Ombudsman
Fairness for all

Guide

The OIA and the public policy making process

A guide to how the OIA applies to information generated in the context of the public policy making process

This guide explains the most common reasons why it can sometimes be necessary to withhold official information generated in the context of the public policy making process.

These reasons relate to the withholding grounds in sections 9(2)(f)(iv) and 9(2)(g)(i) of the OIA—often referred to as the 'good government' withholding grounds.

The guide contains general principles and case studies to illustrate the application of these grounds in relation to public policy-related official information.

There are some related guides that may help as well:

- *Our detailed guide on **section 9(2)(f)(iv)** can be found here.*
- *Our detailed guide on **section 9(2)(g)(i)** can be found here.*
- *Our detailed guide on the application of the **public interest test** can be found here.*

Contents

The public policy making process

The public policy making process involves the elected government (Ministers or Cabinet), taking decisions for the public good, based at least in part on advice and recommendations provided by an independent and impartial public service. It can include the following steps:

- Issue/problem identification (including anticipation of potential or emerging issues or problems)
- Information gathering and research
- Policy formulation (generating and analysing options; identifying risks)
- Inter-agency consultation
- Tendering advice and recommendations to the government
- Decision-making
- Political consultation and negotiation
- Legislation (if the policy requires new law or the amendment of existing law)
- Implementation
- Evaluation.

The process may not be as linear as this suggests. The order of these steps may vary, and some steps may need to be repeated.

In addition to these steps, Ministers may decide to undertake some form of **public consultation or engagement**. This can be at any stage, or at multiple stages, of the process.

The need to withhold

Generally, there are two main reasons why it can be necessary to withhold public policy-related official information. The first relates to the **generation** of policy advice, and the second relates to the **consideration** of policy advice.

Generation of policy advice

There may be a legitimate concern that release of certain information would prejudice the free and frank exchange of opinions between participants in the public policy making process. Usually this is in the early and formative stages of the public policy making process, or when sensitivities are high. The consequences of release at this stage may be that:

- advice is softened, or conveyed orally in preference to formal written briefings;
- safe options are preferred at the expense of controversial or innovative ones; and
- risks are left unexplored or unstated.

The possibility of release may induce a degree of caution that undermines the quality of advice produced in the policy development process, and thereby the quality of the decision ultimately reached.

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

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

In summary, section 9(2)(g)(i) applies when:

- release of the information at issue would inhibit the future exchange of free and frank opinions; and
- that inhibition would prejudice the effective conduct of public affairs.

A common misunderstanding is that the information at issue has to be in the nature of *'free and frank opinion'* to be withheld. It doesn't. What matters is that disclosure of the information at issue (whatever its nature and content), will inhibit the exchange of free and frank opinions in future, **and** that the ability to exchange such opinions is necessary for the robust and effective conduct of the public policy making process.

Detailed information about the application of this withholding ground, and the public interest test, can be found in our guides:

- *Free and frank opinions*
- *Public interest*.

Consideration of policy advice

There may be a legitimate concern that release of policy advice before the Government has seen it, or had the chance to fully consider it in context, may prejudice the orderly and effective conduct of the decision making process. Ministers would be called upon to justify and debate policy proposals still in development and subject to change, thereby diverting their attention from the core process of developing the policy to the stage where it is fit to inform collective decisions.

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

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

In summary, section 9(2)(f)(iv) usually applies:

- to advice related to executive government decision making processes;
- that has or will be tendered to Ministers or Cabinet;
- by Ministers or officials;
- where disclosure would harm the orderly and effective conduct of the relevant decision making process; and
- most often on a temporary basis—while the advice remains under active consideration.

Detailed information about the application of this withholding ground, and the public interest test, can be found in our guides:

- *Confidential advice to government*
- *Public interest*.

What about section 9(2)(ba)(i)?

Section 9(2)(ba)(i) of the OIA (information subject to an obligation of confidence, where disclosure would prejudice the supply of similar information in future) could potentially apply to protect contributions by private individuals or entities to a public policy process. However, Ombudsmen have consistently rejected the argument that section 9(2)(ba)(i) can apply to advice from officials to Ministers, as Ministers do not owe a duty of confidence to their officials.[1] The confidentiality of such advice is protected by section 9(2)(f)(iv).

The Danks Committee on effective government

It is worth recounting in full what the committee that recommended the enactment of the OIA said about the rationale for withholding official information in order to protect the conduct of effective government and administration:[2]

> *There is widespread interest in the activities of government.* ***The fact that the release of certain information may give rise to criticism or embarrassment of the government is not an adequate reason for withholding it from the public*** *[emphasis in original]****. To run the country effectively the government of the day needs nevertheless to be able to take advice and to deliberate on it, in private, and without fear of premature disclosure*** *[emphasis added]. If the attempt to open processes of government inhibits the offering of blunt advice or effective consultation and arguments, the net result will be that the quality of decisions will suffer, as will the quality of the record. The processes of government could become less open and, perhaps, more arbitrary.*

1 See Ombudsman's opinion, case 179181 at paragraphs 115-122, available here.

2 Committee on Official Information. *Towards Open Government: General Report*. (December 1980) at 19-20.

> *It has been argued in the freedom of information debate that as Ministers are accountable for their decisions, so should officials be obliged to reveal their part in and share the consequences of these decisions. The possible outcomes of this sort of development would need to be carefully weighed. The requirement of openness could be evaded, for example, by preparing and giving advice orally, or by maintaining parallel private filing systems; the record of how decisions are arrived at would be incomplete or inaccessible; public confidence would suffer, and if the relative roles and responsibilities of ministers and officials became the subject of public debate, mutual recriminations could all too often develop. The desire to avoid this sort of situation could incline governments to look for politically acceptable or compliant people at senior levels in the public service; such a service is not likely to be able to recruit and retain staff of ability and integrity.*
>
> *These dangers are not such as to deter us from supporting greater openness. But they should be taken carefully into account in mapping out the critical path for change. A new and sharper definition of areas of responsibility at senior levels, and the development of new and perhaps more explicit codes governing the relationship between Ministers and officials might be required. The importance of careful adjustments in this area does point yet again to an evolutionary approach to openness.*
>
> *We therefore conclude that there should be* ***continuing protection as needs be for the free and frank exchange of views between Ministers and their colleagues, between Ministers and officials, or between other officers of the Government in the course of their duty*** *[emphasis in original]. Such protection would not always be needed, will certainly often need to be of only a short-term kind, and should not preclude sensible steps to involve public servants in public debate about policy options and national choices before decisions are taken. Nor should it prevent the release of information explaining the bases of decisions and policies after they have been adopted.*

The public interest in release

The key public interest considerations in favour of releasing public policy-related information are **participation** and **accountability**. Both of these considerations are directly reflected in one of the purposes of the OIA, which is to progressively increase the availability of official information in order to enable effective public participation in the making and administration of laws and policies, and to promote the accountability of Ministers and officials.[3]

The relevance and strength of these considerations will vary depending on the stage that the public policy making process is at. Accountability considerations are usually strongest **after** decisions have been made. Public participation considerations are usually strongest **before** decisions have been made, but equally, the likelihood of risk to the orderly and effective conduct of the decision making process is higher at this time. Determining the correct balance

[3] See s 4(a) OIA.

between these competing interests can be tricky.

So what does *'effective participation'* mean? It doesn't mean that *'the public should sit in the councils of government when decisions are taken'*.[4] It does mean that *'the public should be able to debate the issues involved and, through their representatives, whether Members of Parliament or leaders of special interest groups, put their views so that decision makers can take them into account when the decision is taken'*. This is the notion of contestable advice, which is an essential element of any healthy democracy.

Accordingly, Ombudsmen have long argued that even where withholding of public policy-related official information is necessary under the *'good government'* withholding grounds, there is a public interest in disclosure of basic information about the proposal itself, factual, background or publicly available material, and the options being considered. In that way, decision makers will have a contestable avenue of advice to that put forward by officials when taking their decisions.

General principles

Some general principles that apply to information generated in the context of the public policy making process are described below. A visual summary of these principles is presented at Appendix 1.

> ⚠ **Important note**
>
> The application of these principles still depends on the facts of the specific case. Agencies must consider the content and context of the actual information at issue. Detailed advice on the factors to be considered can be found in our guides:
>
> - *Confidential advice to government*
> - *Free and frank opinions*.
>
> Agencies must also consider whether the need to withhold is outweighed by the public interest in release. Detailed advice on the application of the public interest test, including alternative ways addressing the public interest, can be found our guide: *Public interest*.

[4] Former Chief Ombudsman Sir John Robertson, *Report of the Ombudsmen for the year ended 1993* at 8.

Type of information	Ombudsman position
Basic information	• Basic information about the policy development process, such as the fact that an issue is under consideration, the process by which decisions will be taken, and any opportunities for public participation, should be able to be released in most cases. • While it is possible to argue that simply releasing the fact that an issue is under consideration would prejudice the ability to generate or consider policy advice, Ministers and agencies must be able to make clear and convincing arguments in support of any such contention. Case 175435 is an example of a case where the Ombudsman did not accept that the fact that a matter was under consideration could be withheld.
Early and formative stages **Relevant provision:** Section 9(2)(g)(i)	• Information generated in the early and formative stages of a policy development process can be withheld where that is necessary to ensure the free and uninhibited exchange of ideas between Ministers and officials. Premature disclosure of informal and exploratory (*'blue skies'*) thinking or discussions can inhibit the free and frank exchange of opinions that is necessary for the development of robust policy advice (see cases 173774 and 293216). Controversial or innovative options might not make it to the table, or be taken off the table before the thinking around them is able to fully develop. Officials may pull their punches in order to preserve a relationship of trust and confidence with the Minister. Ministers may not seek advice on politically sensitive issues, or seek it orally rather than in writing. • The Chief Ombudsman has stated: *My view is that section 9(2)(g)(i) will afford protection to information generated during the early formulation of:* • *exploratory advice;* • *'blue skies' thinking; and* • *advice that is intended to be provocative* *with a view to testing issues and policy ideas as part of a 'first principles conversation' between a chief executive or officials carrying out the delegated authority of the chief executive and his or her Minister, if its release would harm the effective conduct of public affairs by inhibiting the free*

Type of information	Ombudsman position
	and frank expression of opinions in similar circumstances in the future. *Any countervailing public interest considerations favouring release in a particular case would need to be very strong to outweigh the valid interest in protecting the effective conduct of public affairs in this context.* *In certain cases, it may well be that rather than release of such early exploratory or provocative advice which would likely result in damaging or inhibiting the ability of officials to express similar free and frank opinions in future, the balance of any public interest consideration favouring release might be met by other means. Depending on the circumstances, this could take the form of an explanation of a process being undertaken, the current stage it is at, and if possible, when the public can expect to be consulted or otherwise informed so as to be able to participate and influence policy development once serious work is underway. Any such statement could be provided without revealing the substance of the requested advice.*
Factual, background or publicly available material	• Factual, background or publicly available material should usually be released (see case 174609). Release of such material cannot generally be expected to harm any of the interests protected in the OIA. It can also help to promote effective public participation in the public policy making process by allowing the public to identify gaps or inaccuracies in the material, and to offer a source of contestable advice. This kind of information can exist in standalone research or background papers or literature reviews, or it may be part of the policy advice that has or will be tendered to Ministers or Cabinet.
Options v analysis	• Agencies should try to distinguish between bare options and the analysis or evaluation of those options. While evaluative material may be protected, bare options should usually be released. It is not generally necessary to withhold information about bare options under section 9(2)(f)(iv) (for example, see case 172541). As the Committee that recommended the enactment of the OIA noted, *'it is by no means now the case—if it ever was—that the canvassing of options within government administration must always be*

Type of information	Ombudsman position
	protected by confidentiality'.[5] Disclosure of options is also consistent with one of the purposes of the OIA, which is to promote public participation in the making of laws and policies. Release of information about options can promote informed public debate, which enhances the policy development process.
Internal and inter-agency consultation and discussions on draft policy proposals **Relevant provision:** Section 9(2)(g)(i)	• Opinions expressed by officials during internal and inter-agency consultation and discussions on draft policy proposals may be withheld, depending on the content and context of the information. These opinions may be expressed orally or in writing, often by email, or suggested amendments by way of tracked changes on the draft policy documents. In addition to a certain degree of informality in the way they are exchanged, they can tend to be conveyed under pressure of time. There can be a risk that release of such information would inhibit officials from discussing each other's work or positions, or critiquing the views advanced by others, in a free and frank way; something which is crucial to the quality and robustness of the final policy that is developed. It could also result in a preference for more formal communications, which could mean consultation takes longer, undermining the speed and efficiency of the policy making process. For example, see cases 285265, 176192 and W48162.
Internal working documents and draft policy advice to Ministers or Cabinet **Relevant provision:** Sections 9(2)(f)(iv) and 9(2)(g)(i)	• Internal working documents and draft advice to Ministers can be withheld if release would inhibit the free and frank expression of opinions in the context of the drafting process. Withholding may also be necessary if release would effectively reveal the advice that will be tendered to Ministers or Cabinet, and thereby prejudice the orderly and effective conduct of the decision making process. • The intended recipient of the advice is generally entitled to see it first, and have a reasonable period of time to consider it, before it is disclosed to others. Disclosure to others first could lead to Ministers being unfairly scrutinised on the detail of proposals still in the formative stages on which they may not have been adequately briefed. It could force Ministers to take a position on a policy before they have had

5 Note 2 at 17.

Type of information	Ombudsman position
	the chance to consider it properly. It could also divert Ministers and officials from the core process of developing the policy. For example, see cases 175799 and 175628.
Informal exchanges between Ministers and officials **Relevant provision:** Section 9(2)(g)(i)	• At stages during the public policy making process, officials may need to convey informal, *'off the cuff'* advice to Ministers under pressure of time. • This advice can be withheld if release would inhibit the future free and frank exchange of opinions between Ministers and officials, either by making officials reluctant to give such advice, or Ministers reluctant to receive it. This would be detrimental to the effective conduct of the public policy making process.
Policy advice to Ministers and Cabinet while under consideration **Relevant provision:** Section 9(2)(f)(iv)	• Subject to the general priciples above (see Factual, background or publicly available material and Options v analysis) policy advice to Ministers and Cabinet can be withheld on a temporary basis while it remains under active consideration, if it is necessary to enable the orderly and effective conduct of the decision making process (for example, see cases 369357, 318858, 285135, 285265, 175799 and 175628). Agencies must be able to demonstrate that release of the specific information at issue would prejudice the ability of the Minister or Cabinet to consider and decide on the advice tendered.
Policy advice to Ministers and Cabinet after decisions have been taken	• Unless it is essential to enable the effective conduct of political consultation and negotiations on the proposed policy (see immediately below), policy advice to Ministers and Cabinet should be released once decisions have been taken (for example, see cases 328421, 342796, 309664 and 176459). Once decisions have been taken, there is a strong public interest in disclosure to promote the public interest in accountability. • This is usually the case even if the decision is to abandon the options under consideration (see cases 288708 and 176675). Any potential harm from release of abandoned options can often be mitigated by release of an explanatory statement. • Paragraph 8.17 of the Cabinet Manual 2017 states:

Type of information	Ombudsman position
	It is generally expected that Cabinet material (Cabinet and Cabinet committee papers and minutes) on significant policy decisions will be released proactively once decisions have been taken, most often by publication online.
Political consultation and negotiations **Relevant provision:** Section 9(2)(f)(iv)	• Advice can be withheld if it is necessary to enable the effective conduct of political consultation and negotiations on the proposed policy (for example, see cases 175609 and W44732). Disclosure before negotiations have been concluded may prejudice the ability of the parties to reach agreement.
Passage of time—stalled processes	• The legitimate expectation of confidentiality under section 9(2)(f)(iv) can diminish over time (see case 177645). In addition, if the public policy making process has stalled or become unreasonably protracted, there may be a public interest in disclosure of more information than would otherwise be the case in order to promote the accountability of Ministers and officials for the conduct of that process (see case 172541). The passage of time can similarly diminish the need to withhold information under section 9(2)(g)(i). Generally speaking, the older the information, the less likely its disclosure can be expected to have an inhibiting effect on the future exchange of free and frank opinions.

Planning the public policy making process

Agencies will be much better off if they think in advance about the official information that's likely to be generated in the context of the public policy making process.

At the planning stage, agencies should consider the following.

- Whether people should be able to participate in the policy process, and if so, when and how; what information needs to be disclosed and when, to ensure that participation can be on an informed basis.
- What information will be generated during the public policy making process; what information will need to be protected, and for how long; what information can be released, preferably proactively but otherwise in response to an OIA request, and when.

- How the policy advice to Ministers and Cabinet should be structured—for example, clear distinctions between the following components of the advice will help if it is requested under the OIA:
    - the background, facts, and principles involved (usually capable of release);
    - the range of options (usually capable of release);
    - analysis and evaluation of the options (may be necessary to withhold on a temporary basis while under active consideration, subject to the application of the public interest test);
    - the advice or recommendation(s) (may be necessary to withhold on a temporary basis while under active consideration, subject to the application of the public interest test); and
    - information that may be sensitive for other reasons, for example, because it is legally privileged.

Information about public participation is available in the Policy methods toolbox published by the Department of the Prime Minister and Cabinet.

Further information

Appendix 1 of this guide has a diagram summarising the general principles that apply to information generated in the context of the public policy making process.

Appendix 2 has case studies illustrating the application of sections 9(2)(f)(iv) and 9(2)(g)(i) to public policy-related information.

Related Ombudsman guides include:

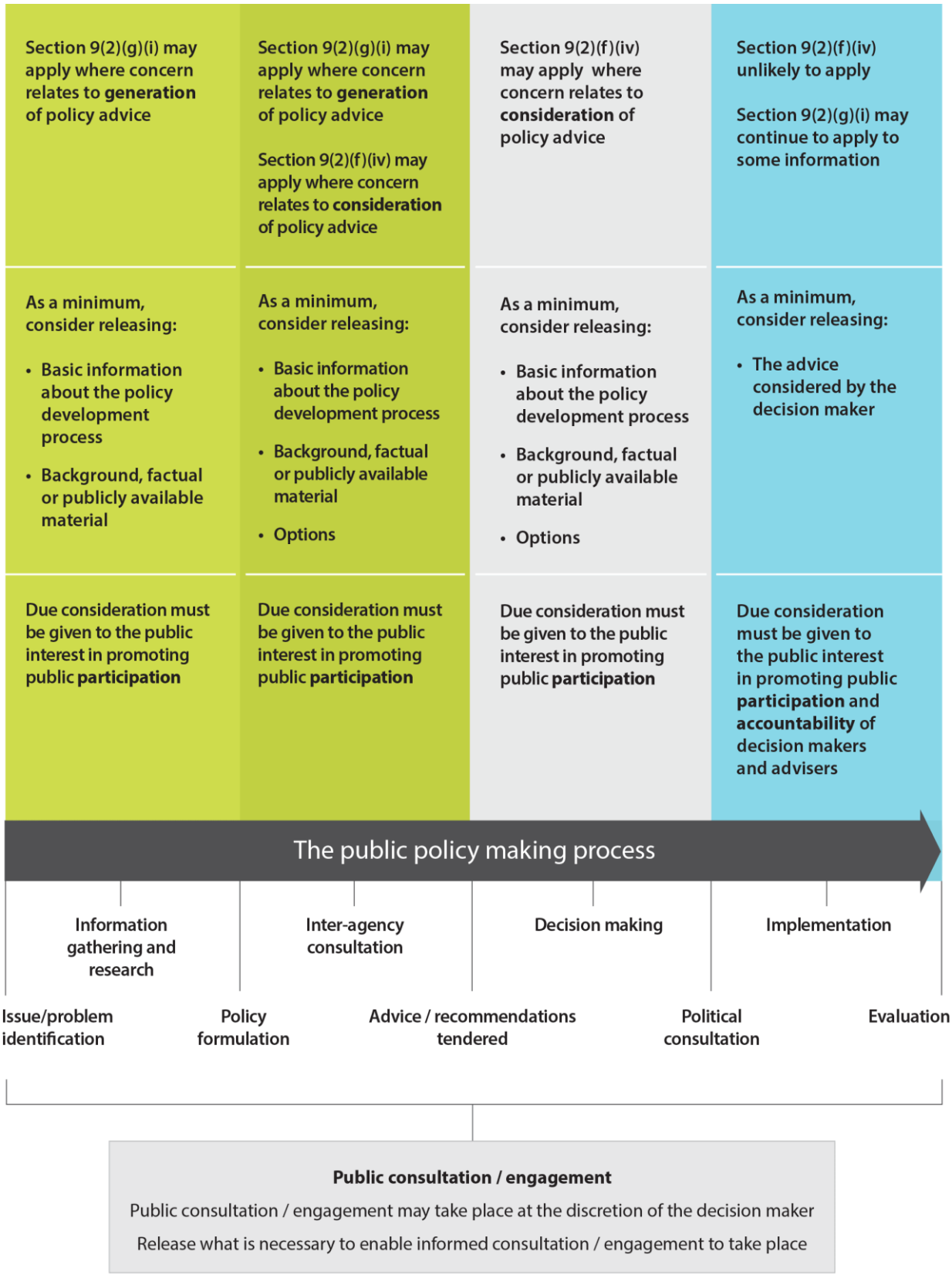
- *The OIA for Ministers and agencies*
- *Confidential advice to government*
- *Free and frank opinions*
- *Public interest*

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

You can also contact our staff with queries about the application of the OIA to public policy-related information by email info@ombudsman.parliament.nz or freephone 0800 802 602. Do so as early as possible to ensure we can answer your queries without delaying your response to a request for official information.

Appendix 1. Visual summary of general principles

You can find a full alternative-text version of this visual summary below.



Alternative-text version of visual summary

General notes

This diagram is a visual summary of the general principles discussed on pages 8–11 of this guide. It is made up of 3 main sections. Each section runs across the width of the page. The first section is a 4 column table split into 3 rows. Each column is a different colour. The second section is directly below the first and is a dark grey arrow that represents a continuum (the arrow runs horizontally across the page, with the arrow-head at the right hand side indicating progression). Text in the arrow reads 'The public policy making process'. Directly below this arrow are the phases in the process marked along the arrow/continuum, from left to right, with phase 1 on the left and phase 9 at the right hand side of the page. The third section is a grey box at the bottom of the diagram which has a centre line linking it to the continuum directly above.

Section 1

Column 1 (light green) covers the early phases: from issue/problem identification, to information gathering and research, to policy formulation.

Row 1 text: Section 9(2)(g)(i) may apply where concerns relate to the **generation** of policy advice.

Row 2 text: As a minimum, agencies should consider releasing:

- Basic information about the policy development process
- Background, factual or publicly available material.

Row 3 text: Due consideration must be given to the public interest in promoting public **participation**.

Column 2 (dark green) covers the next phases: from policy formulation, to inter-agency consultation, to advice/recommendations tendered.

Row 1 text: Section 9(2)(g)(i) may apply where concerns relate to the **generation** of policy advice AND section 9(2)(f)(iv) may apply where concerns relate to the **consideration** of policy advice.

Row 2 text: As a minimum, agencies should consider releasing:

- Basic information about the policy development process
- Background, factual or publicly available material
- Options.

Row 3 text: Due consideration must be given to the public interest in promoting public **participation**.

Column 3 (grey) covers the next phases: from advice/recommendations tendered, to decision making, to political consultation and negotiation.

Row 1 text: 9(2)(f)(iv) may apply where concerns relate to the **consideration** of policy advice.

Row 2 text: As a minimum, agencies should consider releasing:

- Basic information about the policy development process
- Background, factual or publicly available material
- Options.

Row 3 text: Due consideration must be given to the public interest in promoting public **participation**.

Column 4 (blue) covers the final phases: from political consultation and negotiation, to implementation, to evaluation.

Row 1 text: Section 9(2)(f)(iv) is unlikely to apply after decisions have been made. 9(2)(g)(i) may continue to apply to some information.

Row 2 text: As a minimum, agencies should consider releasing the advice considered by the decision maker.

Row 3 text: Due consideration must be given to the public interest in promoting public **participation** and the **accountability** of decision makers and advisers.

Section 2

The continuum: The following phases are marked along the continuum represented as an arrow. The text marked out below it reads from left to right: Issue/problem identification; Information gathering and research; Policy formulation; Inter-agency consultation; Advice/recommendations tendered; Political consultation and negotiation; Decision making; Implementation; Evaluation.

Section 3

This grey box is at the bottom of the page, linking to the continuum above. The title reads: Public consultation/engagement. Text below the title reads: Public consultation / engagement may take place at the discretion of the decision maker and the line directly below reads 'Release what is necessary to enable informed consultation/engagement to take place.'

Back to contents

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.

Index

Good reason for withholding		
Case number	Year	Subject
369357	2014	Ministerial briefings and Cabinet papers on telecommunications and ultra-fast broadband *Section 9(2)(f)(iv) applied—while some decisions had been made, others were still required, and disclosure would prejudice the ongoing decision making process*
318858	2011	Information about the Government's proposed mixed ownership programme *Sections 9(2)(f)(iv) and 9(2)(g)(i) applied—disclosure of preliminary advice would prejudice ongoing decision making process and inhibit future expression of free and frank opinions by officials*
293216	2011	Internal discussion paper on privatisation *Section 9(2)(g)(i) applied—disclosure of early internal discussion paper on sensitive issue would inhibit future expression of free and frank opinions by officials*
175609	2007	Advice relating to Amendment Bill *Section 9(2)(f)(iv) applied—disclosure would prejudice orderly and effective conduct of political negotiations*
285135	2010	Cabinet paper relating to review of the Overseas Investment Act *Section 9(2)(f)(iv) applied—advisory and decision making processes ongoing—disclosure would prejudice the orderly and effective conduct of those processes*
285265	2010	Advice and inter-agency consultation relating to Whānau Ora *Sections 9(2)(f)(iv) and 9(2)(g)(i) applied—disclosure while policy advice still under consideration by Ministers would prejudice ongoing decision making process—disclosure of inter-agency consultation would inhibit future expression of free and frank opinions by officials*

176192	2007	Inter-agency consultation on draft discussion document *Sections 9(2)(f)(iv) and 9(2)(g)(i) applied—disclosure of inter-agency consultation on draft discussion document would inhibit future expression of free and frank opinions by officials, and undermine the efficiency of the consultation process—it would also prejudice Ministers' ability to consider advice that would be tendered at the conclusion of the policy process*
175799	2007	Advice on electoral finance *Section 9(2)(f)(iv) applied—disclosure while policy advice still under consideration by Ministers would prejudice ongoing decision making process—also necessary to withhold connected internal discussion documents—compare with 176459, advice on electoral finance, after the introduction of the Electoral Finance Bill*
175628	2007	Advice on emissions trading scheme *Section 9(2)(f)(iv) applied—disclosure of preliminary advice would prejudice ongoing decision making process*
173774	2006	Advice and 'think piece' on reprioritisation or savings in Vote Education *Sections 9(2)(f)(iv) and 9(2)(g)(i) applied—disclosure of internal discussion documents and advice to Ministers would prejudice ongoing decision making process—disclosure of internal 'think piece' would inhibit future expression of free and frank opinions by officials*
W48162	2003	Comments on early draft Cabinet papers *Section 9(2)(g)(i) applied—disclosure of inter-agency consultation would inhibit future expression of free and frank opinions by officials*
W44732 W44790	2000	Advice relating to pre-funding of New Zealand Superannuation *Section 9(2)(f)(iv) applied—disclosure would prejudice orderly and effective conduct of political negotiations*

No good reason for withholding		
Case number	Year	Subject
328421	2013	Advice concerning partnership schools *Section 9(2)(f)(iv) did not apply—decisions had been made*
342796	2012	Advice regarding proposals for the future of Christchurch education *Section 9(2)(f)(iv) did not apply—decisions had been made—strong public interest in disclosure to enable informed public consultation*

309664	2012	Cabinet paper on decision to retain newborn blood spot cards *Section 9(2)(f)(iv) did not apply—decisions had been made—information did not reveal advice that would subsequently be tendered*
288708	2010	Abandoned options, merger of Archives and National Library *Section 9(2)(g)(i) did not apply—release of formal advice to Ministers about abandoned options after decisions had been made would not inhibit the free and frank expression of opinions by officials*
172541	2008	Options and analysis in the review of New Zealand Superannuation Portability *Section 9(2)(f)(iv) did not apply to all the information—options released, analysis withheld—public interest in release of options given protracted policy process*
176459	2008	Advice on electoral finance, after the introduction of the Electoral Finance Bill *Section 9(2)(f)(iv) did not apply—introduction of Bill constituted discrete end-point in the policy development process—disclosure would not prejudice ability of Ministers to consider advice eventually tendered by officials—compare with 175799, advice on electoral finance*
176675	2008	Abandoned options, South Auckland primary teacher supply *Section 9(2)(f)(iv) did not apply—decisions had been made—disclosure of abandoned options posed no risk*
177645	2008	Information relating to appointment of an honorary consul in Monaco *Section 9(2)(f)(iv) did not apply—confidentiality can diminish over time*
174609	2007	Ministerial briefing on citizenship review *Section 9(2)(f)(iv) did not apply to background / factual information*
175435	2007	Advice on daylight savings and the 2011 Rugby World Cup *Section 9(2)(f)(iv) did not apply to protect the fact that the matter was under consideration*

Good reason for withholding

Case 369357 (2014)—Ministerial briefings and Cabinet papers on telecommunications and ultra-fast broadband

A request for information about telecommunications and ultra-fast broadband was refused under a number of grounds, and the requester complained to the Chief Ombudsman.

The information at issue included partially redacted ministerial briefings and Cabinet papers. Although these papers had been considered, and a decision made to bring forward a review of the regulatory framework, the Ombudsman accepted it was still necessary to withhold parts of them under section 9(2)(f)(iv). The decision to bring forward a review of the regulatory framework was not the culmination of a discrete policy process that had been completed. The review of the regulatory framework had yet to be completed, and the Commerce Commission was also yet to report back on related matters. These ongoing processes may have given rise to a need to revisit the advice that had been tendered previously. It was therefore necessary to withhold the parts of the papers in respect of which additional work was underway, and further advice would be tendered. Disclosure of the earlier advice would prejudice the ability of Ministers and Cabinet to consider the related advice that would be tendered in future.

It was also necessary to withhold some advice in the papers in order to maintain the expression of free and frank opinion that is integral to a robust policy process (section 9(2)(g)(i)). The opinions were expressed in an area where final decisions had not been made. In particular, some of the advice was conveyed to the Minister in an informal manner to provide her with a quick, rough cut analysis in advance of expected announcements by the Commerce Commission. The ability of officials to generate fast reactive advice is essential for the effective conduct of public affairs.

Back to index.

Cases 318858, 319224 and 319684 (2011)—Information about the Government's proposed mixed ownership programme

In the run-up to the 2011 general election the National Government announced its commitment to pursue a *'mixed ownership model'* in relation to certain state-owned assets. In essence, this meant partial privatisation of four state-owned energy companies, and a reduction in the Crown's holdings in Air New Zealand. The Treasury was tasked with undertaking some preliminary work. The media and opposition MPs sought information about this work, and complained to the Chief Ombudsman when their requests were partially refused under sections 9(2)(f)(iv) and 9(2)(g)(i). The information at issue included ministerial reports and discussion papers.

The Chief Ombudsman considered the content and context of the information at issue:

> *It comprises early advice on two of the many aspects under consideration: encouraging New Zealand participation and limiting foreign ownership. It is in the nature of possible*

> *options for consideration, rather than detailed advice and recommendations as to action. Any detailed advice and recommendations as to action will come after the election, once the preparatory work, including detailed scoping studies, is complete. Seen in this context, the information at issue may be characterised as limited in scope, as well as partial and incomplete. Treasury submitted that release would create pressure to design and structure a sales programme based on one or two narrow aspects, rather than what would be the best design and structure for the Crown and investors taking into account all relevant aspects.*

She accepted that release of the information at issue at this stage of the process would be premature and undermine the orderly and effective conduct of that process.

The risk was heightened by the *'complicated and dynamic'* nature of the advisory process:

> *There are a number of aspects to the potential sales programme that need to be considered (e.g. sequencing, estimated proceeds, offer instrument, offer structure, governance, ownership, scale of sell-down, selling syndicate structure, maximising investor participation, marketing and communications, programme management and risk monitoring). These aspects are interrelated, so that advice developed on one aspect may cause earlier advice on another aspect to be reconsidered. Advice may also need to be revisited to take account of changing market conditions.*

It was also heightened by the potentially adverse economic impact of premature release of the information:

> *...there is a genuine and valid concern that release of information that commits Ministers too early in the process to particular design elements, or creates expectations about the use of such elements, will detrimentally affect investor participation, and therefore the level of return to the Crown. Given that the estimated level of return is between $5 and $7 billion, the potential economic impact could be significant.*

The Chief Ombudsman accepted that the economic stakes were such that if the information were disclosed, officials would re- think the manner in which they provided advice to Ministers on the programme on an ongoing basis. In the context where release of official information could have potentially affected the success of the offers and the level of return to the Crown, she accepted that officials were likely to feel inhibited in generating, expressing and recording their opinions, and that a degree of protection at that stage of the process was required so that this particular harm did not eventuate.

The Chief Ombudsman concluded that the information at issue needed to remain confidential at that particular stage of the policy development process in order to protect the interests specified in sections 9(2)(f)(iv) and 9(2)(g)(i). The need to withhold was not outweighed by the public interest in release (this case is also discussed in our public interest guide). You can read the Chief Ombudsman's full opinion here.

Back to index.

Case 293216 (2011)—Internal discussion paper on privatisation

In 2010, the Treasury Secretary appeared on Q+A. In reply to a question about internal papers prepared by the Treasury on privatisation of state assets, he replied:

> *Well one of the things I asked my staff some time ago, is to really think about what are some of the arguments that people advance against privatisation, because New Zealand's a bit unusual. Most countries overseas that's not particularly controversial nowadays, it is here, and we want to get a better understanding of what it is that people are worried about in privatisation.*

A request was made for *'the reports produced by The Treasury on "the arguments that people advance against privatisation"'*. The requester complained to the Chief Ombudsman when it was refused under section 9(2)(g)(i) of the OIA.

The information at issue was two drafts of an internal discussion paper commissioned by the Treasury's Executive Leadership Team. The drafts were discussed at an internal policy forum and no further work was undertaken. The Treasury clarified that the Government had sought no advice on this issue, and none had been provided. It argued that disclosing this kind of background work would prejudice its ability to undertake self-initiated internal dialogues, especially in the case of sensitive policy issues. It said it was critical for the Treasury to be able to do background work on a range of topics before Ministers ask for advice. This enables it to ensure the advice ultimately tendered is robust, and that it can respond to requests for advice quickly and efficiently.

The Chief Ombudsman accepted that section 9(2)(g)(i) of the OIA applied to the information. In her words:

> *This provision recognises that some processes will need to be carried out without public scrutiny with the rationale being that the opportunity to express opinions in a free and frank manner will ultimately result in better decisions.*

It was important that the Treasury had the confidence to explore its initial thinking on the important issue of privatisation in a candid way. Confidentiality was needed to induce the degree of free and frank opinion required during this process to place the Treasury in a position to best advise the Government if and when it decided to have such a discussion.

The Chief Ombudsman concluded that the public interest in disclosure of this early work did not outweigh the need to withhold it. However, if and when the Government actually sought advice on privatisation, the balance between the public interest favouring disclosure and the need to withhold under 9(2)(g)(i) may change, and a fresh assessment would be necessary.

Back to index.

Case 175609 (2007)—Advice relating to Amendment Bill

A requester sought information relating to the Births, Deaths and Marriages Registration Amendment Bill (the Amendment Bill), and complained to the Ombudsman when that request was refused under section 9(2)(f)(iv). The information at issue included ministerial briefings and Cabinet papers on the Amendment Bill.

The request was made at the time that Cabinet had approved the legislative proposals in principle. However, there were still key steps to be taken before the Bill could be introduced to the House, including drafting, approval by the Cabinet Legislation Committee and Cabinet of the draft Bill for introduction, and consultation within caucus and with coalition and support parties. The proposed legislation remained subject to negotiation and potential change, and any change required as a result of that process may have necessitated further consideration and approval by the Cabinet Legislation Committee, Cabinet, and caucus.

The Ombudsman concluded that withholding was necessary in this context in order to maintain the constitutional convention protecting the confidentiality of advice. Confidentiality was required in order to protect the executive government's ability to develop and negotiate political support for the draft legislation, in a timely and orderly fashion.

The Ombudsman accepted that there was a convention that draft legislation and associated advice would remain confidential until that legislation was introduced to the House, subject of course to an assessment of the countervailing public interest considerations favouring disclosure of such information under section 9(1) of the OIA. This was supported by paragraph 7.44 of the Cabinet Manual (2008), which stated:

> *At every stage of its development, draft legislation is confidential and must not be disclosed to individuals or organisations outside government, except in accordance with the Official Information Act or Cabinet approved consultation procedures. Any such release or disclosure must first have the approval of the Minister concerned. Premature disclosure of the contents of a draft Bill could embarrass the Minister, and imply that the prerogative of Parliament is being usurped. Cabinet, government caucus(es) and Parliament must always retain the freedom to amend, delay or reject a Bill.*

The Ombudsman made clear that she was not concerned about the potential for Ministerial embarrassment. Her view was based on the fact that *'the Government of the day must assume responsibility for assessing changes in the political, economic and social environment and for determining whether adjustments to the law are needed in response to those changes'*.[6] The process of developing and negotiating political support for draft legislation may, in the circumstances of a particular case, be unduly impeded by premature disclosure of advice concerning the proposed content and operation of that legislation. Ministers would be called upon to justify and debate legislative proposals that

6 Legislation Advisory Committee Guidelines on Process and Content of Legislation, 2001 Edition (now superseded by 2014 Edition), page 9.

were still in development and subject to change. This in turn would divert ministerial attention from the core process of developing the legislation to the stage where it was fit for introduction to the House, and had sufficient political support to proceed.

For these reasons, the Ombudsman accepted the Minister's submission that *'releasing information on the development of the Bill at this stage could potentially undermine the policy and legislative development process'.*

The Ombudsman acknowledged the public interest in enabling public participation in the making and administration of laws. However, she was not persuaded that this consideration outweighed the need to withhold the information at the time that decision was taken.

There are opportunities for public participation in the legislative process once draft legislation has been introduced to Parliament. Select committee consideration allows members of the House, interest groups, and the general public to examine and have input into draft legislation before it passes into law. Select committees may recommend amendments to the House that are relevant to the subject matter and consistent with the principles and objects of the Bill as introduced. The Ombudsman also noted that papers relating to the Amendment Bill were to be published on the Department of Internal Affairs' website following the Bill's introduction.

Back to index.

Case 285135 (2010)—Cabinet paper relating to review of the Overseas Investment Act

The Minister of Finance refused a request for all recent Cabinet papers on a review of the Overseas Investment Act, and the requester complained to the Chief Ombudsman.

The information at issue was a paper and attached draft policy document that had been considered by the Cabinet Economic Growth and Infrastructure Committee. Following consideration of the papers, the Cabinet Committee decided that further analysis of the overseas investment regime and any proposed amendments to that regime was required. The Treasury was engaged in further policy work, at the completion of which a further paper would be referred to Cabinet.

The Chief Ombudsman was satisfied, given the contentious nature of the issue of overseas investment in New Zealand, that disclosure of the information at issue would have prejudiced the ability of Cabinet to give undisturbed consideration to the advice tendered. Not all relevant advice was completed and to hand, which would have put Ministers at an unfair disadvantage in terms of adequately explaining publicly the issues that would likely stem from any disclosure.

The Chief Ombudsman acknowledged the public interest in disclosure of information related to the review of the Overseas Investment Act, but concluded the overall public interest would not be served by the disclosure of information that would undermine the ability of the Cabinet to receive and consider, in confidence, advice relating to the

review. In coming to this view, she had regard to the expectation that the policy advice relating to the review would be disclosed once decisions had been made, and that the public would have an opportunity to make submissions on any changes requiring legislative amendment through the Select Committee process.

Back to index.

Case 285265 (2010)—Advice and inter-agency consultation relating to Whānau Ora

A requester sought *'copies of all Cabinet papers, advice, briefings and correspondence on the development of the Whānau Ora policy'* over a period of one month. She complained when her request was refused on a number of grounds. The Chief Ombudsman formed the opinion that section 9(2)(g)(i) applied to exchanges between officials drafting the policy, and section 9(2)(f)(iv) applied to the advice tendered to Ministers. There were, she said, two elements of the policy development process that required protection.

First, some of the information at issue comprised free and frank discussion between officials and to Ministers about certain issues relating to the policy development process. The Chief Ombudsman was satisfied that it was necessary to withhold this information to protect the ability of officials to engage in this type of debate as part of the process of developing robust policy. It seemed to her that, if these particular communications were to be released, officials would indeed feel inhibited in the future from discussing each other's work or positions, or critiquing the views advanced by others, in a free and frank way; something which is crucial to the quality and robustness of the final shape of the policy in question (section 9(2)(g)(i) refers).

Second, it was clear that Whānau Ora was a significant policy development process, involving a number of Ministers and a range of different government agencies. The policy development process involved a number of different streams of advice from government agencies regarding the finer details and shape of the policy. When the request was refused, decisions regarding certain aspects of the policy had been made but a number of further decisions regarding fairly fundamental aspects of the final shape of the policy still had to be made.

Given the scale of the policy development process; the range of policy options to be considered; and the fact that decisions regarding certain elements of the policy had not been made, the Chief Ombudsman was satisfied that it was necessary to withhold the information at issue in order to allow undisturbed ministerial consideration of the different options available before decisions were made on the final shape of the policy. She was not persuaded that the public interest considerations favouring the disclosure of this information outweighed the interests in favour of withholding it. In her opinion, disclosure of the information, in a piece-meal fashion, prior to decisions being taken on the final shape of the policy, would not have served to promote the overall public interest.

The Chief Ombudsman also noted that the Taskforce's final report had since been

disclosed and said this seemed to substantially address the public interest by illustrating the type of proposals and recommendations that were under consideration.

Back to index.

Case 176192 (2007)—Inter-agency consultation on draft discussion document

A requester sought Treasury comments on a draft discussion document prepared by the former Ministry of Economic Development (MED) in relation to the review of regulatory control provisions under the Commerce Act (the review). The request was refused under sections 9(2)(f)(iv) and 9(2)(g)(i), and the requester complained to the Chief Ombudsman.

The information at issue consisted of advice between officials and advice to Ministers regarding the drafting of the discussion document. The exchange of views between officials was informal and the material was very much in the nature of a free and frank discussion. This reflected the fact that officials were working within a tight timeframe to allow timely release of the discussion document. All of the material explored and tested views for the purpose of challenge and debate, and to ultimately assist in the drafting of the discussion document.

The Treasury explained that release of this material would affect the way it engaged with MED and other agencies on similar reviews in the future. It would likely result in the production of more formal communications which would reduce the effectiveness and timelines of the communications. For example, future interactions might involve more succinct written material followed up with in-person meetings to clarify and exchange views. This would take longer and be less conducive to developing and testing ideas in a timely manner.

Treasury was also concerned that release of the material would prejudice the ability of Ministers to consider the ongoing stream of advice from departments as the review progressed. In its own words, *'public expression of departmental views (to the extent they have been fully formed at this stage of the review) could lead to public pressure that affects the ability of Ministers to weigh up competing policy alternatives in an undisturbed manner'*.

The Chief Ombudsman stated *'the Treasury has identified two areas of the policy development process which require the protection of sections 9(2)(f)(iv) and 9(2)(g)(i)'*. First, there was a need to protect the ability of officials to comment and draft freely and in a timely manner in the early stages of policy development. If these particular communications were to be released, officials would indeed feel inhibited in the future from discussing each other's positions in a free and frank way; something which is crucial to the quality and robustness of the final product (section 9(2)(g)(i)). Secondly, release of the information would have undermined the ability of Ministers to receive and consider, in an effective and orderly manner, the considered advice that would eventually be tendered at the conclusion of the policy process (section 9(2)(f)(iv)). The Chief Ombudsman did not consider that the public interest in disclosure outweighed the need to protect the interests in sections 9(2)(f)(iv) or 9(2)(g)(i) of the OIA. In forming his view,

he was mindful that Treasury had been involved in the preparation of the discussion document, which canvassed the full range of issues, options and alternative views.

Back to index.

Case 175799 (2007)—Advice on electoral finance

A requester sought information about the Government's proposals for electoral finance and complained to the Chief Ombudsman when that request was refused under section 9(2)(f)(iv).

The information at issue comprised a relatively large amount of advice tendered by Ministers to Cabinet or Cabinet committee, along with advice from officials to Ministers or to staff in the Minister's Office. Other information comprised officials' internal discussion papers/communications that were clearly connected with the overall process of the tendering of advice to Cabinet or Cabinet committee.

The Chief Ombudsman formed the opinion that it was necessary to withhold the advice at that time to maintain the constitutional convention protecting the confidentiality of advice tendered.

The advice formed part of an ongoing process, and no decisions had been made as to whether the proposals would become government policy. Disclosure of the information at that stage would have been likely to cause public confusion and would have placed Ministers, who had yet to consider the completed advice in Cabinet, in a difficult and unfair public position given the inherent sensitivity and complexity of the overall topic. It would thus be likely to have prejudiced what would otherwise be an orderly process for the development of sound policy development and decision-making. The Chief Ombudsman was unable to find any discrete background or options papers that could have been released without prejudicing section 9(2)(f)(iv) interests.

The Chief Ombudsman agreed that there was a high public interest in the disclosure of information related to such an important topic. However, he did not consider that the overall public interest would be served in this case by disclosing information that would be likely to prejudice the ability of the Government to consider in an orderly fashion some quite complex issues. The policy development process would benefit more by waiting for its completion before any disclosure. In the Chief Ombudsman's view, any public debate that focused on the information that was available at that stage of the process would be counter-productive, and such debate would have been better conducted once the Bill had been introduced. In contrast, see case 176459, advice on electoral finance, after the introduction of the Electoral Finance Bill.

Back to index.

Case 175628 (2007)—Advice on emissions trading scheme

In 2007 the Dominion Post reported that the Treasury estimated there would be a negligible impact on the economy from adopting an emissions trading scheme. A

requester sought the relevant Treasury analysis, and complained to the Ombudsman when this was refused under section 9(2)(f)(iv).

The information at issue comprised two very small pieces of information contained within a larger batch of information that was itself *'compact'*. It was clear that this information was part of an ongoing stream of work related to the emissions trading project. Treasury explained that it was neither practicable nor logical to attempt to undertake detailed modelling or analysis of macroeconomic impacts until a clearer picture of the proposed emissions trading scheme had emerged, most likely some months away. Indeed, for all practical purposes, modelling was not feasible until the parameters of the proposed scheme were known.

Treasury argued that the information in question would be of little real value to the requester without broader contextual information, but release, with or without the context, would compromise the policy development process. While this entailed an intensive and high output work programme with officials meeting regularly with Ministers, Cabinet had yet to consider the matter.

The Ombudsman accepted that it was critical that the policy development process was managed in a coherent and orderly manner given the complex and technical nature of the policy work, with a high degree of interconnectedness between different issues. Piecemeal release of preliminary work without full context while the matter was still under very active consideration was likely to be highly disruptive. It would not inform stakeholders or the public at large, and would lead to Ministers being unfairly examined publicly on detailed aspects of proposals still in the formative stages on which they could not be adequately briefed at the time.

While there was undoubtedly a public interest in disclosure of information related to the development of policy, the overall public interest was not served by disclosure of information that undermined the processes in which that development occurred.

The Government recognised that emissions trading proposals were controversial and contentious and that the outcome of the work would be material to both the government and business. It was also accepted that parties potentially affected by the introduction of a trading scheme had a legitimate interest at stake, and that it was in the public interest for such parties to have the opportunity to make a contribution to the policy development process.

The Ombudsman noted that submissions on related policy discussion papers released in 2005 and 2006 were one input to the current stream of work. He also understood that relevant officials had met informally with representatives of business organisations to hear their views on cost/benefit issues. Discussions with other stakeholders had and would continue to occur throughout the policy development process. Furthermore, it was the Government's intention to engage with stakeholders once a framework document had been prepared and issued.

In the light of the above and the Ombudsman's understanding that most advice to

Ministers would be released proactively at the time of the framework document, he considered that the public interest in disclosure of the requested information did not outweigh the interests in withholding.

Back to index.

Case 173774 (2006)—Advice and 'think piece' on reprioritisation or savings in Vote Education

A requester sought all documents regarding reprioritisation or savings in Vote Education, and complained to the Chief Ombudsman when Treasury refused that request under sections 9(2)(f)(iv) and 9(2)(g)(i).

The Chief Ombudsman formed the opinion that section 9(2)(f)(iv) applied to some internal discussion documents and advice tendered to Ministers. That information remained under active consideration, without final Cabinet decisions having been taken. The advice to Ministers was presented in semi-formal way in order to achieve their responses to specific focused policy issues and options, and release of the advice at that stage would have prejudiced the ongoing advisory and decision making process.

In addition, the Chief Ombudsman formed the opinion that section 9(2)(g)(i) applied to an internal *'think piece'*. Officials used this as a technique for creating a wide-ranging set of policy options of a free and frank nature that served as a springboard for further internal discussion. There was a valid concern that if the information was disclosed, officials would be likely to be brought under pressure for considering such options and be inhibited from raising similar ones in future. This could seriously undermine in future the benefits that the technique was intended to produce, and could reduce the potential range of advice the Government would receive and risk the quality of engagement with Ministers.

The Chief Ombudsman acknowledged the public interest in disclosure of policy advice on education. However, the overall public interest would not be served by release of information that would undermine the ongoing advisory and decision making process. Nor would the public interest be served by inhibiting the ability of officials to provide Ministers with free and frank advice. It is important that officials are not inhibited, by fear of disclosure, from voicing and scrutinising as many issues and options as are necessary for the formulation of sound and comprehensive advice. The Chief Ombudsman also noted that publication of some of the information after the policy process was completed would help to address the public interest.

Back to index.

Case W48162 (2003)—Comments on early draft Cabinet papers

DPMC withheld Treasury comments on draft climate change Cabinet papers under section 9(2)(g)(i), and the requester complained to the Ombudsman. The Ombudsman considered the nature and content of the information and the context in which it was

generated.

The information comprised an email from a Treasury official commenting on the draft Cabinet papers, and a draft Cabinet paper with the suggested amendments tracked. DPMC explained that the issues surrounding the ratification of the Kyoto Protocol were complex and had potentially wide reaching implications for many sectors of the economy and society. As a result, the development of policy advice on these issues required collaboration with a number of agencies across government in a relatively short time-frame. DPMC's role in this process included facilitating early sharing and *'sounding'* of ideas between officials within the relevant departments and then bringing together the multiple strands of expertise and knowledge into a single collective piece of advice for Cabinet within a short time frame.

DPMC explained that it adopted a relatively informal process for departmental consultation and provided departments with very early drafts of material for initial comment and thoughts, so that any major issues could be identified early and solutions quickly developed. Swift and vigorous debate ensued as ideas were floated, challenged and discussed before being refined into coherent pieces of analysis and proposals. DPMC advised the Ombudsman that officials were given very little time to comment on the early drafts, therefore any feedback was largely an initial reaction or *'off the top of the head thoughts'*. The information at issue represented the initial comments that were provided by Treasury officials on these early draft versions of the final Cabinet papers.

DPMC was concerned that if the free and frank opinions were disclosed, the processes adopted in this case for developing policy advice would need to be revisited and the level of formality would necessarily increase, hindering the effective conduct of public affairs.

The Ombudsman accepted that release of the information would inhibit future free and frank expression of opinions by or between officials through a greater level of formality being introduced into the early stages of the policy development process. In his view, where a collaborative approach has been adopted for the development of policy advice, the early sharing of ideas between the agencies involved in the policy development process was essential to the effective conduct of public affairs.

The Ombudsman acknowledged that there was undoubtedly a public interest in the disclosure of information relating to the workings of government to promote accountability and participation. However, the overall public interest in this case would not be served by disclosing information that would undermine the ability of the government to function effectively and in an orderly manner. You can read the full case note on our website.[7]

Back to index.

7 Search for *'W48162'* using our online library Liberty.

Cases W44732 & W44790 (2000)—Advice relating to pre-funding of New Zealand Superannuation

As part of its election manifesto, the Labour Party promised to pre-fund New Zealand Superannuation. Although the Coalition Government had not yet agreed to the policy, certain assumptions were made regarding the pre-funding of superannuation for the purposes of the annual budget.

After the budget announcement the Minister of Finance received requests for the advice provided to the government regarding the pre-funding of superannuation. The Minister refused these requests in reliance upon section 9(2)(f)(iv).

The information at issue was generated in order to develop the government's policy regarding the future of New Zealand Superannuation and when viewed in isolation, was fairly innocuous. The decision to withhold the information was taken to protect the political process as opposed to the information itself.

At the time the request was made, the Labour and Alliance parties were in the middle of sensitive negotiations. The Labour Party was concerned that release of the information would jeopardise the ability of the Coalition to reach agreement as to government policy. The Minister was also concerned that the public debate generated by release of the information would compromise the Coalition's ability to work through the issues.

It was accepted that release of the information before the Coalition partners had concluded their negotiations might undermine a convention that section 9(2)(f)(iv) is designed to protect. To this end, and despite the relatively innocuous nature of the information at issue, the Ombudsman concluded that the Minister was entitled to rely section 9(2)(f)(iv) in order to protect the confidentiality of advice tendered by officials.

The Ombudsman acknowledged a strong public interest in the development of superannuation policy. However, there was a greater public interest in allowing the Coalition partners to negotiate the government policy on superannuation. The Ombudsman concluded that the public interest in release did not outweigh the need to withhold. You can read the full case note on our website.[8]

Back to index.

8 Search for *'W44732'* using our online library Liberty.

No good reason for withholding

Case 328421 (2013)—Advice concerning partnership schools

In February 2012, the NZPPTA sought policy advice on the development of partnership schools. The Associate Minister of Education partially refused that request under section 9(2)(f)(iv). The NZPPTA complained to the Ombudsman.

In August 2012, the Associate Minister revised his decision, releasing most of the information at issue, but withholding a small amount of information about the funding of partnership schools under section 9(2)(f)(iv). The Ombudsman considered whether the Associate Minister had good reason to withhold this small amount of information at the time that decision was taken.

He noted that the paper on partnership schools had been presented to Cabinet on 30 July 2012, and before that to the Cabinet Social Policy Committee on 25 July 2012, and had been subsequently published on the Ministry of Education website. Therefore it was apparent that Cabinet and Ministers had already considered the advice tendered by the Ministry and reached a decision as to how they wished to proceed with the policy on partnership schools. In light of this, it was not clear that withholding was necessary to protect the ability of the government to receive and deliberate upon advice in an effective and orderly manner.

The Ombudsman stated:

> *Section 5 of the OIA requires that decisions on whether or not to disclose official information in response to a request must be determined in accordance with the purposes of the Act set out in section 4. ... [T]here are circumstances in which disclosure of policy advice will promote the accountability and participation purposes of the Act, and these factors are more likely to predominate in decisions on OIA requests once Ministers and/or Cabinet have had the opportunity to consider the advice that has been tendered.*
>
> *The proposal to create of a new type of school within the New Zealand educational system is a significant step, and is—in my opinion—a circumstance in which the disclosure of policy advice at this stage in the process is required by section 5 of the OIA when considering the accountability and participation purposes of this enactment. Ministers cannot be held fully accountable for the proposals they are putting forward, unless the relevant information is in the hands of the public. Similarly, the public cannot adequately, let alone effectively, participate in the 'making and administration of laws and policies' if they are not apprised of key elements of the government's proposals. The resourcing of a public service is a key component in the development of policy and the public is entitled to know how the government intends that a new service—in this case a type of school—is to be funded.*

The Ombudsman formed the opinion that section 9(2)(f)(iv) did not provide good reason to withhold the information at issue, and recommended its release. You can read the full opinion here.

Back to index.

Case 342796 (2012)—Advice regarding proposals for the future of Christchurch education

In September 2012, the Minister of Education publicly announced the Greater Christchurch Education Renewal Plan. This prompted a number of requests for the advice on which decisions had been based. Those requests were refused in full under sections 9(2)(f)(iv) and 9(2)(g)(i), and the requesters complained to the Ombudsman.

After the Ombudsman notified the complaints to the Minister, the Ministry advised that the decision to withhold was under review. It subsequently released the business case and associated Cabinet papers, with minor deletions, followed by a large number of education reports and aides memoire.

The Ombudsman formed an opinion on the remaining deletions and (given the importance of the principles involved) the original decision to withhold the information at issue in full.

The Ombudsman considered that minor deletions to the business case were warranted under section 9(2)(f)(iv). The deleted information related to matters on which no decisions had been made. Disclosure of that information would have pre-empted the ability of Ministers or Cabinet to deliberate on the advice received and decide how to proceed.

However, the original decision to withhold the information in full was not justified under section 9(2)(f)(iv). By that stage, Cabinet had made the high level decisions on the renewal of the education system in greater Christchurch and the Minister had announced the key elements of the plan. In those circumstances, there was no reason to believe that the interest protected by section 9(2)(f)(iv) would have been harmed by the release of the documents.

In addition, the Ombudsman considered there was a strong public interest in the release of all information relevant to the proposals to close or merge schools, given that the Minister had initiated formal consultation with those schools and there was an obligation to comply with the legal requirements of good consultation.

In relation to the business case, the Ministry stated that this was withheld at the time of the Minister's announcement because it was indicative only and a more detailed business case would follow. However, it was the business case which coordinated the education and property responses that had been running in parallel and set out a range of options that Cabinet decided on. It was also used to help finalise the document that was developed for consulting the sector and provided the basis for budget decisions. It was therefore a key document in the decision making process and its disclosure was crucial to enable the public's more effective participation in the making and administration of laws and policies, and to promote the accountability of Ministers of the Crown and officials, and thereby enhance respect for the law and to promote the good

government of New Zealand (an object of the OIA expressed in section 4(a)).

Back to index.

Case 309664 (2012)—Cabinet paper on decision to retain newborn blood spot cards

In 2011, a requester complained about the Minister of Health's decision to withhold the Cabinet paper that informed the Government's decision to retain newborn blood spot cards (also known as 'Guthrie' cards) indefinitely. The paper was withheld under section 9(2)(f)(iv), because *'further advice was under active consideration'*.

The paper was considered by Cabinet Committee in July 2010. The Committee agreed to the proposal for *'the permanent retention of newborn blood spot cards, with a strengthened policy framework, and improved Minister of Health and Advisory Group governance arrangements'*. The Committee invited the Minister to report back on the new policy and governance arrangements. That report back (due in August 2011), had not happened by the time the Minister made a decision on the request.

The Ombudsman formed the opinion that release of the paper at issue would not have prejudiced the Minister's or Cabinet's ability to consider the subsequent paper. The purpose of the July 2010 paper was to seek Cabinet Committee agreement to the permanent retention of the newborn blood spot cards, to which the Committee agreed. It did not discuss the expected content of the report back, and in fact the later report back was not contemplated in the paper, but was agreed by the Committee when it considered the paper. The paper therefore did not disclose the advice that was subsequently given in August 2011. The Ombudsman could not see how release of the July 2010 paper, addressing permanent retention of the newborn blood spot cards, would have prejudiced the consideration of the advice in the August 2011 paper, outlining the policy and governance arrangements for the cards. He was therefore of the view that section 9(2)(f)(iv) did not apply to the paper at the time of the refusal. It was not necessary to recommend release of the paper because it had already been made available.

Back to index.

Case 288708 (2010)— Abandoned options, merger of Archives and National Library

In 2011, Archives New Zealand and the National Library were merged into the Department of Internal Affairs. A requester sought the policy advice behind the merger, and complained when the Minister of State Services withheld options that were not included in the final proposals on the basis that it would prejudice the free and frank expression of opinions by Ministers and officials (section 9(2)(g)(i)).

The Chief Ombudsman noted that the options at issue were discussed in a carefully prepared document which was submitted by officials for the Minister's consideration and

feedback. Some of the options were more developed than others and some appeared in later advice for further consideration by Ministers.

Given that the request post-dated Cabinet's decision on the merger, the Chief Ombudsman was not convinced that the interest protected by section 9(2)(g)(i) would be harmed by the release of the advice which the Minister received on the abandoned options. Section 9(2)(g)(i) can provide protection from release for informal exchanges among officials where early or creative work is being generated so as to give encouragement to uninhibited thinking. However, the same concern does not arise in relation to advice which is tendered in a formal fashion to Ministers, unless there is something particularly free and frank about it. The Chief Ombudsman did not consider that officials would refrain from tendering advice on alternative options except with an assurance of long-term confidentiality for their contributions.

After considering the Chief Ombudsman's comments, the Minister decided to release the information and the complaint was resolved.

Back to index.

Case 172541 (2008)—Options and analysis in the review of New Zealand Superannuation Portability

In response to a request for official information in late 2007, the Minister for Social Development and Employment decided to withhold parts of two reports from 2004 and 2005 relating to the review of New Zealand Superannuation Portability. The Minister relied on section 9(2)(f)(iv) because the information was *'still under active consideration through the Budget process'.*

The Minister released the background and issues information, but withheld information about the options and their analysis. She explained that, although Cabinet had agreed to a package of proposals in October 2007, that agreement was subject to funding in Budget 2008. She argued that release before the budget announcements in May 2008 would undermine the convention of budget secrecy and the effective functioning of government.

The Chief Ombudsman considered whether it was necessary to withhold the options and analysis under section 9(2)(f)(iv), in order to maintain the constitutional convention protecting the confidentiality of advice. She drew a distinction between the analysis and bare options.

She accepted that analysis of options that had been agreed by Cabinet but which were still subject to funding decisions needed to be withheld. Disclosure would pre-empt the ability of Cabinet to deliberate on the advice and decide how to proceed. She agreed with the Minister that these options remained *'under consideration'* until the funding issues had been resolved.

The Chief Ombudsman did not accept that it was necessary to withhold the bare options:

> *In my view the release of the bare options tendered in 2005 is not likely to have the effect predicted. The advice is two years old and no advice has been issued as to which of the options are currently under consideration. In these circumstances it is difficult to see how release of this advice would be likely to interfere with the funding decision making process.*

She also considered that there was a strong public interest in release of the bare options. The review had been ongoing since 2001, and in 2006 the Social Services Committee urged that it be accorded urgency. Disclosure of the bare options would promote the accountability of Ministers and officials to the people of New Zealand in relation to a long-running review. It would also enable the New Zealand public to participate in the making of laws and policy in relation to a matter of national interest.

The Chief Ombudsman acknowledged that this was a complex and controversial area of policy, but this in itself did not amount to a good reason to withhold information from the New Zealand public. In contrast, it was a factor that favoured release of information, because:

> *...disclosure of the options tendered can fuel public debate and therefore ensure that decision makers have a contestable avenue of advice to that put forward by officials before decisions are taken.*

The Chief Ombudsman formed the final opinion that section 9(2)(f)(iv) did not provide good reason to withhold the bare options at the time that decision was taken. She recommended release of that information, except to the extent that a decision had been made to include any of the options in Budget 2008. The Minister complied with the Chief Ombudsman's recommendation, releasing all options except for one which was then the subject of a current budget bid.

Back to index.

Case 176459 (2008)—Advice on electoral finance, after the introduction of the Electoral Finance Bill

After the introduction of the Electoral Finance Bill (the Bill), requesters sought information about the policy development, and complained to the Ombudsman when some information was withheld under section 9(2)(f)(iv).

The Minister of Justice explained that, despite the Bill's introduction, some of the advice had not been the subject of final decisions. In particular, an independent review of a range of electoral finance issues was to be conducted by an expert panel, with the assistance of a *'Citizens' Forum'*. The issues would be considered further by the Government on receipt of the expert panel's report.

The Minister argued that releasing the previous advice on these issues would be likely to hinder the future decision making process, by causing undue focus on matters already considered by the Government, when the intention was that the review be completely

objective and unfettered by any previously considered or adopted proposals.

The Ombudsman did not accept that section 9(2)(f)(iv) applied in this context. The introduction of the Bill constituted the end of a discrete phase or break-point in the policy development process. The policy process was not complete, as the Government would have more issues to consider once the independent review was finished. However, the Ombudsman did not consider that release of the information would prejudice the future ability of Ministers to consider the issues afresh, in light of the expert panel's report. The fact that the Government had an open mind on the issues to be considered was reflected in the fact that a decision had been made to refer them to an independent review and the terms of that review. While some members of the public may have been sceptical about the independence of the review, the proper approach was to provide a contextual statement to address any misunderstanding that may have arisen. The Minister accepted the Ombudsman's provisional opinion and released the advice.

Back to index.

Case 176675 (2008)—Abandoned options, South Auckland primary teacher supply

A requester complained to the Ombudsman when deletions were made to an education report on South Auckland primary teacher supply. The Ministry of Education argued that initiatives covered in the report had not been finalised and release would prejudice the development and implementation process.

The Ombudsman noted that the report in question contained options for further investigation. However, the Ministry had subsequently been made aware through the budget process that funding was not available to pursue those options. Accordingly, the options had been abandoned, and the Ministry was focusing on the development of other options that would achieve the same ends. Consultation on those other options was already underway.

The Ombudsman characterised the content of the report as containing bare options for investigation. No detailed advice was provided on those options. The options were standard options for addressing problems involving teacher recruitment and retention.

In addition, by the time the request was refused the associated decision-making in respect of the particular advice had been completed. The first decision was the Minister's, namely, to approve investigation of those particular options. The second decision was made by the Ministry, namely to abandon those options as a result of advice it had received during the budget process.

Because of the content of the advice and the stage reached in the policy making process at the date of the request, the Ombudsman was not convinced that section 9(2)(f)(iv) applied.

The Ombudsman acknowledged the Ministry's concerns that release of the information would raise expectations in the sector which would not be met, and prejudice the

effectiveness of its consultation with stakeholders. He considered this could be addressed by release of an accompanying contextual statement, explaining the basis on which the advice was prepared and the subsequent direction of the policy.

The Ministry decided to release the relevant information after considering the Ombudsman's comments, and that aspect of the complaint was resolved.

Back to index.

Case 177645 (2008)—Information relating to appointment of an honorary consul in Monaco

A requester sought advice to the Minister of Foreign Affairs on the appointment of an honorary consul in Monaco. It was withheld under section 9(2)(f)(iv) and the requester complained to the Ombudsman. The Minister explained that a decision had not been taken, and release of the advice would prejudice his ability to make an objective decision about the proposal.

The Ombudsman acknowledged that this was a relevant factor. He stated:

> *It is accepted that one of the purposes of section 9(2)(f)(iv) is to allow Ministers and Cabinet to consider advice whose release could prejudice their ability to make well-considered decisions on what course of action to take. Prematurely releasing details of a matter under consideration could damage the public interest in good governance—for example, by dissuading individuals whose appointment was under consideration from offering themselves for office.*

However, there were two factors in this case '*which [told] against the public value in confidentiality'.* The first was the length of time that an appointment had been under consideration. The issue first appeared to have been raised in 1991. The latest advice was in 2007. The Ombudsman acknowledged *'the Government's prerogative to make or defer a decision as it sees fit'*. However, *'the public interest ... in withholding information to permit a Government to consider advice in private must diminish over time since a Government will, by definition, have had an increasing amount of time in which to deliberate on the matter'.*

The second factor telling against the public value of confidentiality in this case was the amount of information already available. From publicly available information, it was clear that there was already widespread knowledge of the appointment under consideration.

In view of those two factors the Ombudsman was not persuaded that section 9(2)(f)(iv) provided a justifiable ground for withholding the information. On further consideration, the Minister confirmed that no further steps regarding the appointment of an honorary consul to Monaco would be taken, and agreed to release the advice.

Back to index.

Case 174609 (2007)—Ministerial briefing on citizenship review

A requester sought information about a review of the concept of citizenship, and complained to the Ombudsman when the Minister of Internal Affairs refused that request under section 9(2)(f)(iv).

The information at issue consisted of a briefing to the Minister prepared by officials at the Department of Internal Affairs. While that is the type of information that can attract the protection of section 9(2)(f)(iv), the Ombudsman was not persuaded that it properly applied in this case.

The briefing consisted of background and factual information, and discussion of a research report that was publicly available. The Ombudsman could not see how release of such limited *'advice'* as there was would undermine the Minister's ability to make decisions. Indeed, it was not clear what executive government decisions were required or pending.

All the briefing recommended was a meeting with officials to discuss the Minister's views. It contained no detailed advice regarding policy options under consideration, except for recounting those canvassed in the publicly available research report.

Beyond the factual / background information, there were a few high-level statements of principle and expressions of opinion. However, these where neither surprising, nor, so far as the Ombudsman could see, potentially prejudicial to whatever ongoing executive government decision-making processes there may have been.

The Ombudsman appreciated that these statements and opinions may not have represented Government policy, but could not see why this would make withholding necessary under section 9(2)(f)(iv). She noted that the briefing could be disclosed with a disclaimer that it did not represent Government policy.

The Ombudsman also considered that there was a public interest in release of this kind of general background or high-level issues-based information because it would contribute toward public understanding of, and participation in, an important policy debate.

After considering the Ombudsman's comments, the Minister decided to release the briefing, and the complaint was resolved.

Back to index.

Case 175435 (2007)—Advice on daylight savings and the 2011 Rugby World Cup

The Minister for the Rugby World Cup refused to release Cabinet advice regarding the amendment of daylight savings under section 9(2)(f)(iv), and the requester complained to the Ombudsman.

The Ombudsman noted the limited nature of the advice at issue. It briefly outlined stakeholder preferences and set out the process the Government would follow to arrive

at a decision on the issue. As the advice was anticipatory, it did not contain opinions or recommendations as to what the decision should be. In the Ombudsman's opinion, disclosure of the issue and the fact that it was under consideration by officials was not likely to prejudice the ability of government to receive and deliberate upon future advice in an effective and orderly manner.

The Minister observed that there had been public speculation the issue was under consideration, but no official confirmation of that fact. However, the Ombudsman noted that in withholding advice about *'daylight savings and the 2011 Rugby World Cup'* the Minister had, in effect, already confirmed that advice had been tendered about the issue and therefore that the issue was under consideration.

The Ombudsman also noted that despite the public speculation, there had been no resulting media frenzy or misinformed public debate. There was nothing ambiguous in the content of the advice which led her to think that any resulting public debate would be ill-informed.

In these circumstances the Ombudsman was not convinced that disclosure of the information at issue would be likely to prejudice the ability of Ministers and Cabinet to consider advice on the issue, and therefore that release of the information would undermine the interests which section 9(2)(f)(iv) seeks to protect.

The Ombudsman also observed that there was a public interest in disclosing the fact that this matter was under consideration by the Government. The availability of this information to the people of New Zealand at this time would *'enable their more effective participation'* at a later time when policy advice on the issue was under consideration.

The Minister had acknowledged that *'the potential alteration of daylight savings is of national importance, and will affect all New Zealanders'*. In the Ombudsman's opinion, *'issues of national importance demand timely transparency so that decision makers have a contestable avenue of advice to that put forward by officials before decisions are taken'*.

The Minister complied with the Ombudsman's recommendation to release the advice.

Back to index.