public money, accountability for performing regulatory functions, and promoting public safety and consumer protection.</li> <li>Consider whether these outweigh the need to withhold.</li> <li>See <a href="#">Public interest—A guide to the public interest test in section 9(1) of the OIA and section 7(1) of the LGOIMA</a> for more information.</li> </ul>
<p><b>5. Make a decision on the request</b></p>	<ul style="list-style-type: none"> <li>If the public interest in disclosure outweighs the need to withhold, the information must be released. If it doesn't, then it is open to the agency to refuse the request.</li> <li>Before refusing in full, consider partial release, release of summary information, or release of other information, in recognition of the public interest considerations, including those discussed above.</li> <li>See our <a href="#">Template letter 6: Letter communicating the decision on a request</a>.</li> </ul>

## Appendix 2. Case studies

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

Case number	Year	Subject	Outcome
473515	2018	<a href="#">Cost of digital and touch wall at new Christchurch Library</a> <i>Section 7(2)(b)(ii) LGOIMA applied—release would undermine supplier's negotiations with other buyers which would unreasonably prejudice its commercial position—however, there was an overriding public interest in disclosure of information regarding Council expenditure</i>	Release in full
462024	2018	<a href="#">Information about overseas investment application</a> <i>Section 9(2)(b)(ii) OIA did not apply—disclosure of publicly available and historic information would not unreasonably prejudice third party's commercial position</i>	Release in full
457760	2018	<a href="#">Total cost of legal fees</a> <i>Section 9(2)(b)(ii) OIA did not apply—release of total fees would not unreasonably prejudice third party's commercial position</i>	Release in full
454285	2018	<a href="#">Business plan for Christchurch Convention and Exhibition Centre</a> <i>Section 9(2)(b)(ii) OIA applied—competitors could copy or adopt third party's methodology and strategy and devise plans based on its established operating systems which would unreasonably prejudice its commercial position</i>	Good reason to withhold
449159	2018	<a href="#">Expenditure on goods and services provided by Palantir Technologies</a> <i>Section 9(2)(b)(ii) OIA did not apply—release of total cost would not unreasonably prejudice third party's commercial position—public interest in accountability for spending public money</i>	Release in full
428998	2018	<a href="#">Allocation of Council funds to provide marketing support for Singapore Airlines</a> <i>Section 7(2)(b)(ii) LGOIMA applied—releasing details of arrangement between Wellington City Council, Wellington Regional Economic Development Agency and Wellington Airport, to provide marketing support for Singapore Airline's Wellington-Canberra-Singapore route would enhance the negotiating position of other airports and airlines, thereby prejudicing the Airport's commercial position—remaining information required to be released in light of the public</i>	Release in part

Case number	Year	Subject	Outcome
		<i>interest in in accountability for spending public money, including total funds allocated by Council</i>	
439321	2017	<a href="#">Cost of recruiting Vice-Chancellor</a> <i>Section 9(2)(b)(ii) OIA did not apply—release of total cost would not unreasonably prejudice third party's commercial position—public interest in accountability for spending public money</i>	Release in full
438343	2017	<a href="#">Skypath business case and procurement plan</a> <i>Section 7(2)(b)(ii) LGOIMA applied—releasing business case and procurement plan would unreasonably prejudice the commercial position of the private partner in a public private partnership</i>	Good reason to withhold
435959	2017	<a href="#">Cost of leases on MSD's current and former premises</a> <i>Section 9(2)(b)(ii) OIA did not apply— release of total cost would not unreasonably prejudice third party's commercial position—this kind of information is often publicly available</i>	Release in full
431098	2017	<a href="#">PHARMAC and commercial activities</a> <i>Sections 9(2)(b)(ii) and 9(2)(i) OIA did not apply—PHARMAC did not have a commercial position and was not engaged in commercial activities</i>	Good reason to withhold, but not under sections 9(2)(b)(ii) or 9(2)(i)
403242	2016	<a href="#">Place of last drink ('Alco-link') data</a> <i>Section 9(2)(b)(ii) OIA applied—damage to reputation could lead to loss of business—outweighed by the public interest in promoting public participation in alcohol policy and licensing decisions</i>	Release in full
397786	2016	<a href="#">Dispute resolution scheme reviewers' training manual</a> <i>Section 9(2)(b)(i) OIA did not apply—information was not a trade secret—section 9(2)(i) OIA did not apply—although FairWay was engaged in commercial activities, it was not clear how disclosure would prejudice or disadvantage those activities—the manual was largely in the public domain, and there was little prospect of competition</i>	Release in full
340849 etc	2016	<a href="#">Consideration paid for overseas investments</a> <i>Section 9(2)(b)(ii) OIA applied in part—the risk of prejudice would diminish or extinguish entirely with the passage of time—where that risk remained the commercial viability of related future transactions was at stake</i>	Release in part



Case number	Year	Subject	Outcome
357489	2015	<a href="#">Supporting information provided by successful tenderer</a> <i>Section 9(2)(b)(ii) OIA applied—competitors could copy or adopt successful tenderer’s information in future negotiations or tenders, which would unreasonably prejudice their commercial position</i>	Good reason to withhold
350528	2015	<a href="#">Information about exploration permits awarded to Anadarko Petroleum</a> <i>Section 9(2)(b)(ii) OIA applied—revealing information about particular prospects or reserves would disadvantage third party vis-à-vis their competitors—revealing information about projected costs would disadvantage third party in its negotiations with service companies</i>	Good reason to withhold
347237	2015	<a href="#">Universities and commercial activities</a> <i>Section 9(2)(i) OIA did not apply—University research contracts and trading can be commercial activities—the provision of education to full fee-paying international students may be a commercial activity—but providing tertiary education to domestic students is not a commercial activity</i>	Release in full
315756	2015	<a href="#">Information about proposed Clifford Bay ferry terminal</a> <i>Section 9(2)(b)(ii) OIA applied to Interislander’s operating costs and growth predictions and business strategy—section 9(2)(b)(ii) OIA did not apply to information that was old and out-of-date, or publicly available, or related to the ferry terminal project which would not go ahead.</i>	Release in part
366653	2014	<a href="#">Cost of building naming rights</a> <i>Section 9(2)(b)(ii) OIA did not apply—release of total cost would not unreasonably prejudice third party’s commercial position—public interest in accountability for spending public money</i>	Release in full
341821	2014	<a href="#">List of commercial buildings requiring structural review</a> <i>Section 9(2)(b)(ii) OIA applied—release would prejudice owners’ commercial positions through loss of current and future tenants and adverse valuation and insurance effects—this would be unreasonable because the information was unverified and it would take some time to verify through no fault of the owners, and because the owners had agreed to participate in the review at their own cost</i>	Good reason to withhold

Case number	Year	Subject	Outcome
339333	2014	<a href="#">Interim report into a Chinook salmon mortality event</a> <i>Section 9(2)(b)(ii) OIA applied in part but outweighed by the public interest in disclosure—release of salmon mortality data that would reveal management and husbandry techniques would be likely unreasonably to prejudice the operator’s commercial position—release of information already in the public domain would not be likely to prejudice the operator’s commercial position—strong public interest in promoting public participation in board of inquiry process and accountability for performance of regulatory functions</i>	Release in full
179073 309109	2012 2014	<a href="#">Transport rates, cost and revenues per route</a> <i>Section 7(2)(b)(ii) LGOIMA did not apply to cost per route to the Council—any prejudice would not be unreasonable—section 7(2)(b)(ii) applied to revenue per route—this would reveal operators’ tender strategies, thereby prejudicing their ability to participate competitively in future tenders</i>	Release in part
302561 302600	2013	<a href="#">Information about the production of <i>The Hobbit</i></a> <i>Section 9(2)(b)(ii) OIA applied in part—release of film proposals, production costs and budgets would be likely unreasonably to prejudice third party commercial positions—release of information already in the public domain might be ‘unhelpful to business relationships’ but would not be likely unreasonably to prejudice third party commercial positions</i>	Release in part
326125	2012	<a href="#">Council waste management and commercial activities</a> <i>Section 7(2)(h) LGOIMA did not apply—Council waste management activities not commercial</i>	Good reason to withhold, but not under section 7(2)(h)
297887	2012	<a href="#">Prison industries and commercial activities</a> <i>Section 9(2)(i) OIA applied—pre-cast concrete operation was a commercial activity</i>	Good reason to withhold
287978	2011	<a href="#">Unannounced inspections of rest homes and hospitals</a> <i>Section 9(2)(b)(ii) OIA did not apply—release of adverse findings might damage providers’ reputations and therefore their commercial position, but this would not be unreasonable—the public has a right to know if providers have been found to have breached service standards at the conclusion of a full and fair process—public interest in promoting public safety and consumer protection</i>	Release in large part (names of complainants and consumers were not part of the request)

Case number	Year	Subject	Outcome
279056	2011	<a href="#">Audit report of approved organisation under the Animal Welfare Act</a> <i>Section 9(2)(b)(ii) OIA did not apply—not established that charitable trust had a commercial position, or that release of the information would be likely to prejudice that position, or that prejudice (if it occurred) would be unreasonable—information was not what might normally be described as ‘commercially sensitive’—the likelihood of generalised damage to reputation not established</i>	Release in full
179439	2010	<a href="#">Council parking enforcement and commercial activities</a> <i>Section 7(2)(h) LGOIMA did not apply—parking enforcement was a law enforcement activity not a commercial one</i>	Release in part
178767	2009	<a href="#">Hazardous Activities and Industries List</a> <i>Section 7(2)(b)(ii) LGOIMA did not apply—landholders not in the business of dealing in land did not have a commercial position—disclosure not likely to prejudice the commercial position of those who were in the business of dealing in land—the information was old and already publicly available</i>	Release in full
176901	2008	<a href="#">Company’s annual report</a> <i>Section 7(2)(b)(ii) LGOIMA applied—releasing cost of sales, expenses and revenue would enable competitors to determine the underlying cost of the company’s products and undercut them thereby prejudicing their commercial position</i>	Good reason to withhold
176647	2008	<a href="#">Tender submissions, evaluation of tenders and negotiation brief relating to ‘Ageing in Place’ contract</a> <i>Section 9(2)(b)(ii) OIA did not apply—it had not been demonstrated that the tenderer had a commercial position—section 9(2)(i) did not apply—DHB not engaged in commercial activities—section 9(2)(ba)(ii) applied to tender submissions—section 9(2)(g)(i) applied to evaluation of tenders and negotiating brief</i>	Good reason to withhold, but not under commercial withholding grounds
176175	2009	<a href="#">Charitable trust’s funding application</a> <i>Section 9(2)(b)(ii) OIA did not apply—charitable trust did not have a commercial position—even if it did, release of the information would not be likely unreasonably to prejudice it—The trust had no competitors, and was very different to other organisations in terms of its size, nature of operations and services</i>	Release in full

Case number	Year	Subject	Outcome
174687	2007	<a href="#">Composition and active ingredients of MEP600</a> <i>Section 9(2)(b)(ii) OIA applied—early release of product formulation would inform competitors of what will be brought to market, enabling them to impede the product’s entry or bolster their own marketing—the likely degree of impact would be unreasonable—public interest in promoting public participation did not outweigh the need to withhold</i>	Good reason to withhold
A12648	2007	<a href="#">TVNZ advertising campaign costs</a> <i>Section 9(2)(i) OIA applied—release would undermine strategy to increase advertising revenue</i>	Good reason to withhold
A12172	2007	<a href="#">TVNZ footage</a> <i>Section 9(2)(i) OIA applied—footage could be used by other producers and so disadvantage TVNZ in carrying out its commercial activity as a broadcaster of news, current affairs and documentaries.</i>	Good reason to withhold
173790	2006	<a href="#">DHBs and commercial activities</a> <i>Section 9(2)(i) OIA did not apply—negotiation of age-related residential care contracts not a commercial activity</i>	Release in full
165605	2004	<a href="#">Bioequivalence studies and dissolution data</a> <i>Section 9(2)(b)(i) OIA did not apply—information was not a trade secret—section 9(2)(ba)(ii) OIA applied—the risk of disclosure to competitors would make drug suppliers less likely to enter the New Zealand market</i>	Good reason to withhold, but not under section 9(2)(b)(i)
166819	2003	<a href="#">Ingredients of Foray 48B</a> <i>Section 9(2)(b)(i) applied—releasing ingredients of pesticide used in aerial spraying operation would disclose a trade secret—although public interest in disclosure finely balanced it did not outweigh the need to withhold in view of the steps taken by the government to ensure the safety of the aerial spraying operation</i>	Good reason to withhold
W41207	2001	<a href="#">Hospitals and commercial activities</a> <i>Section 9(2)(i) OIA did not apply—hospital and health services not engaged in commercial activities</i>	Release in full
W38354	1998	<a href="#">Prison industries and commercial activities</a> <i>Section 9(2)(i) applied—footwear manufacturing operation was a commercial activity</i>	Good reason to withhold

Case number	Year	Subject	Outcome
W35177	1996	<a href="#">Crown Research Institutes and commercial activities</a> <i>CRIs engaged in commercial activities—disclosure of research for commercial clients under the OIA would prejudice their ability to obtain further research contracts</i>	NA (comments on section 9(2)(i) were observations only)
W34975	1996	<a href="#">Tendering for prison escort buses and commercial activities</a> <i>Section 9(2)(i) did not apply—tendering for prison escort buses not a commercial activity</i>	Good reason to withhold, but not under section 9(2)(i)
W31971	1994	<a href="#">Names of transcript companies</a> <i>Section 9(2)(b)(ii) did not apply—risk of litigation is not an unreasonable prejudice—public interest in release of information enabling pursuit of legal rights and remedies</i>	Release in full

### Case 473515 (2018)—Cost of digital and touch wall at new Christchurch Library

A requester sought the cost of a digital and touch wall installed at the new Christchurch Library. The Christchurch City Council refused the request under section 7(2)(b)(ii) of the LGOIMA, and the requester complained to the Ombudsman.

The Council argued that release of the cost would be likely unreasonably to prejudice the commercial position of the supplier. The supplier was engaged in negotiations with overseas buyers. If the cost of the wall was disclosed, the overseas buyers might demand that same price. This would severely affect the supplier's profitability in that market, and be detrimental to future negotiations with prospective customers. It might also aggrieve existing customers who had paid a higher price, and thus impact on future repeat business. The Council also argued that the public interest in disclosure of the cost did not outweigh the need to withhold the information because it was only a small proportion of the total cost of the new library.

The Ombudsman noted that the potential for disclosure of such commercial information is part of doing business with a public sector organisation in New Zealand. However, he accepted that the supplier operated in a global market and that its main focus was on the international market, given the small size of the domestic market. Bearing this in mind, along with the fact that the supplier had several international deals under negotiation at the time, he was persuaded that the supplier's commercial position would be unreasonably prejudiced by disclosure of the information at issue.

However, the Ombudsman also considered there was a substantial countervailing public interest in the availability of information about costs of products and services procured by local and central government agencies: *'In my view ... there is an overriding public interest in the availability of adequate information regarding expenditure by Council on the delivery of services to the public, which in turn promotes good government'*.

The Ombudsman formed the opinion that the interest in withholding the total cost of the digital and touch panels under section 7(2)(b)(ii) was outweighed by the public interest in availability of the cost information to promote the accountability and transparency of the Council. He recommended that the cost be disclosed.

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### Case 462024 (2018)—Information about overseas investment application

The National Business Review (NBR) asked the Overseas Investment Office (OIO) for copies of all relevant decision documents in relation to André and Malgorzata Calantzopoulos's acquisition of property in Northland. NBR complained to the Ombudsman after the OIO withheld information concerning the assessment of whether the applicants were of *'good character'*, including allegations considered as part of that assessment.

The information was withheld under section 9(2)(b)(ii) of the OIA (unreasonable

commercial prejudice). The OIO considered that release of the allegations *‘together in a single document’* would unreasonably prejudice Philip Morris’s commercial position, and that competitors might use the allegations to adversely affect Phillip Morris’s reputation. André Calantzopoulos was Chief Executive Officer of Phillip Morris.

The Ombudsman noted that information about the allegations was publicly available, and could be obtained through various searches on the internet. He accepted that details of the allegations themselves may well have been commercially prejudicial to Phillip Morris at some time in the past. However, the allegations were now publicly available and there had been significant public commentary on the various matters over time. Many of the allegations were historic, with the earliest allegation relating to activities in 2003/2004.

The Ombudsman did not consider that the release of this information at the time of the OIO’s decision, and in this context, would further prejudice Phillip Morris’s commercial position. Competitors were already able to use the publicly available information about Phillip Morris, and had been able to for some time.

Read the full case note [here](#).

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### Case 457760 (2018)—Total cost of legal fees

Bay of Plenty District Health Board (DHB) refused to disclose the total fees paid to a law firm in relation to an employment dispute under section 9(2)(b)(ii) because disclosure would unreasonably prejudice the law firm’s commercial position. The requester complained to the Ombudsman.

The DHB argued that release of information about the law firm’s billing structure would provide competitors with an unfair advantage in tendering for the provision of external legal services.

The Ombudsman accepted that the information was commercial information that related to the law firm’s commercial position. He acknowledged that the provision of legal services is a competitive area. Had this case concerned release of the hourly billing rate or fee structure, and/or the number of hours spent in relation to the matter, or any maximum fee that might be incurred in relation to any case, then he may have accepted the DHB’s concern that such information could be used by competitors to obtain a competitive advantage, especially when tendering for the provision of external legal services.

However, the information at issue was the total fees. It would not reveal any details of the successful tender for external legal services, or how the fee structure was determined. Release of this high-level information would not be likely unreasonably to prejudice the law firm’s commercial position. The Ombudsman recommended that the information be disclosed.

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### Case 454285 (2018)—Business plan for Christchurch Convention and Exhibition Centre

Ōtākaro Limited refused a request for the business plan for the Christchurch Convention and Exhibition Centre (CCEC) under sections 9(2)(b)(ii) of the OIA, and the requester complained to the Ombudsman.

The Ombudsman clarified that the business plan was produced by a third party (a company that provided hospitality services), in the course of the CCEC Operator Services Tender. It was a business plan for the delivery of operator services, as opposed to a business plan for the wider CCEC project.

The Ombudsman described the business plan as commercially sensitive information about the author company's prospective business operations. It included budgets and marketing strategies, revenue targets, projected operating costs, proposed personnel structure, IT plans and supplier procurement.

The Ombudsman considered that the company's commercial position would be likely to be unreasonably prejudiced by release of the business plan through the disclosure of its methodology and strategy, acquired through worldwide operation of convention centres and other hospitality venues, together with specific adaptations for the Christchurch market. This would give the company's competitors an advantage over it in similar tender processes, or in the operation of convention centres and other hospitality venues generally. Given that the company had worldwide operations, release of the business plan would likely prejudice its ability to bid for other projects internationally, as competitors could devise plans based on its established operating systems.

The Ombudsman acknowledged a public interest in release of information to demonstrate that the tender process was fair and robust. However, release of this particular business plan would not promote accountability for the tender process. The business plan comprised one party's views as to the day-to-day running of the CCEC, as opposed to elucidating the underlying rationale for the CCEC business model, or the selection criteria applied by Ōtākaro to the various third parties engaged to manage different aspects of the CCEC business. The Ombudsman therefore concluded that section 9(2)(b)(ii) provided good reason to withhold the business plan.

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### Case 449159 (2018)—Expenditure on goods and services provided by Palantir Technologies

A requester sought the annual total spent by the New Zealand Defence Force (NZDF) on goods and services provided by Palantir Technologies. The NZDF refused the request under section 9(2)(b)(ii) (unreasonable commercial prejudice) and the requester



complained to the Ombudsman.

The NZDF argued that release would allow Palantir's competitors, and current and future customers, to gather some idea of its market and/or pricing strategy, which would lead to:

- existing customers of Palantir seeking to renegotiate their contracts to the detriment of Palantir; and
- Palantir's negotiating position in current and future contractual negotiations being weakened.

The Chief Ombudsman was not persuaded that release of the annual total would be likely to unreasonably prejudice Palantir's commercial position. He accepted there was the potential for Palantir's competitors and current and future customers to gain a limited insight into its market strategy, to the extent that it may reveal that Palantir offered discounts to customers it wished to attract. However, it was necessary to consider the likelihood of the potential harm.

The NZDF had withheld information about the nature of the goods and services provided by Palantir under section 6(a) of the OIA (national security). Because the precise nature of those goods and services was not publicly known, there was no evident risk that competitors could use that information in concert with costing information to deduce Palantir's pricing strategy to any level of accuracy. While release of the information at issue might transmit a minor indication of its market strategy to Palantir's competitors and customers, it would not be revelatory to any significant extent.

The Chief Ombudsman also concluded that, even if section 9(2)(b)(ii) of the OIA applied, the need to withhold would be outweighed by the public interest in disclosure. There is significant public interest in disclosing information which gives transparency to how public funds are spent. Transparency can enhance levels of citizens' trust in government, and maintains integrity in the public sector. The release of information of this type encourages good financial management and discourages corruption.

The Chief Ombudsman recommended that the information be disclosed.

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### Case 428998 (2018)—Allocation of Council funds to provide marketing support for Singapore Airlines

Wellington City Council received a request for written material considered by the Council's Chief Executive as part of the decision to provide '*Destination Wellington*' funds to Wellington Airport. The Airport intended these funds to market Singapore Airlines' Wellington-Canberra-Singapore route.

The Council released five documents in response, but made deletions on the basis that disclosure would be likely unreasonably to prejudice the commercial position of the

Airport. The requester sought an investigation and review of this decision by the Ombudsman, contending that the information provided did not enable him to assess whether the expenditure was prudent, or whether it made a difference to Singapore Airlines' establishment of the route.

The Council argued that release of details of the Airport's arrangement with Singapore Airlines would prejudice the Airport's ability to negotiate with other airlines that might want to start services to Wellington. It submitted that providing competitor airports with an *'understanding of how [Wellington Airport] structures and quantifies its support arrangements and the details of Council's assistance would place other airports at a distinct commercial advantage'*.

The Ombudsman accepted that section 7(2)(b)(ii) of the LGOIMA applied to details of the Airport's arrangement with Singapore Airlines. He stated:

*[A]irports, not just airlines, are essentially in competition with one another for passengers, because higher passenger numbers coming through an airport increases revenue. Airports attempt to attract new airlines and destinations and, therefore, new passengers through arrangements such as the one in this case. Wellington Airport's concern is that if details of its arrangement were released, it would make its future negotiations of similar arrangements more difficult and prejudice its ability to increase passenger numbers and, therefore, revenue.*

Knowledge of the Council's payments would also encourage other parties to believe that type or level of assistance would be available in other cases, thereby prejudicing unreasonably the Airport's position in future negotiations.

However, the Ombudsman also considered that, given the information at issue related to a decision to spend public money, there was an inherent public interest in release of much of it. He noted the High Court's statements in *Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council* that *'it is fundamental that the public are to be given worthwhile information about how the public's money and affairs are being used and conducted, subject only to the statutory restraints and exceptions'*.<sup>32</sup>

Ultimately, the Ombudsman considered good reason existed to protect the most sensitive information, including the written agreement between the Council and the Airport and the structure of the Council's potential payments. The Ombudsman recommended that the remaining information be disclosed in the public interest, including the total dollar figure that the Council could be required to pay over the time period committed to.

You can read the full case note [here](#).

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<sup>32</sup> Note [14](#) at 190-191.

### Case 439321 (2017)—Cost of recruiting Vice-Chancellor

Lincoln University refused a request for the total cost of recruiting the Vice-Chancellor under sections 9(2)(b)(ii) (unreasonable commercial prejudice) and 9(2)(j) (negotiations),<sup>33</sup> and the requester complained to the Ombudsman.

In relation to section 9(2)(b)(ii), the University argued that release of the recruitment consultant's pricing information would impact on its ability to tender successfully for future work, which would affect its profitability.

The Ombudsman was not persuaded that section 9(2)(b)(ii) applied. The information did not reveal the consultant's fee structure or pricing policies, or the amount of work done for the fees paid. It was therefore not clear how disclosure of the total cost would be likely unreasonably to prejudice the commercial position of the consultant. The total cost comprised the consultant's fee, plus additional costs for advertising, accommodation, travel, toll calls and other disbursements.

The University suggested that it would be possible to calculate the consultant's fee from the total costs because the additional fees were standard throughout the industry and as a result it would be possible to estimate these. However, the Ombudsman was not convinced of this. The additional fees were dependent on a number of factors that would vary according to the circumstances of the particular recruitment process, for example, the travel component of the fee was dependent on whether the applicants were locally or internationally based.

The Ombudsman also considered that the public interest considerations in transparency and accountability for expenditure of public funds outweighed any interest in withholding. He noted the view of successive Ombudsmen that there is a strong public interest in the release of information about the employment of consultants in the public sector, including the fees paid for their services.

The University agreed to release the information after considering the Ombudsman's comments and the complaint was resolved.

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### Case 438343 (2017)—Skypath business case and procurement plan

A requester sought deleted sections of an Auckland Council Committee meeting agenda. The deleted sections contained the business case and public private partnership (PPP) procurement plan for the SkyPath project.<sup>34</sup>

The Council refused the request under sections 7(2)(b)(ii) (unreasonable commercial

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<sup>33</sup> The application of s 9(2)(j) in this case is discussed in our [Negotiations](#) guide.

<sup>34</sup> A project to construct a semi-enclosed pathway underneath the city-side of the Auckland Harbour Bridge.

prejudice), 7(2)(c)(i) (confidentiality) and 7(2)(i) (negotiations) of the LGOIMA, and the requester complained to the Ombudsman. The Ombudsman concluded that there was good reason, under all of these provisions, to withhold the information.<sup>35</sup>

In relation to section 7(2)(b)(ii), the Ombudsman noted that the affected third party was the private partner to the PPP agreement, the Public Infrastructure Partners (PIP) Fund. As an investment entity that aims to produce a profitable return for its investors, the PIP Fund clearly had a commercial position. The question was whether release of the information at issue *'would be likely unreasonably to prejudice'* that commercial position.

The information included project costing figures, revenue estimates and proposed underwriting arrangements still to be negotiated between the Council and the PIP Fund. The Ombudsman was satisfied that releasing this information would be likely unreasonably to prejudice the ability of the PIP Fund to negotiate future PPP agreements, in particular those involving underwriting agreements.

Disclosure of the commercial terms under which the PIP Fund appeared likely to enter into a PPP with the Council in the case of the SkyPath, risked setting a benchmark for future projects, thus impacting upon its ability to negotiate more favourable terms in the future. Disclosure of construction cost projections would also impact on the ability of the PIP Fund, which was to fund the cost of constructing SkyPath, to obtain competitive tenders from contractors by revealing already anticipated costs and thus creating a *'price floor'*.

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### Case 435959 etc (2017)—Cost of leases on MSD's current and former premises

Opposition Research Units requested the cost of leases held at MSD's current and former premises. MSD refused the requests under sections 9(2)(b)(ii) (unreasonable commercial prejudice) and 9(2)(j) (negotiations), and the requesters complained to the Ombudsman. The Ombudsman concluded that neither of these provisions provided good reason to withhold the information.<sup>36</sup>

In relation to section 9(2)(b)(ii), the Ministry argued that releasing the rent paid would impact on the property owner's ability to negotiate rent for that property and for their other properties. Other property owners could utilise this information to entice tenants from one building to another.

The Ombudsman accepted that the property owners had a *'commercial position'* as they were in the business of leasing commercial properties. However, it was not clear that unreasonable prejudice would result to that position if the requested information was to be made available.

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<sup>35</sup> The application of s 7(2)(i) in this case is discussed in our [Negotiations](#) guide.

<sup>36</sup> The application of s 9(2)(j) in this case is discussed in our [Negotiations](#) guide.

The Ministry submitted that disclosure of the information would reveal the owner's pricing strategy. However, even if other lessees or lessors were to use this information in the context of their own negotiations for the lease of property, it was a significant leap to suggest that this knowledge would be likely to unreasonably prejudice the commercial position of those who owned the buildings.

The Ombudsmen have rarely been persuaded that disclosure of a total cost for services/goods provided to a public body would prejudice anyone's interests. Certainly, there has been no suggestion that previous disclosures of this nature have deterred private sector entities from conducting business with the public sector, nor resulted in a prejudice to the commercial position of a private sector entity.

An internet search showed that similar information was available in respect of other agencies. Other agencies, including local authorities, had previously disclosed this information to requesters in the course of resolving complaints made to the Ombudsman. Average rates within a market are also well known.

In addition, the reason MSD vacated its former premises was to allow a full redevelopment of the site. The rent paid before redevelopment would bear no correlation to the rent that might be expected after redevelopment. Disclosure of the latter information was therefore highly unlikely to prejudice the commercial position of the owner in future transactions.

The lease in respect of MSD's current premises was very long. It seemed unlikely that the rent to be paid for a long-term tenancy, with negotiated incentives and various expenditures, could impact on a possible negotiation for that premises when the lease concluded.

The Ombudsman observed that there are a number of factors that contribute to the negotiation of leases, including but not limited to the location, size, and condition of the premises; amenities and operational expenses; the term of the lease and '*security*' of the lessee; the suitability of the premises for the intended use, and any expenditure required to alter this; incentives that may be negotiated; and market factors (such as availability).

In light of the multiple relevant factors leading to a negotiated rent, the Ombudsman did not agree that disclosure of the rental costs would reveal pricing strategy. The Ministry's suggestion that disclosure of the rates paid for individual tenancies held by a particular lessee, at a particular time, and for particular properties would prejudice the ability of the property owner to negotiate on other, different properties, was unconvincing.

Because the Ombudsman did not consider that section 9(2)(b)(ii) applied, he did not have to consider the public interest in release. However, he observed that there was a strong public interest in release. That public interest related to the Ministry's accountability in respect of public expenditure, particularly where it was a long-term and ongoing cost incurred by the taxpayer.

The Ombudsman also noted that his opinion in this case only applied to the requests at

hand. It did not mean that, in all circumstances where a request is received for the rent/lease costs paid by a government agency, the information must be disclosed. Each request must be considered on its own merits. There may very well be circumstances surrounding a request that mean disclosure of the information would be likely to prejudice a protected interest under the OIA, or that disclosure of total amounts, rather than a breakdown, is appropriate.

The Ombudsman recommended that the information be disclosed. You can read the full case note [here](#).

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### Case 431098 (2017)—PHARMAC and commercial activities

The Minister of Health refused a request for information associated with PHARMAC's 2016/17 budget bid, and the requester complained to the Ombudsman. The Minister relied on section 9(2)(b)(ii) of the OIA, on the basis that disclosure would unreasonably prejudice Pharmac's commercial position.

The Ombudsman noted that, in order to have a commercial position to protect, an entity must undertake commercial activities. PHARMAC stated that the relevant commercial activities were the procurement and negotiation of commercial arrangements for the supply of pharmaceuticals. The prejudice or disadvantage would be the disclosure to suppliers of information regarding PHARMAC's willingness to pay, with opportunities for gains to New Zealanders' health forgone as a result. PHARMAC commented that most pharmaceutical suppliers are large and sophisticated corporations who closely monitor information in the public arena and who would immediately factor such information into their commercial strategies.

However, the Ombudsman saw no reason to depart from the established approach of other Ombudsmen that, for the purposes of the OIA, PHARMAC does not undertake commercial activities by purchasing medicines. PHARMAC uses similar techniques that a commercial enterprise would employ to maximize profit, in seeking to secure the supply of a pharmaceutical for the best price. However, PHARMAC is not in competition with any other agency nor is it pursuing a profit. This means that sections 9(2)(b)(ii) and 9(2)(i) of the OIA are not available as withholding grounds.

The Ombudsman considered that section 9(2)(j) (negotiations) applied to at least some of the information at issue.<sup>37</sup>

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<sup>37</sup> The application of s 9(2)(j) in this case is discussed in our [Negotiations](#) guide.

### Case 403242 (2016)—Place of last drink (*'Alco-link'*) data

The media asked the New Zealand Police for data showing where people were last drinking before being arrested or charged. Police refused the request under section 9(2)(b)(ii), on the basis that disclosure would unreasonably prejudice the commercial position of high-ranking premises.

The Ombudsman accepted that:

*...the public could draw incorrect and prejudicial conclusions about the quality and reputation of (in particular) high ranking premises and whether licensed premises have been abiding by the terms of their licence.*

Diminished reputation could lead to a loss of patronage, which would be likely to unreasonably prejudice the commercial position of the businesses.

However, the Ombudsman considered that the need to withhold was outweighed by the public interest in release. *'There is a very high public interest in public participation in the laws and policies relating to alcohol in our communities'*. All relevant evidence (including place of last drink data) should be available to promote effective participation by the public in the consultation process before a local alcohol policy is implemented. Likewise, all evidence should be available to individuals objecting to an application for a licence or to call into question a decision of a District Licensing Committee.

The Ombudsman considered that the Police's concerns about the robustness of the data could be addressed by disclosure with a contextual statement.

The Police released the data after considering the Ombudsman's provisional opinion, and the complaint was resolved.

You can read the full case note [here](#).

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### Case 397786 (2016)—Dispute resolution scheme reviewers' training manual

A requester asked FairWay Resolution Ltd for a copy of its reviewers' training manual. At the time, Fairway was a Crown-owned company (it is now an employee-owned company, and no longer subject to the OIA), providing resolution services, including review of ACC claims decisions. FairWay refused the request under sections 9(2)(b)(i) (trade secrets) and 9(2)(i) of the OIA (prejudice or disadvantage to commercial activities). The requester complained to the Ombudsman.

#### Trade secrets

Fairway argued the manual had intellectual property value. It had spent considerable time and effort developing it, and it was only available on its internal shared drive.

The Ombudsman noted that the term *'trade secret'* within the context of the OIA is

concerned with highly secret information capable of indefinite protection. This is separate from provisions accommodating ‘*confidential information*’ (section 9(2)(ba)), and information that would prejudice a commercial position (section 9(2)(b)(ii)), or commercial activities (section 9(2)(i)).

The Ombudsman considered the [criteria for identifying a trade secret](#). The manual derived its content from relevant provisions of the Accident Compensation Act 2001, case law, and the requirements of natural justice and fair process. It outlined the process for the hearing of a review in accordance with those principles. It was not technical information. It was quite accessible and could not be described as the product of creation or ingenuity.

It was not the case, nor should it be, that FairWay required absolute secrecy about the manner in which it conducted reviews. The content of the manual could be inferred from the manner in which reviews were conducted. In addition, an earlier revision of the manual was available online, and there was little difference between that version and the one at issue.

The manual did not contain evidence of unique or special procedure developed by FairWay. While it might be time consuming to do so, there would not be any great difficulty in duplicating similar information. Indeed, aspects of the review process were outlined in other publicly available documents.

Beyond the fact that the manual was not published online, or made available to the public, there was little in the way of protocol for maintaining secrecy of the document. It was stored on a shared document drive. There were no restrictions on the staff members who could access it. The document was not labelled or identified as confidential. In the Ombudsman’s opinion, there was not the required degree of secrecy for the manual to qualify as a trade secret.

It was also not clear what advantage or value the manual would have for those outside of the organisation. The material did not disclose specialised process or proprietary information, nor did it appear to disclose information that would be beneficial to any entity seeking to compete (eg, pricing structures, time management practices, performance indicators, or terms arising from the contract for services).

The Ombudsman concluded the information in the manual did not amount to a trade secret. Although some effort had gone into its preparation, the information did not attract the necessary degree of secrecy or value to competitors. Prior disclosure and dissemination of the manual online undermined any claim to secrecy, and diminished the extent to which it could be considered necessary to withhold the information under section 9(2)(b)(i).

### **Prejudice or disadvantage to commercial activities**

Fairway argued the manual would provide an unfair advantage to its competitors, by giving them a precedent or template.



The Ombudsman noted that Fairway was an independent Crown-owned company providing a range of conflict management services, one aspect of which related to reviews under the Accident Compensation Act 2001. It was the only provider of review services to ACC, and operated under a contract for services.

The Ombudsman accepted that FairWay operated for the purpose of making a profit, particularly in regard to its alternative dispute resolution services. The Minister's Annual Letter of Expectations for 2014/15 clearly identified that FairWay was to operate '*profitably*', and to seek a broader customer base and new business opportunities. FairWay confirmed that it provided ACC review services for the purpose of making a profit, which might be contrasted with a requirement to merely maintain an operational surplus, or exercise prudent financial management.

However, it was not clear what prejudice or disadvantage would arise from disclosure of the manual, or what benefit could be derived by FairWay's purported competitors. The manual was largely a restatement of information from relevant sources. Its commercial value appeared to be only the limited benefit a competitor might derive from the fact of compilation of that material. An old, but comprehensively similar version of the manual was online, yet the Ombudsman had seen no evidence that this had led to any disadvantage.

Even if the Ombudsman was to be persuaded that disclosure of the manual could cause some prejudice to Fairway's commercial activities, the content of the manual did not suggest that it was necessary to withhold the information in order to protect that interest. The manual was derived from public sources and set out fairly elementary procedural requirements.

The likelihood of any prejudice arising was also unclear. FairWay had not identified prospective competitors, and was the only organisation to provide ACC with review services. Given that the manual was substantially similar to the earlier version available online, withholding was not necessary in order to avoid prejudice or disadvantage to FairWay's commercial activities. The information had largely been made available, although not by the agency itself.

The Ombudsman concluded that section 9(2)(i) did not apply.

### **Public interest**

Given the Ombudsman's conclusion that sections 9(2)(b)(i) and 9(2)(i) of the OIA did not apply, it was not necessary to consider the countervailing public interest in disclosure. However, the Ombudsman noted the public interest in claimants having access to information about the way Fairway conducts reviews. This was supported by section 22 of the OIA, which provides a right of access to internal rules and guidelines used to make decisions that affect people personally.

The Ombudsman concluded there was no good reason to withhold the manual. Fairway accepted the Ombudsman's opinion and released the manual.

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### Case 340849 (2016)—Consideration paid for overseas investments

The Overseas Investment Office (OIO) proactively releases on its website decision summaries for overseas investment applications granted and declined. In a majority of cases the decision summaries are published in full, but in some cases the information is withheld. The withheld information is most often the amount paid, or the '*consideration*'. It is often withheld under section 9(2)(b)(ii) of the OIA (unreasonable commercial prejudice).

For many years, CAFCA (the Campaign Against Foreign Control of Aotearoa) had routinely asked the OIO to provide it with the information withheld from published decision summaries. In most of those cases, the OIO had refused CAFCA's request in order to protect the privacy of the applicant (if they were an individual), or their commercial position (if they were a commercial entity). This resulted in 3-4 complaints to the Ombudsman each year.

In 2016, the Ombudsman considered a series of complaints relating to the withholding of the consideration in 108 decision summaries. The Ombudsman met with the OIO to discuss an efficient way of dealing with these complaints, and ways of improving the proactive release process.

The Ombudsman explained that the risk that disclosure of the consideration would prejudice an applicant's commercial position would diminish, or extinguish entirely, with the passage of time. The OIO accepted this, and agreed to review whether there was any longer a need to withhold the consideration in the 108 decision summaries at issue. After consulting the applicants, the OIO released the consideration in most cases.

In relation to four summaries, the Ombudsman accepted that withholding of the consideration in two cases was necessary to protect the applicants' privacy, and in two other cases, that disclosure would be likely to have an adverse effect on the commercial viability of related future transactions. For example, if an applicant was seeking to acquire interests of a similar nature, disclosing the consideration in a comparable transaction would likely prejudice its negotiating position. Prejudice was also likely to arise where an applicant may be negotiating other directly related contracts, or where the consideration effectively revealed information about an applicant's pricing or valuation strategy.

In relation to the proactive release process, if the OIO determines that there is good reason to withhold the consideration when the decision summary is first published, that information will be withheld for a fixed period of 12 months or until it becomes public knowledge, whichever is sooner. The onus is on applicants to contact the OIO if they consider that there are still good grounds under the OIA for withholding the information after that period.

You can read the full case note [here](#).

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### Case 357489 (2015)—Supporting information supplied by successful tenderer

The Ministry of Education awarded a contract to provide transport services to Tenderer A, on the basis that they received higher points during the qualification phase of the tender. Tenderer B sought the number of points awarded to Tenderer A, and the information they supplied during the qualification phase. The Ministry refused the request under section 9(2)(b)(ii) (unreasonable commercial prejudice), and Tenderer B complained to the Ombudsman.

The Ministry released some of the information, including the number of points awarded to tenderer A, during the investigation. The Ombudsman formed the opinion that there was good reason to withhold the remaining information.

The Ombudsman described the information at issue as:

*...consist[ing] of extensive information relating to [Tenderer A's] staff employment conditions, drivers' qualifications and experience, policies and procedures relating to staff induction, training, assessment and monitoring ... tender requirements, complaint handling and other matters.*

The Ombudsman accepted that there was a 'serious or real and substantial risk' that:

*[Tenderer A's] commercial position would be prejudiced by other tenderers (in future tenders or negotiations with the Ministry) seeking to negate [Tenderer A's] competitive advantage by copying or adopting the information at issue.*

This prejudice would be unreasonable because of the amount of time and effort Tenderer A put into developing the information at issue.

You can read the full opinion [here](#).

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### Case 350528 (2015)—Information about exploration permits awarded to Anadarko Petroleum

Anadarko Petroleum was awarded two petroleum exploration permits in the annual 'Block Offer' process run by New Zealand Petroleum and Minerals (part of the Ministry of Business, Innovation and Employment—MBIE). A requester sought all information held about Anadarko's application. MBIE refused the request under a number of grounds including section 9(2)(b)(ii) (unreasonable commercial prejudice), and the requester complained to the Ombudsman.

The information at issue included:

- seismic data used to assess the chances of a commercial accumulation of petroleum

being present;

- information reflecting Anadarko's exploration strategy;
- financial information, including projected costs for particular operations; and
- the Block Offer assessment panel's evaluation of Anadarko's applications, including the technical data, the work programme, the company's financial capability, and its technical capability.

The Chief Ombudsman found that sections 9(2)(b)(ii) and 9(2)(ba)(i) and (ii) (confidentiality) of the OIA applied, and were not outweighed by the public interest in disclosure.

In relation to section 9(2)(b)(ii), the Chief Ombudsman noted that the information clearly related to Anadarko's commercial position. The Block Offer bidders were all commercial entities, operating in a highly competitive market.

Disclosure of information about the locations of particular prospects or reserves would be highly valuable to Anadarko's competitors, including other permit holders and prospective applicants. Disclosure of information about projected costs would undermine their negotiations with service companies. Release would unreasonably prejudice the ability of Anadarko to compete in the market.

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### Case 347237 (2015)—Universities and commercial activities

A requester sought the external monitor's report on the University of Canterbury College of Education's Graduate Diploma in Teaching and Learning, and complained to the Ombudsman when this request was refused under section 9(2)(i) of the OIA (commercial activities), among other grounds.

The University was concerned that release of the report would result in reputational damage, which would prejudice its '*usual commercial activities*' including recruiting and maintaining the student population and securing research contracts. The University stated:

*While our primary purpose is to not make a profit but to provide education, if we do not attract enough students we lose government funding and student fee revenue, putting the organisation's staffing, programmes and reputation at risk. Our reputation is fundamental to our existence and the primary selling point to students as a quality and competitive international University with excellent teaching programmes.*

The University noted that it is required to maintain a surplus of revenue, which is the '*exact equivalent of profit, albeit by another name*'.

The Ombudsman accepted that the requirement of the Tertiary Education Commission (TEC) that universities each year have an operating surplus of between 3-5 percent is a

profit in plain language. He also noted that section 166 of the Education Act 1989 clarifies that universities have all the abilities of corporations.

University research contracts and trading are clearly commercial activities, which may directly assist with the surplus requirement. All universities now have commercial entities to manage their research outputs.

The Ombudsman also noted that the University charges international students more in fees than domestic students for the equivalent course (section 288 of the Education Act 1989 requires that foreign students are not subsidised by domestic students). It is possible that the provision of education to full fee-paying international students could be categorised as a commercial activity.

However, the surplus is an indicator of financial health which ensures that universities operate within a safety margin. There is no requirement for universities to pursue a profit in all their activities, as might be expected with a business. The University had not argued that domestic student fees (which are approved by the TEC) are set with a profit in mind, although no doubt the required surplus is a contextual factor.

While the University undertakes commercial activities, and is required to make an overall surplus/profit, the Ombudsman did not consider that providing tertiary education to domestic students was a commercial activity.

The report itself did not have wider application than the quality of the Graduate Diploma in Teaching and Learning. Like other educational courses provided by the University, the majority of the costs are recovered through government funding, with the balance coming from domestic student fees. While this structure contributes to the financial viability of the University, in all the circumstances, the Ombudsman was not persuaded that delivering teachers' training was a commercial activity of the nature contemplated by section 9(2)(i) of the OIA.

The Ombudsman also observed that there was a strong public interest in transparency, and said that *'independent reports of this nature on the performance of a public institution should be publicly available'*.

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### Case 315756 (2015)—Information about proposed Clifford Bay ferry terminal

A requester sought information about a ferry terminal that was proposed to be built at Clifford Bay in Marlborough. The Ministry of Transport refused the request and the requester complained to the Ombudsman.

It was subsequently announced by the Minister that the proposed ferry terminal would not proceed. The Ombudsman asked the Ministry to review its decision. The Ministry confirmed the decision to withhold a significant amount of material under section 9(2)(b)(ii), among other grounds, because release would be likely unreasonably to prejudice the commercial position of the Interislander ferry (owned by KiwiRail Holdings

Limited).

The Ombudsman concluded that section 9(2)(b)(ii) applied to some, but not all, of the information. The key difficulty was the age of the information (much of it dated from 2009-2011), and the fact that a decision had been taken not to proceed with the proposed terminal.

The Ombudsman accepted that information about the Interislander's **operating costs** remained sensitive. Release of information such as port fees, fuel costs and labour costs could enable a competitor to better negotiate their own comparative costs, thereby enabling lower operating costs and lower customer charges. This would be likely to prejudice the Interislander's commercial position.

He also found that there was good reason to withhold Kiwirail's **growth predictions and business strategy**, where this was not publicly available or related to the proposed port. The Ombudsman accepted that section 9(2)(b)(ii) can apply to a business's internal growth predictions. Such information is developed in-house, and is used to develop strategies to grow a business, or minimise losses. It is crucial information within any business, release of which would be likely unreasonably to damage its commercial position.

However, the Ombudsman did not accept that there was good reason to withhold:

Information within the **growth predictions and business strategy that related to the proposed ferry terminal**. The growth predictions were based on increased sailings and capacity that differed from that possible at the existing Port of Marlborough in Picton, and from a shorter travel distance and time between Wellington and destinations south of Clifford Bay. The business strategy flowed from these figures. The growth figures and related strategy could not be adapted to apply to the Port of Marlborough. Release of this information would not be likely to prejudice the Interislander or KiwiRail's commercial position.

- Information about **construction and operating costs and potential yields from the proposed port**. Because a decision had been made *not* to continue with the proposed port, release could not possibly prejudice the Interislander's or KiwiRail's commercial position. When the information was created, it related to a hypothetical port. At the time of the Ministry's reconsideration of the request, the decision had been taken not to proceed with a port at Clifford Bay. The figures at issue had no bearing on Kiwirail's current commercial position, as they were not costs and yields that would ever occur.
- Information about **passenger volumes, car volumes and information about the freight market**. This information dated from 2009-2011. The same or similar information was already publicly available in Kiwirail's annual report and a study published by the Ministry. Release of this information would not be likely to prejudice KiwiRail's commercial position.

- **A 2009 estimate of the value of KiwiRail's land at Picton.** The Ombudsman could not see how release of a high-level valuation from 2009 could impact the sale or other leveraging of the land. Any contract for sale and purchase, or other leveraging of the land, would be based on much more recent valuations, and the estimated value of the land in 2009 was unlikely to be relevant. Release of the valuation dating from 2009 would not be likely to prejudice KiwiRail's commercial position.

The Ombudsman recommended that the information for which there was no good reason for withholding should be released.

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### Case 366653 (2014)—Cost of building naming rights

The Ministry of Justice refused to release the amount paid for naming rights to the Justice Centre in reliance on section 9(2)(b)(ii) (unreasonable commercial prejudice). The requester complained to the Ombudsman.

The Ministry argued that release would damage the commercial position of the building owners in regard to other properties in their portfolios, as prospective or existing tenants could argue that they should receive a similar rate. It submitted that the price for the naming rights formed part of the lease agreement and should therefore be refused on the basis that it was revealing of the owners' pricing/marketing strategy.

The Chief Ombudsman accepted that the building owners had a commercial position. They were in the business of leasing commercial property and the associated naming rights. However, she did not think disclosure would be likely unreasonably to prejudice that position. She stated *'it is the degree to which the information reveals a pricing strategy which is key to whether s 9(2)(b)(ii) will apply'*.

Even were other building lessees to use the information in the context of their own negotiations with the owners in an attempt to drive a price lower, it was a large leap to suggest that this knowledge would be likely unreasonably to prejudice the owners' commercial position. Price is just one of a number of variables which factor in a negotiation such as this. Other factors include the nature and location of the building, the circumstances of the tenant and the market conditions.

The Chief Ombudsman noted that her predecessors had rarely been persuaded that disclosure of a total cost for a service/good provided to a public body would prejudice anyone's interests, and there was no suggestion that previous disclosures had deterred private sector entities from doing business with the public sector, or directly resulted in prejudice to the commercial position of the private sector entities.

The Chief Ombudsman also noted that there was a strong public interest in the availability of this information. The public interest related to the Ministry's accountability in respect of public expenditure, particularly in circumstances where the expenditure related to non-core business.

The Chief Ombudsman recommended that the information be disclosed.

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### Case 341821 (2014)—List of commercial buildings requiring structural review

A request was made to MBIE for a list of commercial buildings that had been identified by a preliminary review to possibly have features in common with the defective Canterbury Television Building. MBIE withheld the list under section 9(2)(b)(ii) of the OIA (unreasonable commercial prejudice), and the requester complained to the Ombudsman.

The Chief Ombudsman agreed that section 9(2)(b)(ii) applied. The list was created from a paper-based review of local authority records. Buildings were added to the list based on a number of criteria, but that did not necessarily mean those buildings were unsafe. Further information, including detailed engineering evaluations, would be required to determine this.

Release of the list without this further information would lead the public to assume that the buildings were unsafe. This would be likely to prejudice the owners' commercial positions through:

- loss of current tenants whose business is adversely affected by association with the building; and/or
- loss of future tenants who avoid the building; and/or
- adverse valuation or insurance effects.

This prejudice would be unreasonable due to the unverified status of the buildings, and the fact that owners had agreed to participate in the review at their own cost. It would also take some time to verify the information, through no fault of the owners (owners were facing delays of several months for an engineer to be available to review their building).

The Chief Ombudsman stated:

*I consider that it would be unreasonable in the circumstances to release unverified information into the public domain, when doing so has adverse commercial implications for the owners who are funding the voluntary reviews, and at the risk of thwarting the process in place to supply accurate and verified information to both the review, and to the public (via the local authority property files).*

Regarding the public interest in disclosure, she acknowledged that *'the public have a right to know if buildings are unsafe prior to entry'*. However, the withheld list was not a list of buildings that were unsafe. It was a list of buildings that may have had features in common with a building that was found to be unsafe.

Those buildings would be subject to further review and evaluation by local authorities. If any buildings were confirmed to be earthquake-prone, the local authority could take immediate steps to inform the public by placing a notice on the building, and updating



the Land Information Memorandum.

As the review of each specific building was conducted, the information about earthquake risk and resilience would be made available and allow the public to be accurately informed so that it could judge the known risk and act accordingly. The public interest in disclosing the preliminary list was not strong because some buildings on the list might not be considered earthquake-prone or to pose a risk to public safety, and those that did would be publicly notified by the local authority.

You can read the full opinion [here](#).

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### Case 339333 (2014)—Interim report into a Chinook salmon mortality event

A community association requested reports by the Ministry of Primary Industries (MPI) into the deaths of a number of salmon at a farm owned by the New Zealand King Salmon Company (NZKS).

The reason for the request was to enable the community association to participate in a board of inquiry scheduled to consider NZKS's applications for district plan changes and resource consents that would enable it to expand its operations.

MPI disclosed its interim report in part, but withheld some information under section 9(2)(b)(ii) of the OIA (unreasonable commercial prejudice). The community association complained to the Ombudsman.

The Ombudsman found that section 9(2)(b)(ii) applied to some but not all of the information, and that the need to withhold was in any event outweighed by the public interest in disclosure.

#### **Section 9(2)(b)(ii) applied**

This information comprised salmon mortality data at NZKS farms. The company argued this data would reveal management and husbandry practices, which would provide a significant competitive advantage in a still developing technical field.

The community association noted that evidence about mortality events had been presented at the board of inquiry, and it was not a secret that such events occur at salmon farms throughout the growing cycle. They queried whether a competitor would gain an insight or an advantage into NZKS's management or husbandry practices from an analysis of past mortality rates. They also queried the extent of competition in the salmon farming industry, noting that NZKS is the dominant and virtually sole producer of sea-pen farmed Chinook salmon in New Zealand.

The Ombudsman noted that, although general information about mortality events was presented at the board of inquiry, the information at issue here was specific to particular sites, months and husbandry practices. In terms of competition, although NZKS was the dominant producer in New Zealand, it was not the only one. Other farms were estimated

to produce up to 36 percent of the country's total farmed salmon. Chinook salmon were also farmed in Chile and Canada. Prejudice could also arise from lowering barriers to entry, and not only from providing information to existing competitors.

The Ombudsman concluded that release of the mortality data would be likely unreasonably to prejudice NZKS's commercial position.

### **Section 9(2)(b)(ii) did not apply**

This information related to the fact and reasons for testing for Infectious Salmon Anaemia Virus (ISAV), as a possible cause of the mortality event. MPI argued that disclosure would lead to a *'high likelihood of export markets for New Zealand salmon products closing'*, which would prejudice the commercial position of NZKS and other salmon-producing companies. This prejudice would be unreasonable because ISAV was not the cause of the mortality event.

However, the withheld information was largely similar to what had already been publicly released by MPI. The Ombudsman was not persuaded by the suggestion that New Zealand products would be *'stigmatised'* by the association with ISAV. This underestimated the ability of the public—and biosecurity and food safety regulators overseas—to comprehend the definitive conclusion reached that ISAV was not the cause of the mortality event. Any risk of prejudice could be mitigated by disclosing the information with a contextual statement.

The Ombudsman stated:

*The Ministry has argued that any association of the company and its products with this disease would be unreasonable. However, given that the overall test results showed that the disease was not present in Chinook salmon, I consider that any association would be minor and that any adverse implications would be readily rebutted, so that there would not be likely to be any unreasonable prejudice to the company's commercial position.*

Disclosure might result in some adverse publicity for NZKS in the short term. However, such prejudice would meet the threshold of *'unreasonably'* prejudicing its commercial position.

### **Public interest in release**

The Ombudsman stated that participation in the board of inquiry process *'is undoubtedly a public interest activity'*. Disclosure of the information would have enabled the community association to participate more effectively in that process. It would also have contributed to the quality of public debate on a matter of public interest.

The Ombudsman also found there was a significant public interest in the public knowing how the Ministry prudently carried out its regulatory functions in the area of food safety and disease control. He referred to the following statement by the Irish Information Commissioner relating to the food safety and disease control responsibilities of the

### Department of Agriculture and Food:<sup>38</sup>

*I consider that there is a significant public interest in the public knowing how the Department carries out its regulatory functions in the area of hygiene and food safety and the control of disease. I consider that the public, as the ultimate consumers of food products, has a legitimate interest in knowing information of the nature that is contained in these records.*

The public interest in disclosure was heightened by the significance of the subject:

*There can be no doubt of the significant public interest in matters of food safety, given the substantial statutory framework on this issue, and the swiftness with which the Ministry acted once it had been notified of the mortality event.*

There was also a ‘significant public interest in the public knowing the full picture’:

*Disclosure of the information would remove any unfounded suspicion that the Ministry in some way favoured the operator of the farm (or the aquaculture sector more broadly) over its food safety and biosecurity responsibilities. It would present the full picture of the Ministry’s investigation. There was already a limited amount of information in the public domain. Withholding the information at issue, in relation to what was already in the public domain, may have served to exacerbate any concerns regarding the Ministry’s role. Disclosure of the information may have helped to allay any unfounded concerns.*

The Ombudsman concluded that the significant public interest in:

- enabling the public to effectively participate in these ongoing matters; and
- the public knowing how the Ministry discharged its regulatory functions in the area of food safety and biosecurity;

outweighed the need to withhold the information. You can read the Ombudsman’s full opinion [here](#).

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### Cases 179073 (2012) and 309109 (2014)—Transport rates, cost and revenues per route

Cases 179073 and 309109 concerned requests to Greater Wellington Regional Council for its transport rating model, which were refused partly in reliance on section 7(2)(b)(ii) of the LGOIMA (unreasonable commercial prejudice). The issue was whether disclosure of the cost and revenue per route would be likely unreasonably to prejudice the transport operators’ commercial positions.

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<sup>38</sup> Office of the Information Commissioner. ‘ABC Ltd and DEF Ltd and the Department of Agriculture and Food’. Case 98198. Retrieved on 6 May 2016 from <http://www.oic.gov.ie/en/Decisions/Decisions-List/ABC-Ltd-and-DEF-Ltd-and-the-Department-of-Agriculture-and-Food1.html>.

**Case 179073—cost per route to the council**

The information at issue in case 179073 concerned the cost per route to the Council. The Council argued that disclosure of this information would reveal the operators' pricing strategies, and prejudice their commercial position by enabling competitors to undercut them in future tenders for the same or similar services.

However, the Ombudsman did not consider that disclosure of the total cost per route would reveal the operators' pricing or market strategy to any significant degree. He noted that operators would build a range of variables into their tender bids, including the various cost components and their projected profit margins. The information at issue did not provide a detailed breakdown of the full range and costs of the variables that operators used in calculating their tender bids. It was therefore unclear how disclosure would be likely to prejudice the operators' commercial positions.

The Ombudsman accepted that, where the total contract price of a successful tender has been kept confidential, the incumbent supplier has the advantage over its competitors at the next tender round of knowing the details of the previous accepted tender. If this information was made available to competitors, that advantage would be lost. This may prejudice the incumbent's commercial position, but such prejudice is not '*unreasonable*', as it would simply allow competitors to redress an advantage created by confidentiality, and to enter a tender round on a more level playing field.

By incorporating the reference to '*unreasonable*' in section 7(2)(b)(ii), Parliament recognised that there may well be commercial prejudice arising from release, but that information must still be released if that prejudice is not unreasonable. In the Ombudsman's view, it was not unreasonable, indeed it should be anticipated, that information generated in the course of carrying out a public sector activity will be publicly available. On the other hand, information that discloses the particular marketing or pricing policies followed by the operator on the basis of its own commercial judgements will not be available merely because these are in the hands of a public sector agencies with which it had a contract.

The Ombudsman stated:

*I do not see it as being a purpose of section 7(2)(b) of the LGOIMA to protect existing operators from the prospect of competition when future public contracts are awarded ... The presence of a reasonableness test in section 7(2)(b) ... entails that it is not just the interests of the present operators that must be considered. Section 7(2)(b) demands a consideration of the circumstances in which it is reasonable to overlook any suggested (even acknowledged) commercial prejudice to them. In my view the erosion (if such it is) of commercial advantage resulting solely from incumbency, is not an unreasonable prejudice.*

The Council agreed to release the information.

**Case 309109—revenue per route**

In case 309109, the Council agreed to disclose the cost per route, but withheld the estimated revenue for each route. The Chief Ombudsman formed the opinion that release of the information would unreasonably prejudice the commercial position of transport operators. Releasing the estimated revenue would be likely to reveal transport operators' strategies in the last tender round and also in future tender rounds, if the Council sought tenders on the same, or substantially the same, basis as the last tender. This would affect transport operators' ability to participate competitively in future tenders for transport services in the region.

The Chief Ombudsman observed that ratepayers are entitled to have as much information as is reasonably necessary to enable them to ascertain whether the amounts they pay through rates for public transport services have a reasonable basis, and, likewise, users of public transport services are entitled to know whether fares are reasonable taking into account, among other things, the cost of providing those services. But it was not in the public interest that transport operators reveal their tender strategy by disclosing their revenue on a route-by-route basis. Keeping that information confidential would assist in maintaining a competitive environment for the provision of transport services in the region, and allow the council to obtain the most favourable price for the service.

You can read the full opinion on case 309109 [here](#).

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**Cases 302561 and 302600 (2013)—Information about the production of *The Hobbit***

Requesters sought information regarding the production of *The Hobbit*. The Minister for Economic Development withheld some information under a range of withholding grounds, including section 9(2)(b)(ii) of the OIA (unreasonable commercial prejudice), and the requesters complained to the Ombudsman.

The Ombudsman formed the opinion that section 9(2)(b)(ii) applied to:

- documents relating to the Government's assessment of, and assistance for, screen infrastructure in New Zealand; and
- information relating to specific applications for the Large Budget Screen Production Grant.

Disclosure of information about potential studio development proposals or production costs and budgets would be likely unreasonably to prejudice the commercial position of the companies involved. The need to withhold this information was not outweighed by the public interest in release.

However, section 9(2)(b)(ii) did not apply to advice which had been supplied by the film

industry third parties to Ministers during an industrial dispute which preceded the filming of *The Hobbit*. The third parties argued it would damage their business relationships. However, the Ombudsman noted that information of a similar nature was already in the public domain. While release *'may not be helpful to business relationships'*, there was no serious risk of unreasonable prejudice to the third parties' commercial positions. The information *'takes public knowledge of the commercial concerns no further than this public information'*.

You can read the full opinion [here](#).

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### Case 326125 (2012)—Council waste management and commercial activities

Auckland Council withheld financial modelling options and feasibility studies for its waste management and minimisation proposals, to enable it to carry out commercial activities without prejudice or disadvantage (section 7(2)(h) LGOIMA). The requester complained to the Ombudsman.

The Council explained that the waste management industry is very competitive, and that it operates in competition with private providers. Release would disadvantage the Council by enabling competitors to cherry pick the profitable services identified in the modelling. This would have a detrimental effect on the Council's ability to provide a full suite of recycling services, including 'non-profitable' services where these are partly funded by surpluses on the 'profitable' services.

The Chief Ombudsman did not accept that the Council's waste collection activities were *'commercial'*, in the sense of being carried out for the purpose of making a profit. While some aspects of the services were intended to yield a surplus, this covered the cost of the non-profitable services the Council was required to provide.

The information at issue could be said to relate to Council's **financial** position, but this is not necessarily the same as a **commercial** position, since the provision of waste management services in its district is one of the Council's functions. The Chief Ombudsman formed the opinion that section 7(2)(h) did not apply. However, she did accept the application of the negotiations withholding ground (section 7(2)(i) LGOIMA).

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### Case 297887 (2012)—Prison industries and commercial activities

The Department of Corrections refused a request for information about its pre-cast concrete employment operations under section 9(2)(i) of the OIA (commercial activities) and the requester complained to the Ombudsman.

During the investigation, the Department released most of the information, including its annual revenue, whether it met its costs, and any cost to the taxpayer. The information that remained at issue was the names of customers who had received a credit due to

quality issues, and the value of those credits.

The Chief Ombudsman concluded that the concrete yard was a commercial activity. The Corrections Inmate Employment objectives and business plan supported this. While the primary purpose of the yard was to facilitate rehabilitation by offering employment opportunities to inmates, this did not mean it could not also be a commercial activity. Nor was this precluded by a ministerial directive to avoid developing a dominant market share.

The Chief Ombudsman also concluded that release would disadvantage the Department in carrying out its commercial activities. First, it would enable competitors to target the Department's customers, which could reduce the number and value of contracts won by the Department, and therefore its income and the long-term viability of the operation. Secondly, it could lead to a loss of confidence in the Department's products, which would detrimentally affect sales.

In view of the information already disclosed, the Chief Ombudsman formed the opinion that the need to withhold the names of customers and value of credits was not outweighed by the public interest in release.

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### Case 287978 (2011)—Unannounced inspections of rest homes and hospitals

Consumer New Zealand asked the Ministry of Health for full reports of unannounced inspections of rest homes and hospitals in 2009. Of the 12 unannounced inspections in 2009, the Ministry refused to release five full reports because summaries of those reports were publicly available. It released seven reports for which summaries were not publicly available, but withheld the names of the providers. The Ministry relied on section 9(2)(b)(ii) of the OIA (unreasonable commercial prejudice). Consumer New Zealand asked the Ombudsman to investigate and review this decision. It noted that it was not seeking to obtain the names of any individuals.

The Ministry confirmed that the providers, which included three limited companies and two charitable trusts, provided their services for a fee and operated to make a profit. The Ministry argued that, as the unannounced inspection reports contained adverse findings, disclosure would be likely to affect the reputations of the providers and their ability to compete with other service providers, thus unreasonably prejudicing their commercial positions. The likelihood of consumers choosing alternative providers would be increased if Consumer New Zealand published the reports with the adverse findings. The Ministry considered that the public interest was met by publishing summaries of the inspection reports on its website.

The Ombudsman accepted that the predicted prejudice might eventuate, but not that it would be 'unreasonable' if it did. He stated:

*I think it would be accepted that consumers have a right to know whether the private*

*facilities that they or their family members are considering using provide safe and responsible levels of service ... It therefore seems reasonable to me that they should have the opportunity to draw their own conclusions from information about the quality of the health care services provided by particular rest homes and hospitals. If the choices of consumers are affected by adverse information about private facilities which (after following a proper process) have been found not to meet service standards, it does not follow that the prejudice occasioned by the release of this information is unreasonable.*

The Ministry suggested that providers would be subject to an ‘arbitrary process’, as they might not be able to respond to any adverse comment generated by the publication of the reports. However, the Ombudsman noted that the inspection process itself provided the opportunity for providers being investigated to comment on draft reports. Given that there were procedural safeguards in place for the benefit of the providers before reports were finalised, any claimed ‘arbitrary process’ post-publication did not amount to a flaw in the report itself.

The Ombudsman accepted that some harm might be suffered by providers on publication of the reports to the public at large. If the impact of publication was to draw some unfair comment such harm has to be weighed against the countervailing public interest considerations favouring disclosure. The Ombudsman also noted that this risk could be mitigated by disclosure of appropriate contextual information.

The Ombudsman concluded that section 9(2)(b)(ii) of the OIA did not apply, and that even if it did, the need to withhold would be outweighed by the public interest in disclosure. There was a strong public interest in assuring the public that facilities which receive public funding to care for vulnerable people are held properly accountable for the provision of a service that meets quality and safety requirements. The disclosure of inspection reports was a critical element in meeting that interest.

It was also necessary to ensure that the public had confidence in the unannounced inspection process. This was best achieved by the process being as transparent as possible, thereby helping to dispel any possible scepticism about whether a full and searching inspection had taken place, and about the extent to which the provider had been made accountable and required to remedy the deficiencies in its service standards.

The Ombudsman did not consider that the public interest was met through publication of the summary reports. The summaries at issue were not full and complete. They did not specify in any detail how particular standards were or were not fully attained, and what particular steps were required to be taken to resolve those issues. They also did not explain how the required remedial actions would be monitored or what the relevant timeframes were.

The summaries effectively asked consumers to accept on faith that certain deficiencies had been identified and would be remedied. They did not provide the detail contained in the inspection reports which would enable consumers to be more confident that they are making a decision about the suitability of a particular facility for themselves or a family



member with as much information as possible.

The full inspection reports not only included ‘*findings*’ but also the objectives, limitations and methodology of the process and the particular corrective actions required. In the Ombudsman’s opinion, all of that information, if disclosed, would serve to enhance the public’s perception of the transparency of the process and increase its confidence that providers are held to account.

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### Case 279056 (2011)—Audit report of approved organisation under the Animal Welfare Act

A requester sought a copy of an audit report completed by the Ministry of Agriculture and Forestry (MAF) into an organisation called the Animal Welfare Institute of New Zealand (AWINZ). The request was refused on numerous grounds, and the requester complained to the Ombudsman.

When AWINZ was consulted on the request, it argued, amongst other things, that parts of the report should be withheld under section 9(2)(b)(ii) of the OIA (unreasonable commercial prejudice). In a letter to AWINZ, the Ombudsman set out his detailed reasons for rejecting that argument.

Although AWINZ was a charitable trust, it claimed to have a commercial position in respect of its services to the film industry, which related to the monitoring of animal welfare issues. It argued that release of the parts of the report relating to its film monitoring activities would unreasonably prejudice its commercial position.

The Ombudsman acknowledged that the charitable status of an organisation does not preclude the possibility that the organisation might be engaged in activities for the purpose of making a profit and then apply those profits for charitable purposes.

However, the Ombudsman was not persuaded that AWINZ had a commercial position, or that the other requirements of section 9(2)(b)(ii) were met. He also considered that any need to withhold the information would have been outweighed by the strong public interest in disclosure of audit reports.

The Ombudsman’s starting point was the requirement of a profit motive. He commented:

*If the entity in question is a business or company then it will generally be apparent that such an organisation will be engaged in activities predominantly for the purpose of making a profit and will therefore have a commercial position. However with charitable organisations, the assumption is that the predominant purpose of the organisation will not be to make a profit. In such cases, further evidence about the organisation’s profit-making activities will be necessary before an Ombudsman will be satisfied that a charity has a commercial position.*

The Ombudsman did not have sufficient information to be satisfied that AWINZ engaged in film monitoring work with the predominant purpose of making a surplus or profit, which it then applied to its other charitable purposes. As AWINZ had refused to provide the auditors with any information about this aspect of its work, it was not possible to gauge much about its activity at all.

On the one hand, AWINZ referred to this work as a *'source of income'*, which would suggest that profit was made and presumably channelled back into the Trust. On the other hand, the audit report referred to AWINZ *'recovering the costs'* of payments and disbursements made to contractors carrying out the monitoring work. A possible interpretation might be that AWINZ provided a service to the film industry (in the interests of ensuring the welfare of animals on film sets), and recovered the cost of that service without generating a profit from the work.

Even if AWINZ had a commercial position, the Ombudsman was not satisfied that release of the information *'would be likely'* to prejudice it. A simple assertion to that effect was insufficient.

None of the information was might be described as *'commercially sensitive'*, such as pricing structures, detailed breakdowns of particular tenders, contracts or business plans, the release of which might provide competitors in the same market with an advantage. As referred to above, AWINZ had refused to provide the auditors with any detailed information.

There were some negative comments in the report regarding conflicts of interest and a lack of accurate record-keeping. However, they did not relate specifically to AWINZ's film monitoring work. At most, it could be suggested that release of the report could damage the reputation of AWINZ, which may then have consequences for a number of its activities, including the film monitoring work. However, there did not appear to be a serious or substantial risk of this occurring.

The Ombudsman was also not satisfied that any prejudice, if it occurred, would be unreasonable. AWINZ argued that its film monitoring activities should not have been included in MAF's audit. The auditors included them because AWINZ's status as an approved organisation was relevant to film companies' decision to use that organisation for monitoring activities. The Ombudsman agreed that, if an *'approved organisation'* offers a commercial service and is able to rely on its *'approved'* status to enhance its credibility in this regard, then it is reasonable any assessment of its performance as an *'approved organisation'* be made available.

The Ombudsman recommended that the audit report be released.

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### Case 179439 (2010)—Council parking enforcement and commercial activities

Wellington City Council refused a request for *'a list of the criteria used by the Council and*

*its contractors to decide whether or not to waive parking tickets'* in order to enable it to carry out commercial activities without prejudice or disadvantage (section 7(2)(h) LGOIMA), and the requester complained to the Ombudsman.

The Council argued that release would lead to loss of revenue from parking infringement fines due to members of the public having information which is very likely to be used to construct a defence on the infringement issued.

The Ombudsman did not accept that the Council operated a parking infringement policy as a commercial activity. The authority for such a policy derived from a penal provision in the Land Transport Act 1998 creating an offence. It may be that with the development of infringement notices and an administratively-based method of enforcing and levying fines, the original penal nature of the process had become obscured. But that, in essence, is what it was. It was not a commercial activity; it was a penal activity.

The fact that income generated by it may be applied to offset other Council costs (which the Transport Act itself required) was beside the point. If everyone complied with the parking bylaws there would be no income generated at all. If the Council was operating an infringement policy in order to generate a profit it would thus be placed at a disadvantage by citizens acting within the law. In the Ombudsman's view, this could not be correct.

The Ombudsman accepted that a Council may carry on a car parking business as a commercial activity by operating facilities at which motorists may leave their vehicles for a fee. But this was not the case here. In this case, the Council was carrying out a law-enforcement role, not operating a business. Section 7(2)(h) of the LGOIMA could not apply.

The Ombudsman found there was good reason to withhold some of the information under section 6(a) of the LGOIMA (maintenance of the law), and the Council agreed to release the remainder.

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### Case 178767 (2009)—Hazardous Activities and Industries List

A requester sought the '*Hazardous Activities and Industries List*' from the local council. This was a list of all sites where activities or industries had been carried out that were known to have the potential to cause land contamination. The request was refused under sections 7(2)(b)(ii) (unreasonable commercial prejudice) and 7(2)(c)(i) of the LGOIMA (confidentiality), and the requester complained to the Ombudsman.

The Ombudsman found that, unless the landholder was in the business of dealing in land, section 7(2)(b)(ii) could not apply. While there is no doubt that persons not in the business of dealing in land are financially motivated to protect the value of their properties, that is not the same as having a commercial position.

In relation to those landholders who were in the business of dealing in land, the

Ombudsman was not convinced disclosure would be likely unreasonably to prejudice their commercial position:

- The information dated back to 1995. It did not reveal that land was contaminated, but only that it had been associated with a use that could lead to contamination.
- The information was available on LIMs (Land Information Memoranda) and PIMs (Property Information Memoranda), or on request on a site-specific basis from the Council. It could also be obtained through historical searches of certificates of title and aerial photographs.
- It is generally well known within the property fraternity which properties may have contamination issues due to the nature of the activity/industry on the site.
- A prudent vendor/purchaser would be likely to undertake investigations prior to any transaction being entered, meaning the suitability of the site would be established prior to sale in any event.

The Ombudsman also rejected the application of section 7(2)(c) of the LGOIMA. He accepted that section 7(2)(a) (privacy) applied in respect of information about an individual's landholdings. However, he concluded that any need to withhold the information was outweighed by the public interest in disclosure. The Ombudsman identified a public interest in current and future owners of the properties being aware of the risk of potential land contamination. There was also a wider public interest in the public being apprised of information about sites where there may be a potential for contamination, so that they were in a position to assess for themselves whether there were any risks to the environment or their person.

You can read the full opinion [here](#).

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### Case 176901 (2008)—Company's annual report

Hutt City Council refused to disclose a company's annual report on the basis that it would be likely unreasonably to prejudice the company's commercial position (section 7(2)(b)(ii)). The council held the report because it was a minority shareholder in the company. The requester complained to the Ombudsman.

During the Ombudsman's investigation, the Council accepted that parts of the report could be disclosed without prejudice, for example, the contents page, the company directory, the notes to the financial statements, and the auditor's report.

The Ombudsman concluded the remaining information was properly withheld under section 7(2)(b)(ii). While the Companies Act 1993 requires that a company's annual report must be made available to its shareholders, it does not require that it be made publicly available.

The company was established to deploy fast, open-access broadband. It was described at the time as a fledgling company with limited capital operating in a very competitive market. The annual report contained detailed financial information about the company's sales, expenses and revenue.

Disclosure of this information would enable the company's direct competitors, who were much larger telecommunications companies, to price their own competing products at a level that the company would find hard to sustain financially and thus attempt to force it out of business. This would be likely unreasonably to prejudice its commercial position.

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### Case 176647 (2008)—Tender submissions, evaluation of tenders and negotiation brief relating to 'Ageing in Place' contract

An unsuccessful tenderer sought documentation about the 'Ageing in Place' contract awarded to Presbyterian Support Services by Hawkes Bay District Health Board (the DHB) in 2006. The DHB refused the request under sections 9(2)(b)(ii) and 9(2)(i) of the OIA, and the requester complained to the Ombudsman.

The Ombudsman was not persuaded that section 9(2)(b)(ii) applied because it had not been demonstrated that the tenderers had a '*commercial position*'. The Ombudsman was also not persuaded that section 9(2)(i) applied because the DHB was not engaged in '*commercial activities*'.

The Ombudsman told the DHB he could see no good reason to withhold the total tender price. The DHB agreed to release this information. The Ombudsman formed the opinion that there was good reason to withhold:

- the tender submissions, including the component prices from which the total was derived, under section 9(2)(ba)(ii); and
- the DHB's evaluation of tenders and brief for negotiating with the successful tenderer under section 9(2)(g)(i).

#### **Tender submissions**

The Ombudsman was persuaded that the tenderers would regard the details of their proposals, including the component prices from which the total was derived, as sensitive information that they would not wish to fall into the hands of anyone who might in future be one of their rival tenderers, whether the requester or anyone else.

He concluded that disclosure of this information would breach an obligation of confidence to the tenderers and that this breach would be likely to have an adverse effect on tenderers' responses to future tenders issued by the DHB. In his view, this would be damaging to the public interest.

### **Evaluation of tenders and negotiation brief**

The Ombudsman noted that the contract negotiation brief documentation involved free and frank opinions expressed on the successful tender. The opinions were sensitive because they related to financial and related information about the contract. Disclosure of this information would breach obligations of confidentiality to the successful tenderer and provide information on the DHB's negotiation processes that could prejudice future such negotiations.

Other information involved the DHB's evaluation of tenders (not from the requester), the disclosure of which would breach obligations of confidence to the tenderers concerned.

The Ombudsman concluded that disclosure of this information would have an inhibiting effect in future on the quality of the documentation associated with the DHB's contract negotiations and tender evaluation, something that would be prejudicial to the future conduct of such tenders.

The Ombudsman was not persuaded that the public interest in disclosure of this information outweighed the need to withhold it.

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### **Case 176175 (2009)—Charitable trust's funding application**

A requester sought the Wellington Marine Conservation Trust's application under the Learning Experience Outside the Classroom (LEOTC) fund, which is administered by the Ministry of Education. The Ministry refused the request under section 9(2)(b)(ii) (unreasonable commercial prejudice) and the requester complained to the Ombudsman.

The Ministry advised the Ombudsman that, while the total value of the contract should not be withheld, the financial breakdown of how the Trust distributed funds in order to deliver the contracted service was commercially sensitive information.

The process by which the Trust, and other Ministry contractors for these services, obtained this funding was contestable. All potential contractors submitted proposals to the Ministry during a tender process and outlined how they could deliver services, including a detailed budget breakdown.

Releasing this information could have prejudiced the present and future commercial position of the Trust in two ways. Firstly, by advantaging any third party that might wish to operate in competition to the Trust. Secondly, by undermining any commercial advantage that the Trust might have developed in terms of tendering for future Ministry contracts for similar services.

The Ombudsman wrote to both the Ministry and the Trust explaining why he did not think there was good reason to withhold the information under section 9(2)(b)(ii).

First, the Ombudsman was not persuaded that the Trust had a commercial position. He acknowledged that the status of an organisation does not, of itself, necessarily determine

whether it has a commercial position. A charitable organisation may undertake commercial activities in order to make a profit, even though those profits are then applied for charitable purposes.

It is generally readily apparent that certain organisations, such as business enterprises, are engaged in activities for the purpose of making profit and therefore have a commercial position. However, with other organisations, such as charitable organisations, it may not be readily apparent that the organisations are engaged in activities with a view to making a profit. In such cases, further evidence may be necessary before an Ombudsman is satisfied that the organisation has a commercial position.

In this case, the Ombudsman was not persuaded that the Trust engaged in the provision of LEOTC services for the predominant purpose of making a surplus or profit which it could then apply to its other charitable purposes. The Trust was a not-for-profit charitable Trust. Although it competed in a contestable selection process for the provision of LEOTC services, the Trust did not appear to have engaged in that process with the intention of making a surplus or profit from any monies provided by the Ministry.

Even if the Ombudsman was persuaded that the Trust had a commercial position, he did not see how disclosure of the particular information at issue would be likely unreasonably to prejudice that position. There were no organisations that operated in competition to the Trust in the area of marine education in the Wellington region. Even if someone decided to set one up, it was difficult to see how they could gain an advantage from release of the information.

The information related to the operation of a particular organisation which was differentiated from other organisations by its size, the nature of its operations, and the services it provided. It was unclear to the Ombudsman how the disclosure of financial information about the operation of the Trust would provide a commercial advantage to other service providers seeking LEOTC funding.

The Ministry agreed to release the information after considering the Ombudsman's comments, and the complaint was resolved.

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### Case 174687 (2007)—Composition and active ingredients of MEP600

Ancare New Zealand Ltd applied to the Environmental Risk Management Authority (the Authority), under the Hazardous Substances and New Organisms (HSNO) Act 1996, for approval to import or manufacture a veterinary medicine known as MEP600.

Wyeth (NZ) Ltd, a competitor and submitter on that application, requested the composition and active ingredients of MEP600. The Authority refused Wyeth's request on the basis that disclosure would unreasonably prejudice Ancare's commercial position (section 9(2)(b)(ii) of the OIA). Wyeth complained to the Ombudsman.

Ancare argued that releasing the information would inform its competitors, including Wyeth, of exactly what it intended to bring to the market. This would allow them to take steps to bolster the marketing of their products in the same sector, or to block the entry of Ancare's product in various ways, for example, by loading up distribution channels with special deals. They might also develop copycat products, and take other steps to impede Ancare's entry into the market.

In Ancare's view, it was highly likely its competitors would use the information in order to limit the impact of its product. It pointed out that normally competitors would not have information confirming formulation ingredients until after the product launch. That would allow Ancare a reasonable timeframe to establish a market and brand. Early access to the information would cut the timeframe resulting in an unfair advantage to competitors and a concomitant prejudice to Ancare.

The Ombudsman agreed that release posed a real or significant risk of prejudice to Ancare's commercial position. Whether the prejudice was unreasonable was '*a question of degree*'. Ancare had spent significant time, money and effort to develop the product, in an industry where that process can cost hundreds of thousands of dollars. Ancare predicted that loss of its competitive advantage would have a significant impact (as much as 50 percent), on projected sales. This degree of prejudice was, in the Ombudsman's opinion, unreasonable.

Regarding the countervailing public interest in disclosure, Wyeth claimed to have expertise that would enable it to make submissions to the Authority, but it could not effectively do so without the information at issue. Wyeth effectively implied that the Authority could not safely determine Ancare's application without the benefit of its submissions.

The Ombudsman did not accept this argument. While the HSNO Act mandated public participation in the Authority's decision making, it also clearly envisaged the need to withhold some commercially prejudicial information (see section 57). That did not mean this information could not be considered by the Authority (see section 56), or that its processes would be unfair if it was.

The Ombudsman had no reason to doubt the qualifications and experience of the Authority's staff and statutory appointees. The Authority also had the ability to obtain independent expertise if necessary. The Authority had prepared an Evaluation and Review Report in respect of the application, which was available to Wyeth, and which seemed to be a very careful and thorough consideration of the relevant issues.

The Ombudsman did not want to appear to undervalue the importance of public participation. However, she was mindful of the commercial importance attached to the information at issue. She concluded that the public interest in disclosure did not outweigh the need to withhold.

The matter did not end there, as Wyeth appealed the Authority's decision to the courts. While the High Court initially found in its favour, the Court of Appeal and Supreme Court



subsequently found against it. It is of note that the Court of Appeal agreed that:<sup>39</sup>

*...the active ingredient of a formulation such as MEP600 is likely to be valuable commercial information and compelling release of it at this stage of the regulatory process is likely to cause significant prejudice to an applicant.*

It also concluded that there was sufficient information available to the public about the risks posed and the way in which those risks would be mitigated or managed to enable them to make meaningful submissions on the application.

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### Case A12648 (2007)—TVNZ advertising campaign costs

TVNZ refused a request for costs in relation to its ‘*We Are One*’ advertising campaign under section 9(2)(i) (commercial activities), and the requester complained to the Ombudsman.

The Chief Ombudsman formed the opinion that section 9(2)(i) provided good reason to withhold the information. The *We Are One* campaign was an intrinsic part of TVNZ’s strategy to increase market share and advertising revenue by revitalising the *TV ONE* brand.

Collecting advertising revenue is a commercial activity, as its predominant purpose is to make a profit. Release of the information would disadvantage TVNZ in carrying out this commercial activity, as it would allow competitors to anticipate TVNZ’s level of investment in the campaign. This would allow competitors to divert their own promotional funding to compete directly with TVNZ, or to target other areas where TVNZ is placing less emphasis, in an intensely competitive market for free-to-air advertising revenue. The Chief Ombudsman concluded that the campaign costs revealed an essential element of TVNZ’s marketing strategy, and access to this information would provide a competitive advantage to other players in the market.

While there is a public interest in the disclosure of information about how a crown entity expends its funds, the overall public interest would not be served by release of information that undermined the ability of TVNZ to maintain its commercial performance in a competitive market. TVNZ is in a different position to a core government department, as it is required to maintain its commercial performance and operate as a successful going concern. The Chief Ombudsman noted that only 10 percent of TVNZ’s annual running costs were contributed by the taxpayer, and the remaining 90 percent were funded by advertising revenue.

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<sup>39</sup> *Ancare New Zealand Ltd v Wyeth (NZ) Ltd* [2009] 3 NZLR 501 at paragraphs 60-67.

### Case A12172 (2007)—TVNZ footage

A requester sought TVNZ's full footage of a court case. The request was refused under section 9(2)(i) (commercial activities) and the requester complained to the Ombudsman.

The Ombudsman formed the opinion that section 9(2)(i) provided a good reason to withhold a copy of the footage. The raw footage shot by TVNZ is the basis for many of its news items and is often retained for possible future use. Release of the information would limit its potential value for use by TVNZ in future, and could enable it to be used by other producers, and so disadvantage TVNZ in carrying out its commercial activity as a broadcaster of news, current affairs and documentaries.

There was no overriding public interest in release in this case. However, the Ombudsman left open the possibility of the requester arranging with TVNZ to view the footage, rather than receive a copy of it.

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### Case 173790 (2006)—DHBs and commercial activities

A requester sought information relating to an age-related residential care contract. Northland District Health Board (DHB) withheld the information in reliance on section 9(2)(i) of the OIA (commercial activities), and the requester complained to the Ombudsman.

The Chief Ombudsman noted that a profit motive is a prerequisite for the conduct of a 'commercial' activity. He did not accept that the DHB was engaged in commercial activities:

*When a DHB enters into a service agreement for the supply of goods and services I do not consider it has the intention of making a profit through that activity. This is despite the fact that the providers of the service (such as age-related residential care) may have such a motive and that those providers' activities may therefore be regarded as 'commercial'.*

The DHB's objective by contrast was to secure an acceptable level of care provided at least cost to the tax payer from within an amount allocated by the Government under a parliamentary appropriation.

Under the Crown Entities Act 2004 a DHB is a Crown entity, and within that classification, a statutory entity and Crown agent. Under the New Zealand Public Health and Disability Act 2000, section 22 (*Objectives of DHBs*) and section 23 (*Functions of DHBs*) make no mention of a profit objective or a function related to such an objective. Both those Acts require DHBs to operate in a financially responsible manner (section 41 of the NZPHD Act and section 51 of the Crown Entities Act).

However, none of these provisions indicated that DHBs have a profit motive, which could be contrasted with the objectives of the former Crown health enterprises (CHEs), which included being 'as successful and efficient as comparable businesses in the private sector'

that made ‘*profits*’ or ‘*losses*’ rather than ‘*surpluses*’ or ‘*deficits*’. By contrast to CHEs, the former hospital and health services were required explicitly to operate on a not-for-profit basis and were declared to be so operating if their annual net income covered all annual costs, including the cost of capital. Section 41(1)(b) of the NZPHD Act similarly provides that DHBs must endeavour to cover their annual costs, including the cost of capital, from net annual income.

The Chief Ombudsman added that just because an organisation (such as a DHB) is non-profit-making, does not mean it cannot engage in commercial activities (eg, op-shops run by the Salvation Army); nor that profit-making organisations cannot engage in non-commercial activities (eg, by making charitable donations). However, the Chief Ombudsman regarded the negotiation of the age-related residential care service agreement as entailing no more than the prudent management of the collective financial position of DHBs rather than the pursuit of a profit on their behalf.

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#### Case 165605 (2004)—Bioequivalence studies and dissolution data

A pharmaceutical company applied for consent to market certain generic medicines in New Zealand under section 21 of the Medicines Act 1981. One of their competitors requested bioequivalence studies<sup>40</sup> and dissolution data<sup>41</sup> provided in support of the application. Medsafe refused the request under sections 9(2)(b)(i) (trade secrets) and (ba) (confidentiality) of the OIA, and the requester complained to the Ombudsman.

The Chief Ombudsman rejected Medsafe’s argument that release of the information would disclose a trade secret. He noted that the products were readily available, and anyone could carry out the same tests, and arrive at the same information. He did not consider them to be trade secrets, which are usually more in the nature of ‘*processes, patterns, and formulae*’.

However, he did accept that the data was subject to an explicit obligation of confidence, and that disclosure would be likely to damage the public interest (section 9(2)(ba)(ii) of the OIA). The New Zealand market is small by international standards, and suppliers would be less inclined to seek approval to enter it if it meant their competitors could access information that might be used to their disadvantage in larger foreign markets. This would restrict the availability of affordable or efficacious drugs to consumers.

The requester argued that there was a public interest in ensuring that Medsafe carried out its function of reviewing the safety and efficacy of generic medicines properly, and that Medsafe’s performance could not be reviewed unless the information about bioequivalence and dissolution was released.

The Chief Ombudsman did not agree. He noted comments by Young J in *Beecham v*

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<sup>40</sup> Testing of two drugs with identical active ingredients, or the same drug at different dosages.

<sup>41</sup> Testing of the batch-to-batch consistency of the same drug.

*Minister of Health* [2002] BCL 606 that ‘the public watchdog is Medsafe ... not the plaintiffs who self-evidently have their own commercial interests to protect’. There was not sufficient public interest in the release of information in order to allow pharmaceutical companies to review the performance of Medsafe to outweigh the public interest in suppliers submitting applications to Medsafe and gaining registration in New Zealand.

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### Case 166819 (2003)—Ingredients of Foray 48B

A requester sought the ingredients in Foray 48B, a pesticide used in controversial aerial spraying operations to eradicate the Painted Apple Moth in Auckland and the Asian Gypsy Moth in Hamilton. While the active ingredient of that spray was known (Btk), the inert ingredients were withheld by the Minister for Biosecurity under section 9(2)(b)(i) of the OIA (trade secrets).

The Minister noted that the full list of ingredients had been disclosed to officials at the Ministry of Agriculture and Forestry and the Ministry of Health, and doctors from the Auckland District Health Board (ADHB) who were involved in preparing a health risk assessment for the painted apple moth programme. The requester complained to the Ombudsman.

The Chief Ombudsman considered there to be no doubt that the information constituted a trade secret:

*A formulation has a major effect on a product’s toxicity, residue behaviour and efficacy and is the thing that determines whether or not it will sell. Manufacturers invest substantial money in the development of formulations and the data packages that support their approval and desire to protect their investment and not to let the formulations fall into the hands of their competitors. The manufacturer of [this pesticide] made its formulation available to the New Zealand Government only in the strictest confidence. It asserts that the formulation is fundamental to the global success of the product. Its major market is in northern hemisphere countries where sales are large and small changes in market share can have a major impact on the company’s income.*

The Chief Ombudsman noted that once the formulation was in the public domain, the secret would be lost and the manufacturer’s competitors would be in a position to take advantage of it.

The Chief Ombudsman also accepted that there was a strong public interest in being assured that the formulation of Foray 48B was safe for the purposes for which it was being used. Knowing the formulation of Foray 48B may have helped to give that assurance, especially in the absence of other circumstances or information which does.

Against this, he considered the steps that had been taken ensure the health risks flowing from the spraying programme were within acceptable limits, including:

- assessments by the Pesticides Board and Environmental Risk Management Authority;
- an independent and comprehensive health risk assessment by the ADHB; and
- provision of a dedicated painted apple moth health service to provide advice, treatment and assistance to members of the community.

The Chief Ombudsman described the steps taken as *‘comprehensive and publicly known following review by the country’s recognised authorities on these matters’*.

The Chief Ombudsman concluded the competing interests were finely balanced, but the considerations favouring disclosure did not outweigh the need to withhold. Had the steps taken by the Government been less than they had been, the balance between release and withholding may have been different.

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### Case W41207 (2001)—Hospitals and commercial activities

A requester asked the Ombudsman to investigate and review the Minister of Health’s refusal to disclose information about the upgrade and redevelopment of Wellington Hospital. The Minister relied on section 9(2)(i) of the OIA (commercial activities).

The Ombudsman rejected the proposition that the Minister of Health and hospitals were engaged in *‘commercial activities’*.

The nub of the issue, in terms of the analysis required under section 9(2)(i), is not whether an organisation is a *‘commercial’* one or capable of carrying out *‘commercial activities’*, but whether making requested information available would prejudice *‘a commercial activity’*.

Clearly the status of a body does not determine every kind of activity it may carry out. For example, a University might have a commercial position with respect to research contracts for which it tenders to make financial gains, notwithstanding that by its nature it is not a commercial enterprise. Similarly, charities may own properties for rent, or be engaged in retailing. The profits derived may then be distributed for charitable purposes, but the activity would nevertheless be commercial, notwithstanding that a charity is not established for commercial purposes.

It is because non-commercial enterprises may undertake commercial activities, and commercial enterprises may undertake non-commercial activities that it is necessary to be able to determine whether there is a feature that attaches to a *‘commercial activity’* which distinguishes it from a *‘non-commercial activity’*.

It is considered that the profit motive, the intention to make a profit, is a necessary factor that needs to exist before an activity is a *‘commercial activity’* for the purposes of the OIA. A relevant United Kingdom decision on distinguishing *‘commercial’* from *‘non-commercial’* activities is *Expro Services v Smith* [1991] IRLR 156. This case raised the issue

of whether some catering and cleaning work contracted out by the Ministry of Defence was a ‘commercial activity’ of the Ministry’s. It was held that although the work was a ‘commercial activity’ when carried out by the contractor, it was simply an ‘authorised activity’ and not a ‘commercial activity’ when carried out by the Ministry. When carried out by the contractor it was carried out for financial gain. When carried out by the Ministry, it was not.

The case of the *Mayor of Timaru v South Canterbury Electric Power Board* [1928] NZLR 174 is authority for the view that a commercial activity must have a commercial purpose and that a commercial purpose requires the intention to make a profit. That approach was also taken in *Calgary (City) v Alberta (Assessment Appeal Board)* (1987) 77 AR 23 (QB). The Court stated that ‘...whatever other attributes an activity may have it is not a commercial activity unless in addition it has as its predominant purpose the making of a profit’.

Section 11(2)(b) of the Health and Disability Services Act 1993 provided that every hospital and health service must operate ‘on a not-for-profit basis’.<sup>42</sup> Accordingly, neither the Minister of Health nor the Hospital could be said to have been engaged in ‘commercial activities’, and the reason for withholding under section 9(2)(i) had not been made out. In light of this finding, the Minister released the information.

You can read the full case note [here](#).

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### Case W38354 (1998)—Prison industries and commercial activities

The Department of Corrections refused a request for documents relating to the tendering and purchase of assets and the setting up of a footwear manufacturing operation at Wanganui Prison under section 9(2)(i) of the OIA (commercial activities). The requester complained to the Ombudsman.

During the investigation the Department released most of the information. The information that remained at issue consisted of asset purchase costs and tender amounts, an analysis of sales projections, details of overhead, administrative and production costs and volume production targets.

The Ombudsman concluded that the footwear factory was a ‘commercial activity’. The goal of the business (per the business plan) was to promote inmate employment while making a financial return on investment, and producing a profit commensurate with similar private enterprises.

The Ombudsman noted that the footwear industry operates in a fully competitive

<sup>42</sup> The Health and Disability Services Act 1993 was repealed by the New Zealand Public Health and Disability Act (NZPHDA) 2000, which established District Health Boards (DHBs). While the NZPHDA does not explicitly say that DHBs must operate on not-for-profit basis, they are non-profit organisations. See case [173790](#) for a discussion of DHBs and commercial activities.

market. In that context, disclosure of analyses of projected sales and production costs, planned volume production targets, and projected income and profits would provide direct competitors with information that they could use in a market situation to obtain a competitive advantage.

The Ombudsman also accepted that disclosure of the purchase prices for the assets used to set up the factory would enable competitors to better understand the Department's product costing methodologies and influence their own marketing strategies to the detriment of the Department's commercial activities.

The Ombudsman concluded that the public interest in disclosure did not outweigh the need to withhold under section 9(2)(i). You can read the full case note [here](#).

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### Case W35177 (1996)—Crown Research Institutes and commercial activities

Crown Research Institute (CRI) AgResearch refused a request for data generated during research undertaken for one of its commercial clients. The requester complained to the Ombudsman.

The Ombudsman formed the opinion that there was good reason to withhold the data at issue under section 9(2)(ba)(i) of the OIA (confidentiality). However, he also addressed general concerns about the impact of disclosure on CRIs' commercial activities.

CRIs believed they would encounter difficulties obtaining commercial revenue if potential clients were concerned about disclosure of the research they had commissioned to their competitors. This would allow their competitors to obtain free of charge research which the client had paid the CRI to undertake for it alone, and to negate any commercial advantage the client may have obtained over competitors as a result of the research.

The Ombudsman commented that the OIA does not allow for a blanket assurance to be given that all such research information can be withheld. However, section 9(2)(i) is always likely to apply where a CRI has entered into a commercial contractual arrangement to undertake research for a client. Disclosure of that research to another party without the consent of the client would prejudice the CRI's ability to obtain further contracts.

However, section 9(2)(i) is subject to the public interest, and no assurance can be given that the countervailing public interest will never be strong enough to outweigh the need to avoid prejudice or disadvantage to a CRI's commercial activities. However, CRIs can reasonably advise potential clients that in cases where an agency is acting in a purely commercial activity, completely separate from any regulatory or social policy function, there is likely to be little countervailing public interest in disclosure.

You can read the full case note [here](#).

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### Case W34975 (1996)—Tendering for prison escort buses and commercial activities

The Department of Corrections was considering contracting out prison escort bus services. A requester sought the Department's current operating costs, including wages, overtime, meals, running and repair costs, and accommodation for officers. The Department refused the request under section 9(2)(i) (commercial activities), and the requester complained to the Ombudsman.

The Department argued that it would be disadvantaged in carrying out the tender process because tenderers' bids would be influenced by the departmental figures, and would not provide the direct comparisons the Department was seeking to establish.

The Ombudsman rejected the argument that the tender process was a commercial activity. The purpose for which the Department was seeking tenders for providing the prison escort buses was not to make a profit, but to make fiscal savings. The activity was not therefore seen as meeting the test to make it a '*commercial*' one, and it was concluded that section 9(2)(i) could not apply to the information at issue.

However, the Ombudsman did accept that section 9(2)(j) (negotiations) applied, on the basis that disclosure of the information could be used by the successful tenderer to '*negotiate-up*' rates during the negotiation stage of the tendering process. This would prejudice or disadvantage the Department in its negotiations with the successful tenderer.

You can read the full case note [here](#).

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### Case W31971 (1994)—Names of transcript companies

TVNZ asked the former Department of Social Welfare for the names of all transcript companies that had provided the Department with transcripts or videos of TVNZ programmes. In making its request, TVNZ referred to a High Court decision (*Television New Zealand v Newsmonitor Services Ltd* [1994] 2 NZLR 91), which held that by copying and selling TVNZ's transcripts, Newsmonitor Services Ltd had infringed TVNZ's literary and broadcast copyrights.

The Department refused the request under section 9(2)(b)(ii) adding that, in its view, the making and supply of the transcripts was protected by section 53(2) and (3) of the Copyright Act 1962 (being a reproduction on behalf of the Crown or a Government Department for use within a Government Department or by a servant of the Crown).

The Department explained that it believed it was entitled to obtain the transcripts and that the company which provided them, acting as the Department's agent, was also protected by the Copyright Act. It believed that release of the information would unreasonably prejudice the commercial confidentiality of the company concerned.

While section 53 of the Copyright Act might well be relevant to whether the Department



and the company had been acting within the law, this was not relevant to the question of whether release of the information would prejudice any of the interests protected by the OIA. Given the Department's view that it and its agent had been acting within their rights under the Copyright Act, it was difficult to see that release of the information could unreasonably prejudice the commercial position of the agent. It could in fact enhance that position by establishing the company as a provider in the transcription market. On the other hand, if the Department and the company had not been acting within their rights under the Copyright Act, there would be a public interest in release of the information to enable TVNZ to pursue a legal remedy against the Department and/or the company.

Although release of the name of the company might place it in the position of having to defend litigation, it was difficult to conclude that such an outcome could be said 'unreasonably to prejudice' the company's commercial position in terms of section 9(2)(b)(ii). Litigation and the associated costs are an inherent risk of being involved in business. As the company concerned was in a business which, in the light of *Television New Zealand v Newsmonitor Services Ltd*, might at least arguably be in violation of the rights of TVNZ, this risk was even more obvious. In the Ombudsman's view, the risk of possibly being exposed to litigation costs could not be said to prejudice 'unreasonably' the company's commercial position.

The Ombudsman also concluded that there was a public interest in TVNZ being able to pursue a legal remedy. On the face of it, TVNZ had an arguable case, but without the information at issue, it could not pursue a legal remedy. The right to pursue legitimate actions through the Court is a public interest worthy of protection. Even if section 9(2)(b)(ii) could be said to have applied, the need to withhold would be outweighed by the countervailing public interest in disclosure. The Department released the information to TVNZ.

You can read the full case note [here](#).

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