

## Request for emails between officials discussing the advice that should be tendered on the answering of parliamentary questions

<b>Legislation</b>	Official Information Act 1982, s 9(2)(g)(i)
<b>Agency</b>	Minister of State Services
<b>Ombudsman</b>	Peter Boshier
<b>Case number(s)</b>	470699
<b>Date</b>	28 January 2019

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*Parliamentary Privilege Act 2014 did not provide a statutory bar on the Ombudsman's investigation of a complaint under the OIA—section 9(2)(g)(i) applied—release would prejudice the free and frank expression of similar communications in future—no public interest override*

A requester sought general advice given or received by the Minister of State Services on answering parliamentary questions. The Minister refused the request in reliance on section 9(2)(g)(i) of the OIA, and the requester complained to the Ombudsman.

The information at issue comprised emails between officials discussing the advice that should be tendered on the answering of parliamentary questions. It was not the actual advice tendered to the Minister.

### Parliamentary privilege

The Chief Ombudsman noted that the information at issue constituted ‘*proceedings in Parliament*’, as defined in the Parliamentary Privilege Act 2014 (PPA). He considered first whether the PPA gave rise to any limitation on his ability to investigate the withholding of that information. He consulted the Speaker of the House of Representatives who advised:

*I do not see a general conflict with parliamentary privilege arising from the Ombudsman performing the duties of that office, including conducting investigations into the handling of official information that may also be a proceeding of the House.*

The Chief Ombudsman then considered whether section 9(2)(g)(i) of the OIA provided good reason to withhold the emails.

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

The key issue under section 9(2)(g)(i) is whether release of the information at issue would inhibit the future free and frank expression of opinions that are necessary for the effective conduct of public affairs. Relevant factors include the nature and content of the information, the source of the information, and the context in which it was generated.

The emails comprised officials' opinions on how the Minister might wish to answer parliamentary questions. They were written under pressure of time and in very informal terms. The Chief Ombudsman stated that *'the informality and immediacy of the advice is relevant to whether its disclosure may be likely to inhibit the future expression of similar advice in a free and frank manner'*.

The Chief Ombudsman said it was important that officials are able to discuss and revise proposed advice on responses in a free and frank manner without concern that this process will later become publicly available. It is also important that such discussion is documented rather than undertaken orally, a practice which would undermine accountability for the advice.

The Chief Ombudsman concluded that release of the emails would prejudice the free and frank expression of similar communications in future, which would in turn prejudice the effective conduct of public affairs by inhibiting the candour and quality of advice on suggested answers to parliamentary questions.

## Public interest

Having reviewed the emails, the Chief Ombudsman concluded there was nothing in their content that gave rise to a public interest in disclosure sufficient to outweigh the interest in preserving the ability of officials to provide the Minister with the best advice and information on such matters in the future, and the ability of the Minister to seek that advice.

The public interest was addressed by the parliamentary process and the Minister's actual response. The Minister is accountable to Parliament for the responses to questions, and if a reply is deemed insufficient, MPs can ask additional questions.

The Chief Ombudsman formed the opinion that section 9(2)(g)(i) of the OIA provided good reason to withhold the emails.

*This case note is published under the authority of the [Ombudsmen Rules 1989](#). It sets out an Ombudsman's view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.*