

## Confidential advice to Government

A guide to section 9(2)(f)(iv) of the OIA

*One reason for withholding official information is to ‘maintain the constitutional convention protecting the confidentiality of advice tendered by Ministers and officials’—section 9(2)(f)(iv) of the OIA.*

*This section usually applies where the release of confidential advice given to Ministers or Cabinet would prejudice the orderly and effective conduct of government decision making processes.*

*This guide explains how section 9(2)(f)(iv) applies, and includes a step-by-step worksheet and case studies of actual complaints considered by the Ombudsman.*

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

*If you are concerned about the inhibiting effect disclosure will have on the future exchange of free and frank opinions, see our guide on section 9(2)(g)(i): [Free and frank opinions](#).*

*If you are concerned about the impact of disclosing information generated in the context of the **public policy making** process, see our guide on [The OIA and the public policy making process](#). It explains how sections 9(2)(f)(iv) **and** 9(2)(g)(i) apply in that specific context.*

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## What the Act says

The starting point for considering any request for official information is the **principle of availability**. That is, information must be made available on request unless there is a good reason for withholding it.<sup>1</sup>

Reasons for refusal fall into three broad categories: conclusive reasons,<sup>2</sup> good reasons,<sup>3</sup> and administrative reasons.<sup>4</sup> Among the ‘good reasons’, section 9(2)(f)(iv) applies where withholding is necessary to maintain the [constitutional convention](#) which protects the confidentiality of advice tendered by Ministers and officials.

‘Good reasons’ are subject to a ‘public interest test’, meaning that if they apply, agencies must consider the countervailing public interest in release. If the public interest in release outweighs the need to withhold, the information must be released. For more information on how to do the public interest test, see our guide [Public interest—A guide to the public interest test in section 9\(1\) of the OIA and section 7\(1\) of the LGOIMA](#).

## When section 9(2)(f)(iv) applies

The primary purpose of section 9(2)(f)(iv) is to protect the orderly and effective conduct of executive government decision making processes. Official information regimes across the world recognise that sometimes governments need some private time and space in which to be able to deliberate and decide on the advice they receive. As the Committee that recommended the enactment of the OIA noted, ‘to run the country effectively the government of the day needs ... to be able to take advice and to deliberate on it, in private, and without fear of premature disclosure’.<sup>5</sup> In line with this, 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

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<sup>1</sup> See s 5 OIA and LGOIMA.

<sup>2</sup> See ss 6 and 7 OIA and s 6 LGOIMA. ‘Conclusive’ reasons are not subject to a ‘public interest test’, meaning that if they apply, there is no need to consider any countervailing public interest in release.

<sup>3</sup> See s 9 OIA and s 7 LGOIMA. ‘Good’ reasons are subject to a ‘public interest test’, meaning that if they apply, agencies must consider the countervailing public interest in release.

<sup>4</sup> See s 18 OIA and s 17 LGOIMA. ‘Administrative’ reasons for refusal are not subject to a ‘public interest test’, meaning that if they apply, there is no need to consider any countervailing public interest in release.

<sup>5</sup> Committee on Official Information. *Towards Open Government: General Report* (December 1980) at 19.

- most often on a [temporary](#) basis—while the advice remains under active consideration.

## Executive government decision making

Section 9(2)(f)(iv) protects advice related to executive government decision making processes. This means decisions made by Ministers of the Crown, either individually or collectively through the Cabinet process. The decision making process may relate to the formulation of public policy, but it doesn't have to.<sup>6</sup>

Section 9(2)(f)(iv) does not protect advice related to internal decision making processes within a government agency, or decision making processes within some other kind of body (see case [382375](#)). There may be legitimate reasons why, in the circumstances of a particular case, such information needs to be withheld, but they do not relate to the maintenance of [constitutional conventions](#).

## Advice tendered

Section 9(2)(f)(iv) applies to advice that has or will be tendered. 'Advice' means opinions or recommendations as to the course of action to be adopted. 'Tendered' means offered or presented formally to Ministers or Cabinet. This will often be in the form of briefings and papers to Ministers or Cabinet.

Section 9(2)(f)(iv) can also apply to information generated in preparation for the tendering of advice to Ministers or Cabinet, for example internal discussion documents. However, there must be a clear **connection** between the subject matter of the internal discussion documents and the advice that will be tendered to Ministers or Cabinet, such that disclosure of the documents could reasonably be expected to prejudice the ability of Ministers or Cabinet to consider the advice. Section 9(2)(g)(i) of the OIA may also be relevant if the concern is that release of the internal discussion documents will inhibit the future exchange of free and frank opinions (see our guide to [free and frank opinions](#)).

## By Ministers and officials

Section 9(2)(f)(iv) applies to advice tendered by Ministers and officials. 'Ministers' means Ministers of the Crown, including Associate Ministers and Parliamentary Under-Secretaries.<sup>7</sup> 'Officials' is a broad term that includes members of public service and those who have a relationship with their Minister that is akin to that.

In the cases considered to date, section 9(2)(f)(iv) has not applied to information provided by:

- members of the public (for example, public submissions—see case [331383](#));

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<sup>6</sup> For guidance on the application of the OIA to information generated in the context of the public policy making process see our guide: [The OIA and the public policy making process](#).

<sup>7</sup> See s 2 OIA.

- external consultants or lobbyists (see case [174587](#)); or
- external advisory groups or taskforces (see cases [285265](#) and [177919](#)).

There may be legitimate reasons why, in the circumstances of a particular case, such advice needs to be withheld, at least temporarily (see, for example, case [285265](#)), but they do not relate to the maintenance of [constitutional conventions](#).

## Harm in release

Section 9(2)(f)(iv) does not mean that all advice can be withheld until Ministers or Cabinet make a decision. It does not give Ministers and Cabinet a right to ‘*undisturbed consideration*’ of advice in all cases. It must be demonstrated in each case that there would be a harm in release of the information—that release of the **specific** information requested would in the circumstances of the **particular** case prejudice the ability of the Minister or Cabinet to consider and decide on the advice tendered. Agencies should consider the following:

- What is the executive government decision making process to which the information relates?
- How would release of the requested information undermine the orderly and effective conduct of that process?

## Temporary protection

Section 9(2)(f)(iv) generally provides temporary protection for advice related to ministerial or Cabinet decision making. Once the relevant decisions have been taken and any necessary political consultations or negotiations concluded, there is usually no need for ongoing protection of the advice under this section. Also at this point the public interest in disclosure to promote the accountability of the decision maker comes into play, which may outweigh any residual need to withhold information.

It is important to note that some government policy and decision making processes are complex and involve multiple stages. It may be necessary to withhold advice that has already been considered if it is directly connected to, and would tend to reveal, advice that is yet to be tendered, and in so doing, would prejudice the ability of the Minister and/or Cabinet to consider and decide upon the advice that is yet to be tendered. This argument was accepted in cases [313823](#) and [369357](#), but not in cases [176459](#) and [309664](#).

In exceptional circumstances, that go to the heart of the effective operation of executive government policy and decision making processes, the Ombudsman has accepted that the convention of confidentiality may endure even after the advice is no longer under consideration, although not in perpetuity. For example, see:

- case [401501](#) in relation to Policy Advisory Group briefings to the Prime Minister;
- case [282242](#) in relation to Cabinet Office advice to Ministers on ethics and probity;
- cases [W45495](#) and [175076](#) in relation to draft answers to parliamentary questions; and

- cases [174448 & 176590](#) in relation to political consultation recorded on CAB 100 forms.

## Budget secrecy

The OIA does not explicitly recognise the convention of budget secrecy. However, budget-related advice to Ministers and Cabinet may be protected by section 9(2)(f)(iv). The Ombudsman has noted that *‘the general constitutional convention which protects the confidentiality of advice tendered by Ministers and officials is heightened during Budget preparation’* (see case [176434](#)).

In relation to budget-related advice to Ministers and Cabinet, the questions to consider are:

- whether release would undermine the ability of Ministers and/or Cabinet to consider expenditure and revenue options and thereby prejudice the orderly and effective preparation of the budget; and
- whether the need to withhold the information is outweighed by the public interest in release.

As above, the protection afforded by section 9(2)(f)(iv) to budget-related advice is generally temporary. Once budget decisions have been made and announced there is usually no ongoing need to protect the information. This is so even if the decision is to abandon the initiative.

However, the Ombudsman has recognised that unsuccessful initiatives that are intended to be re-submitted in the next budget may require ongoing protection until they have been considered (see case [176434](#)). There may also be other reasons to withhold budget-related information, for example, if release would prejudice commercial interests (see [Commercial information](#) for more guidance).

Cases [172541](#) and [176434](#) illustrate the application of section 9(2)(f)(iv) to budget information.

### What are constitutional conventions?

Constitutional conventions are customs and practices relating to issues of constitutional or political importance. Section 9(2)(f) of the OIA is about *‘maintaining constitutional conventions’*, but the Act doesn’t say what those specific conventions are. Instead it lists certain interests and relationships that the unspecified constitutional conventions are intended to protect, including the confidentiality of advice tendered by Ministers and officials—section 9(2)(f)(iv).

While the conventions aren’t specified, the purpose of section 9(2)(f)(iv) is to enable the orderly and effective conduct of government decision making processes. Sometimes the Government needs some private time and space in which to be able to deliberate and decide on the advice it has received. If the release of advice that is still under consideration would prejudice the orderly and effective conduct of executive government decision making processes, then its withholding will be necessary in order to *‘maintain’* the constitutional conventions.

## Assessing the need to withhold under section 9(2)(f)(iv)

The following factors are relevant in assessing the need to withhold information under section 9(2)(f)(iv).

### **The content of the information**

- Is the information of an advisory nature ie, opinions or recommendations as to the course of action to be adopted? Release of information that is not of an advisory nature, for example, information provided for information or noting purposes only, may be less likely to impact on the orderly and effective conduct of government decision making processes.
- Is the information of a confidential nature, ie unknown outside the parties to the exchange? Information that is already known or otherwise publicly available will not be confidential. If such information is severable from the relevant confidential material, there may be a basis for partial release.
- Is there any background material, or information that is purely factual or comprises bare options (as opposed to the analysis or evaluation of options)? Such material can often be released without any impact on the relevant decision making process. If it is severable from the remaining advisory material, there may be a basis for partial release. 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 protected by confidentiality'*.<sup>8</sup>
- What is the subject of the information? What does the content of the information actually reveal? Are there any factors, such as sensitivity or controversy of the information, that heighten the risk of prejudice to the orderly and effective conduct of decision making processes?

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<sup>8</sup> Note 5 at 17.

## The context of the information

- What is the executive government decision making process to which the information relates? How does the specific information at issue relate to that process? What stage is that process at? What will the impact be if the information is released at this stage?
- Has the relevant decision maker seen the advice? Disclosure of advice to others before it has been tendered to the relevant decision maker may prejudice the orderly and effective conduct of the decision making process.
- Has the relevant decision making process concluded? If not, when will it be concluded? What will the impact be if it is released at this time? Once a decision has been made there is usually no need for ongoing protection of the advice on which it was based. This can be so even if the decision is to abandon the options that were under consideration (see case [176675](#)). Generally speaking, the more time that passes, the less sensitive the information is likely to become.
- What political consultations or negotiations are required as part of the decision making process? What stage are those consultations or negotiations at? What will the impact be on those consultations or negotiations if the information is released at this time? Release of information before political consultations and negotiations have concluded may prejudice the ability of the parties to reach agreement (see cases [174609](#) and [W44732](#)).
- How much time has passed since the advice was tendered? Is it still under genuine consideration, or has it been overtaken by events such that a decision is no longer likely to be required or taken? The legitimate expectation of confidentiality may diminish over time, where the decision maker has had a reasonable opportunity to consider and deliberate on the advice. The countervailing public interest in release of at least some information may also be higher if the decision making process has become excessively long and protracted. See cases [177645](#) and [172541](#).

## The public interest in release

As noted above, section 9(2)(f)(iv) is subject to a ‘*public interest test*’ meaning that if it applies, agencies must consider the countervailing public interest in release. If the public interest in release outweighs the need to withhold, the information must be released. Detailed guidance on the application of the public interest test is available here: [Public interest—A guide to the public interest test in section 9\(1\) of the OIA and section 7\(1\) of the LGOIMA](#).

Public interest considerations that are particularly relevant in this context are:

- promoting the accountability of Ministers and officials for the advice provided to executive government, and promoting the accountability of executive government for the decisions made in respect of that advice; and
- enabling public participation in the making and administration of laws and policies.

Both of these considerations are directly reflected in one of the purposes of the OIA.<sup>9</sup>

The relevance and strength of these considerations will vary depending on the stage that the decision making process is at. Accountability considerations are usually strongest **after** a decision has been made. Public participation considerations are usually strongest **before** a decision has 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 between these competing interests can be tricky. However, agencies are encouraged to give **meaningful** consideration to how informed public participation can be achieved where that is warranted. This applies at the outset, in planning how the advisory and decision making processes will be carried out, and in the event of receiving the often inevitable OIA requests.

### Planning advisory and decision making processes

At the project planning stage, agencies should consider the following.

- Whether people should be able to participate in the 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 advisory and decision 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 advice to executive government 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);

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<sup>9</sup> See s 4(a) OIA.

- 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.

It is now common practice to proactively release advice once decisions have been made, and any potential harm to executive government deliberative and decision making processes has abated. The Cabinet Manual specifically states *'[i]t 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'* (paragraph 8.17).

Information on public participation is available in the Department of the Prime Minister and Cabinet's [Policy methods toolbox](#).

## Dealing with OIA requests

The following should be considered when dealing with an OIA request that is likely to be refused to protect the orderly and effective conduct of executive government decision making processes.

- Partial release of the information requested. For example, information that is not of a confidential nature or that would be unlikely to prejudice the decision making process, such as background or factual information, or bare options under consideration. This may help to address the public interest in accountability and participation.
- Release of summary information or other information (some of which may already be publicly available), for example, background or discussion papers, research papers, options papers, or descriptive information about the issues under consideration and the process by which decisions will be taken. This may help to address the public interest in accountability and participation.
- Explaining how the agency has applied the public interest test in this case, providing proper recognition for the public interest in accountability and participation. Say what information will be provided and when in order to address these interests. Detail any opportunities for public participation, and how the agency will ensure that this will take place on an informed basis.
- If the requested information can't be released now, consider releasing it proactively later, and give an indication of when that is likely to be.

## Further information

[Appendix 1](#) has relevant case notes and opinions.

There is also a step-by-step [work sheet](#) on the application of section 9(2)(f)(iv).

Related guides include:

- [\*The OIA for Ministers and agencies\*](#)
- [\*Public interest\*](#)
- [\*Free and frank opinions\*](#)
- [\*The OIA and the public policy making process\*](#)

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

You can also contact our staff with any queries about the application of section 9(2)(f)(iv) by email [info@ombudsman.parliament.nz](mailto:info@ombudsman.parliament.nz) or freephone 0800 802 602. Do so as early as possible to ensure we can answer your queries without delaying your response to a request for official information.

## Appendix 1. Relevant case studies and opinions

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

### Cases illustrating when section 9(2)(f)(iv) applied

Case number	Year	Subject
466605	2020	<a href="#">Ministerial briefing on volunteer rural constabulary programme</a> <i>Disclosure would prejudice orderly and effective conduct of political negotiations</i>
401501	2015	<a href="#">Confidentiality of Policy Advisory Group briefings to the Prime Minister</a>
385479	2015	<a href="#">Information regarding rental housing warrants of fitness</a> <i>Disclosure would prejudice orderly and effective conduct of ongoing advisory and decision making process</i>
369357	2014	<a href="#">Ministerial briefings and Cabinet papers on telecommunications and ultra-fast broadband</a> <i>While some decisions had been made, others were still required, and disclosure would prejudice the orderly and effective conduct of ongoing advisory and decision making processes</i>
313823	2012	<a href="#">Report on application to enter negotiations to integrate school</a> <i>While the report itself had been considered, it was part of a longer term process of advice—disclosure would prejudice the orderly and effective conduct of ongoing advisory and decision making processes</i>
282242	2012	<a href="#">Confidentiality of Cabinet Office advice to the Ministers on ethics and probity</a>
318858, 319224 & 319684	2011	<a href="#">Information about the Government's proposed mixed ownership programme</a> <i>Disclosure would prejudice orderly and effective conduct of ongoing advisory and decision making processes</i>
285135	2010	<a href="#">Cabinet paper relating to review of the Overseas Investment Act</a> <i>Disclosure would prejudice orderly and effective conduct of ongoing advisory and decision making processes</i>

285265	2010	<a href="#">Information relating to Whānau Ora</a> <i>Section 9(2)(f)(iv) applied to advice tendered by officials but not external taskforce</i>
176434	2008	<a href="#">Budget initiative Resource Teachers: Vision</a> <i>Budget secrecy</i>
174448 & 176590	2007 2008	<a href="#">Confidentiality of details of political consultation recorded on CAB 100 forms</a>
175799	2007	<a href="#">Advice on electoral finance</a> <i>Disclosure would prejudice orderly and effective conduct of ongoing advisory and decision making processes—compare with <a href="#">176459</a>, advice on electoral finance, after the introduction of the Electoral Finance Bill</i>
175628	2007	<a href="#">Advice on emissions trading scheme</a> <i>Disclosure would prejudice orderly and effective conduct of ongoing advisory and decision making processes</i>
175076	2007	<a href="#">Confidentiality of draft answers to parliamentary questions</a>
174609	2007	<a href="#">Advice relating to Amendment Bill</a> <i>Disclosure would prejudice orderly and effective conduct of political negotiations</i>
W45495	2001	<a href="#">Confidentiality of draft answers to parliamentary questions</a>
W44732 W44790	2000	<a href="#">Advice relating to pre-funding of New Zealand Superannuation</a> <i>Disclosure would prejudice orderly and effective conduct of political negotiations</i>

### Cases illustrating when section 9(2)(f)(iv) did not apply

Case number	Year	Subject
458197	2017	<a href="#">Advice regarding the effectiveness of benefit reductions</a> <i>Some information not advice as to action—Some information publicly available—Minister had the opportunity to consider the information and publicly announced her intentions—Strong public interest in disclosure to promote public participation</i>
382375	2014	<a href="#">Advice to the Local Government Commission</a> <i>Advice tendered to another organisation not executive government</i>
328421	2013	<a href="#">Advice concerning partnership schools</a> <i>Decisions had been made</i>

342796	2012	<a href="#">Advice regarding proposals for the future of Christchurch education</a> <i>Decisions had been made</i>
309664	2012	<a href="#">Cabinet paper on decision to retain newborn blood spot cards</a> <i>Decisions had been made—Information did not reveal advice that would subsequently be tendered</i>
331383	2012	<a href="#">Public submissions on Green Paper for Vulnerable Children</a> <i>Public submissions not advice tendered by Ministers or officials</i>
177919	2009	<a href="#">Review of schools' operational funding</a> <i>Information not of an advisory nature—information tendered by an external advisory group, not Ministers or officials—disclosure would not prejudice ability of Ministers to consider advice eventually tendered by officials</i>
172541	2008	<a href="#">Options and analysis in the review of New Zealand Superannuation Portability</a> <i>Options released, analysis withheld—budget secrecy</i>
176459	2008	<a href="#">Advice on electoral finance, after the introduction of the Electoral Finance Bill</a> <i>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 <a href="#">175799</a>, advice on electoral finance</i>
176675	2008	<a href="#">Abandoned options, South Auckland primary teacher supply</a> <i>Decisions had been made—disclosure of abandoned options posed no risk</i>
177645	2008	<a href="#">Information relating to appointment of an honorary consul in Monaco</a> <i>Confidentiality can diminish over time</i>
174609	2007	<a href="#">Ministerial briefing on citizenship review</a> <i>Information not of an advisory nature—information not related to executive government decision making process</i>
175435	2007	<a href="#">Advice on daylight savings and the 2011 Rugby World Cup</a> <i>Advice about the decision making process, rather than the decision to be taken—disclosure would not prejudice Cabinet's ability to reach a decision on advice eventually tendered</i>
174587	2007	<a href="#">Stock take report on the Crime Reduction Strategy</a> <i>Report by external consultant not advice tendered by Ministers or officials</i>

W54720	2005	<a href="#"><u>Treasury costings of student free loan policy</u></a> <i>Advice tendered to political party, not executive government—decisions had been made</i>
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