

## Negotiations

A guide to section 9(2)(j) of the OIA and section 7(2)(i) of the LGOIMA

*One reason for withholding information is to protect the ability of agencies to negotiate effectively.*

*Section 9(2)(j) of the OIA<sup>1</sup> applies where withholding is necessary to enable the agency that holds the information to carry on negotiations without prejudice or disadvantage.*

*This guide explains how section 9(2)(j) works, and includes a step-by-step work sheet and case studies of actual complaints considered by the Ombudsman.*

*There are some related guides that may help as well. Section 9(2)(j) 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 impact of disclosure on the commercial position of a third party, or the commercial activities of the agency that holds the information, see our guide on [Commercial information](#).*

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

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<sup>1</sup> References to the OIA should be taken as references to the LGOIMA; references to s 9(2)(j) OIA should be taken as references to s 7(2)(i) LGOIMA.

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## What the Act says

The starting point for considering any request for official information is the **principle of availability**. That is, information must be made available on request unless there is a good reason for withholding it.<sup>2</sup>

Reasons for refusal fall into three broad categories: conclusive reasons,<sup>3</sup> good reasons,<sup>4</sup> and administrative reasons.<sup>5</sup> Among the ‘good reasons’, section 9(2)(j) applies where withholding is necessary to ‘enable a Minister [or agency] holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations)’.<sup>6</sup>

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

### Glossary

**Necessary** means reasonably necessary.<sup>7</sup>

**Would be likely** means there is a serious or real and substantial risk.<sup>8</sup>

**Prejudice** means to impair.<sup>9</sup>

**Disadvantage** is less adverse than ‘prejudice’, and means an unfavourable outcome.<sup>10</sup>

**Negotiations** means dialogue between two or more parties intended to reach an understanding or resolve a point of difference. See [here](#) for more information on the meaning of ‘negotiations’ in section 9(2)(j).

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

<sup>3</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>4</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>5</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>6</sup> Section 7(2)(i) of the LGOIMA applies to the local authority holding the information.

<sup>7</sup> This is based on the High Court judgment in *Television New Zealand Ltd v Ombudsman* [1992] 1 NZLR 106 at 118. In 2015, without reference to this earlier judgment, the High Court interpreted ‘necessary’ to mean ‘essential’ (*Kelsey v the Minister of Trade* [2015] NZHC 2497). However, the Ombudsman prefers a test of reasonable necessity over one of strict necessity.

<sup>8</sup> *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 at 391.

<sup>9</sup> *Kelsey v the Minister of Trade* [2015] NZHC 2497 at paragraph 120.

<sup>10</sup> Note [9](#) at paragraph 142.

## Related provisions

### Confidentiality

Negotiations may be conducted on a confidential basis. There is a specific withholding ground that applies to information that is subject to an obligation of confidence, where disclosure would:

- prejudice the ongoing supply of information that is in the public interest; or
- otherwise damage the public interest.

If an agency is concerned about the impact of disclosure on the future supply of confidential information, or some kind of damage to the public interest **other than** its ability to carry on specific negotiations, then it should consider section 9(2)(ba) of the OIA.<sup>11</sup> More information about this withholding ground can be found in our Practice Guideline: [Confidentiality](#).

If an agency is concerned about the impact of disclosure on its ability to carry on specific negotiations, then it should consider section 9(2)(j).

Sometimes both of these provisions can apply.

### Commercial information

The term ‘*negotiations*’ includes commercial negotiations. Other grounds for withholding commercial information include:

- Section 9(2)(b)(ii) of the OIA,<sup>12</sup> which provides good reason for withholding official information (subject to a countervailing public interest test) if it is necessary to ‘*protect information where the making available of the information would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information*’.
- Section 9(2)(i) of the OIA,<sup>13</sup> which provides good reason for withholding information (subject to a countervailing public interest test) where it is necessary to ‘*enable a Minister [or agency] holding the information to carry out, without prejudice or disadvantage, commercial activities*’.

See our [Commercial information](#) guide for more information about these withholding grounds.

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<sup>11</sup> Section 7(2)(c) LGOIMA.

<sup>12</sup> Section 7(2)(b)(ii) LGOIMA.

<sup>13</sup> Section 7(2)(h) LGOIMA.

## When section 9(2)(j) applies

Section 9(2)(j) applies where withholding is necessary to enable **any** agency holding the information to carry on negotiations without prejudice or disadvantage.

For section 9(2)(j) to apply, withholding must be **reasonably necessary** (see [Glossary](#)) to enable the agency to carry on the negotiations without prejudice or disadvantage. This means there must be reason to believe that release of the information would **prejudice or disadvantage** the agency in carrying on the negotiations. A mere assertion of prejudice or disadvantage will not be sufficient. Agencies must be able to:

1. identify the specific [negotiations](#); and
2. explain precisely how release of the information at issue would [prejudice or disadvantage](#) them in carrying on those negotiations.

The following elements are discussed in more detail below:

- [Negotiations](#)
- [Prejudice or disadvantage](#)

### Should the request be transferred?

The decision on release is usually best made by an agency which is a party to the negotiations. This is because it is best placed to identify the likely consequences of disclosure.

If the agency that received a request is concerned about another agency's ability to negotiate, it should consider whether it is obliged to transfer the request to that agency because the information is more closely connected with that agency's functions.<sup>14</sup>

## Negotiations

The term '*negotiations*' is not defined in the legislation. It therefore takes the ordinary meaning of **dialogue** between two or more parties intended to reach an **understanding** or resolve a point of **difference**. The other party may be a private individual or entity, or another agency.

'*Negotiations*' are **not just consultations or discussions** (although they can include them). There must be '*at least two parties at arm's length each seeking to obtain a result favourable*

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

to itself and a belief by both that this is possible'.<sup>15</sup> For example, in case [456080](#), the Chief Ombudsman commented that discussions between agencies and Ministers about the Budget do not constitute 'negotiations' as envisaged by section 9(2)(j).

'Negotiations' must be **genuine**, meaning there is 'at least the possibility of give and take between the parties involved'. Dealings conducted on a 'take it or leave it' basis are not 'negotiations'.<sup>16</sup>

The 'negotiations' in question should generally be **in train or reasonably contemplated**. It may not be enough that the information could be relevant to unspecified negotiations at an undefined point in the future (see cases [439321](#), [435959](#) and [302561 and 302600](#)). The prospect of negotiations must be 'real'.<sup>17</sup>

Common types of negotiations include tender negotiations, contractual negotiations, wage bargaining, and the resolution and settlement of disputes and grievances.

All negotiations can be protected, whatever their subject. The reference to commercial and industrial negotiations is inclusive. In addition to commercial and industrial negotiations, section 9(2)(j) has been applied to protect Treaty of Waitangi (Treaty) negotiations (see cases [424906](#), [288181](#) and [W47755](#)) and international negotiations (see case [285033](#)).

## Prejudice or disadvantage

Section 9(2)(j) does not protect all information relating to particular negotiations. It only protects information that, if disclosed, would prejudice or disadvantage the agency in its negotiations.

'Prejudice or disadvantage' means something more than just 'unhelpful'. 'Prejudice' means the agency's ability to conduct or conclude the negotiations would be **impaired**. 'Disadvantage' is less adverse than 'prejudice', and in this context means the circumstances or conditions of negotiation would be **less favourable** to the agency (see [Glossary](#)).

Agencies must be able to explain how release would prejudice or disadvantage them in carrying on negotiations. They should identify the [nature of the prejudice or disadvantage](#) and the [likelihood](#) of it coming to pass.

### Nature of the prejudice or disadvantage

Prejudice or disadvantage may arise where disclosure would **benefit the agency's negotiating opponent**. As the authors of *Freedom of Information in New Zealand* note, 'public agencies

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<sup>15</sup> Eagles, I, Taggart, M, and Liddell, G. *Freedom of Information in New Zealand*. Oxford: Oxford University Press, 1992 at 322.

<sup>16</sup> Note [15](#) at 324.

<sup>17</sup> Note [15](#) at 325.

*cannot be expected to tip their negotiating hand to those with whom they do, or propose to do, business’.*<sup>18</sup>

Premature release of information that would reveal an agency’s negotiating position or strategy, including their top or bottom line, potential trade-offs, or fall-back position (alternative or second choice option) may put the agency at a bargaining disadvantage. This could assist the agency’s negotiating opponent to argue for more favourable terms or extract concessions. For example, see:

- Case [451764](#)—Budget for staff remuneration
- Case [438343](#)—SkyPath business case and procurement plan
- Case [431098](#)—PHARMAC budget bid
- Case [424906](#)—Information about Hauraki Treaty negotiations
- Cases [379452](#) and [358693](#)—Information about dispute between South Link Health and Southern District Health Board
- Case [348838](#)—Rent paid for transmission and broadcast sites
- Case [330600](#)—Advice about SkyCity convention centre
- Case [323046](#)—Costs for the grounding of the *MV Rena*
- Case [313674](#)—EQC cost estimates
- Case [176463](#)—Risk assessment report on Hut Creek Mine
- Case [W47755](#)—Projected quantum of Treaty settlement claims
- Case [W34975](#)—Costs for prison escort buses

Prejudice or disadvantage may also arise where disclosure would **inhibit the other party to the negotiation**. *Freedom of information in New Zealand* states:<sup>19</sup>

*...a public admission as to the distance between the parties, while presumably no secret to those conducting them, is arguably undesirable on the ground that it might lead to a reluctance to retreat from publicly announced positions lest this be construed as weakness by voters or shareholders.*

Lastly, prejudice or disadvantage may arise where disclosure would **detrimentally affect the relationship between the negotiating parties**, leading to reduced cooperation and information sharing, and decreasing the likelihood of compromise. Negotiations may become more complex and take longer to complete as each party assesses the risks associated with the release into the public domain of information given and received. For example, see:

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<sup>18</sup> Note [15](#) at 320.

<sup>19</sup> Note [15](#) at 321.

- Case [440126](#)—Correspondence about the Total Mobility Scheme
- Case [424906](#)—Information about Hauraki Treaty negotiations
- Case [358693](#)— Information about dispute between South Link Health and Southern District Health Board
- Case [328698](#)—Emails regarding the *MV Rena*
- Case [316311](#)—Record of meeting with neighbour
- Case [288181](#)—Information about Whanganui River Treaty negotiations
- Case [285033](#)—Initiatives to end whaling in the Southern Ocean
- Case [179213](#)—Draft agreement to investigate, construct and operate a windfarm

The risk of **lobbying and media attention** has been held not to constitute a prejudice or disadvantage for the purpose of section 9(2)(j) (see cases [353000](#) and [292427](#)). In case [292427](#), the Ombudsman stated:

*[The agency] suggests that release will lead to lobbying and media attention. However, one purpose of the OIA is to increase the availability of official information to people to enable more effective participation in the making and administration of laws and policies (see section 4(a)(i) of the OIA). Participation can legitimately include lobbying and inducing media attention. I discount the prospect of this kind of ‘prejudice’ as falling within section 9(2)(j) at all.*

*Public pressure is something for all parties to take account of. The OIA is not there to help agencies avoid public pressure. Section 9(2)(j) is not available to prevent public input to the discussions...*

While the possibility cannot be ruled out in a particular case, Ombudsmen have also been cautious of accepting that disclosure of information under the OIA would **deter private entities from negotiating with agencies in future**. There are significant benefits to private entities in treating with the Government. In case [439321](#) for example, the Ombudsman noted that recruitment agencies will be aware that all government agencies in New Zealand are subject to the OIA, and as such there is always the possibility that the information they provide to such agencies may be released. He did not consider this would dissuade them from putting forward their best price in order to secure work in a competitive market.

## Likelihood of the prejudice or disadvantage

The following factors should be considered when assessing the likelihood of the anticipated prejudice or disadvantage.

Nature and content of the information	<ul style="list-style-type: none"> <li>• Was the information generated for the purpose of the negotiation? Is it directly related to the issues under negotiation? Is it the kind of information one would normally</li> </ul>
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	<p>seek to conceal from one's negotiating opponent?</p> <ul style="list-style-type: none"> <li>• Ombudsmen have long-recognised that whether the anticipated prejudice or disadvantage will arise from release of information will very much depend on the precise nature of the information at issue, and the relevance of that information to the actual issues under negotiation.</li> <li>• Release of information that was not generated for the purpose of the negotiation, or is not directly related to the issues under negotiation, may be less likely to prejudice or disadvantage the agency in carrying on the negotiation (see cases <a href="#">435959</a>, <a href="#">353000</a> and <a href="#">302561</a>).</li> </ul>
Extent to which the information is in the public domain	<ul style="list-style-type: none"> <li>• To what extent is the information already in the public domain or available to the requester?</li> <li>• Release of information that is already in the public domain or available to the requester may be less likely to prejudice or disadvantage the agency in carrying on the negotiations (see cases <a href="#">446128</a>, <a href="#">435959</a>, <a href="#">356243</a>, <a href="#">323046</a>).</li> <li>• Negotiating opponents cannot benefit from release of information that is already known to them (see cases <a href="#">435959</a>, <a href="#">379452</a>, <a href="#">356243</a> and <a href="#">323046</a>).</li> </ul>
Background to the negotiations	<ul style="list-style-type: none"> <li>• What is the background to the negotiations, including the sensitivity of the issues? Who has the negotiating advantage?</li> <li>• The risk of prejudice or disadvantage may be heightened by factors relating to the background to the negotiations, including the sensitivity of the issues. It may also be heightened in situations when the agency is at a negotiating disadvantage.</li> </ul>
Relationship between the parties	<ul style="list-style-type: none"> <li>• What is the nature of the relationship between the negotiating parties? What are the views or attitudes of the opposing party to release of the information at issue? Consider consulting the opposing party if this is not known. You can find detailed guidance on how to do that, including template letters, in our guide: <a href="#">Consulting third parties</a>.</li> <li>• The risk of prejudice or disadvantage may be heightened if the relationship between the parties is difficult or they are strongly opposed to release (see cases <a href="#">379452</a> and <a href="#">288181</a>). Note, however, that while the agency may take the views of the opposing party into account in making its decision on the request, the opposing party cannot simply veto disclosure.</li> </ul>

### Timing of the request

- Are the negotiations live or have they concluded?
- The risk of prejudice or disadvantage will be highest while the negotiations are live (in reasonable anticipation or in train).
- Where negotiations have concluded it will be harder to argue that a prejudice or disadvantage will occur if the requested information is released (see cases [446128](#) and [428652](#)). As the committee that recommended the enactment of the OIA noted, ‘arguments for the confidentiality of a negotiating position do not necessarily continue to apply after a negotiation is completed’.<sup>20</sup>
- However, there may be occasions where negotiations have ended, but it is apparent that further rounds or closely related negotiations will take place in the future, and that release of the information would prejudice or disadvantage the agency in those negotiations. As noted in *Freedom of Information in New Zealand*:<sup>21</sup>

*...once negotiations have been either successfully concluded or abandoned they are no longer capable of being put at risk by disclosure. Upon completion, much of the information which might until then validly be withheld under section 9(2)(j) will become accessible under the OIA. ... It is conceivable that disclosure of information concerning past negotiations might, on rare occasions, adversely affect negotiations not yet commenced. This may occur if the proposed negotiations are **between the same parties or concern the same subject-matter** as those recently concluded. In such cases, however, the identity of the parties or subject-matter would have to be **close**, and the prospect of future negotiations **real**, in order to justify withholding under section 9(2)(j). [emphasis added]*

## The public interest in release

As noted above, section 9(2)(j) 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.

Section 9(2)(j) itself reflects the public interest in ensuring that agencies are able to negotiate

<sup>20</sup> Committee on Official Information. *Towards Open Government: General Report*. (December 1980) at 35.

<sup>21</sup> Note [15](#) at 325.

effectively in matters that will generally involve the imposition of costs or liabilities. It is against this interest that agencies must weigh the countervailing public interest considerations favouring disclosure.

Common public interest considerations favouring disclosure in this context include:

- Accountability for the matters that gave rise to the negotiation. For example, where the negotiation is necessary because something has gone wrong, there may be a public interest in disclosure of information to promote accountability for that, and the actions taken as a result.
- Accountability for how negotiations are conducted.
- Accountability for spending public money (see, for example, cases [446128](#), [439321](#) and [435959](#)). As the High Court said in *Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council*, ‘it is fundamental that the public are to be given worthwhile information about how the public’s money and affairs are being used and conducted, subject only to the statutory restraints and exceptions’.<sup>22</sup>
- Public participation in matters relating to the negotiation (see, for example, cases [353000](#) and [292427](#)).

The result of the public interest balancing exercise will not always be full and unrestricted disclosure of the information at issue. There may be other ways that the competing interests favouring withholding and disclosure can be met, including partial release (for example, cases [438343](#), [379452](#) and [358693](#)), release of summary information (for example, case [440126](#)), and release of other information.

Timing is often the key issue in striking the correct balance between the effective conduct of negotiations on the one hand, and the public’s right to know on the other. As noted in *Freedom of Information in New Zealand*, ‘once [negotiations] are over, the public is entitled to know how they were conducted on its behalf’.<sup>23</sup>

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

## Further information

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

Appendix 2 has [case studies](#) illustrating the application of section 9(2)(j).

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<sup>22</sup> [1991] 2 NZLR 180 at 191.

<sup>23</sup> Note [15](#) at 321.

Other related guides include:

- [Commercial information](#)
- [Confidentiality](#)
- [The OIA and the public tender process](#)
- [Public interest](#)
- [Consulting third parties](#)

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

## Appendix 1. Negotiations work sheet

<p><b>1. Can section 9(2)(j) apply?</b></p> <p><b>Relevant part of guide:</b></p> <p><a href="#">When does section 9(2)(j) apply?</a></p>	<ul style="list-style-type: none"> <li>• Is your agency carrying on the negotiations? If another agency is carrying on the negotiations, consider whether to transfer the request.</li> <li>• Are you concerned about the impact of release on those negotiations? If yes, go to step 2.</li> </ul>
<p><b>2. Negotiations</b></p> <p><b>Relevant part of guide:</b></p> <p><a href="#">Negotiations</a></p>	<ul style="list-style-type: none"> <li>• Identify the specific <a href="#">negotiations</a>.</li> <li>• Negotiations means dialogue between two or more parties intended to reach an understanding or resolve a point of difference.</li> <li>• The negotiations must generally be in train or reasonably contemplated.</li> <li>• If there are negotiations, go to step 3. If not, release the information or consider whether another withholding ground might apply.</li> </ul>
<p><b>3. Prejudice or disadvantage</b></p> <p><b>Relevant part of guide:</b></p> <p><a href="#">Nature of the prejudice or disadvantage</a></p> <p><a href="#">Likelihood of the prejudice or disadvantage</a></p>	<ul style="list-style-type: none"> <li>• Explain how release of the information at issue would <a href="#">prejudice or disadvantage</a> the agency in carrying on those negotiations.</li> <li>• Identify the <a href="#">nature of the prejudice or disadvantage</a>. For example: <ul style="list-style-type: none"> <li>- Would release give an advantage to, or inhibit, the agency's negotiating opponent? If so, how?</li> <li>- Would release detrimentally affect the relationship between the negotiating partners? If so, how would this prejudice or disadvantage the agency's ability to conduct and conclude the negotiations?</li> </ul> </li> <li>• Consider the <a href="#">likelihood</a> of that prejudice or disadvantage coming to pass. It should be so likely that withholding is reasonably necessary. Relevant factors include the <a href="#">nature and content of the information</a>, the <a href="#">extent to which the information is in the public domain</a>, the <a href="#">background to the negotiations</a>, the <a href="#">relationship between the parties</a>, and the <a href="#">timing of the request</a>.</li> <li>• Always consider whether it is possible to release the information in part. Remember, section 9(2)(j) does not protect all information relating to a negotiation, just the information that would be prejudicial if released.</li> </ul>

	<ul style="list-style-type: none"> <li>• If release would prejudice or disadvantage the agency in carrying on the negotiations, go to step 4. If not, release the information or consider whether another withholding ground might apply.</li> </ul>
<p><b>4. Apply the public interest test</b></p> <p>Relevant part of guide: <a href="#">The public interest in release</a></p>	<ul style="list-style-type: none"> <li>• Identify any public interest considerations in favour of disclosure, for example, accountability for the matters that gave rise to the negotiation, for how the negotiations are conducted, and for spending public money, and public participation in matters related to the negotiation.</li> <li>• Consider whether these outweigh the need to withhold.</li> <li>• See <a href="#">Public interest—A guide to the public interest test in section 9(1) of the OIA and section 7(1) of the LGOIMA</a> for more information.</li> </ul>
<p><b>5. Make a decision on the request</b></p>	<ul style="list-style-type: none"> <li>• If the public interest in disclosure outweighs the need to withhold, the information must be released. If it doesn't, then it is open to the agency to refuse the request.</li> <li>• Before refusing in full, consider partial release, release of summary information, or release of other information, in recognition of the public interest considerations discussed above.</li> <li>• See our <a href="#">Template letter 6: Letter communicating the decision on a request</a>.</li> </ul>

## Appendix 2. Case studies

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

Case number	Year	Subject	Outcome
456080	2017	<a href="#">KiwiRail business case</a> <i>Discussions between agencies and Ministers about the budget do not constitute negotiations as envisaged by section 9(2)(j) OIA</i>	NA (comments on section 9(2)(j) were observations only)
451764	2017	<a href="#">Budget for staff remuneration</a> <i>Section 7(2)(i) LGOIMA applied—releasing staff remuneration budget would undermine the Council's bargaining position and prejudice ability to negotiate effectively with staff and representatives</i>	Good reason to withhold
446128	2017	<a href="#">Consultant's reports on ICT issues</a> <i>Section 7(2)(i) LGOIMA did not apply—some information was publicly available—negotiations had been concluded</i>	Release in full
440126	2017	<a href="#">Correspondence about the Total Mobility Scheme</a> <i>Section 7(2)(i) LGOIMA applied—revealing the respective positions and concerns of the parties to the negotiation would lead to reduced cooperation and information sharing, and decrease likelihood of compromise</i>	Good reason to withhold
439321	2017	<a href="#">Cost of recruiting Vice-Chancellor</a> <i>Section 9(2)(j) OIA did not apply—no specific negotiations—release of total costs would not deter businesses from treating with government</i>	Release in full
435959	2017	<a href="#">Cost of leases on MSD's current and former premises</a> <i>Section 9(2)(j) OIA did not apply—possibility of future unspecified negotiations not sufficient—this type of information often publicly available—specifics of this case meant the information was unlikely to be relevant to any future negotiations</i>	Release in full
438343	2017	<a href="#">SkyPath business case and procurement plan</a> <i>Section 7(2)(i) LGOIMA applied—withholding strengths and weaknesses of negotiating position necessary to enable Council to carry on negotiations without prejudice or disadvantage</i>	Good reason to withhold

Case number	Year	Subject	Outcome
431098	2017	<p><a href="#">PHARMAC budget bid</a></p> <p><i>Section 9(2)(j) OIA applied to information about PHARMAC's willingness to pay for pharmaceuticals—section 9(2)(j) OIA did not apply to PHARMAC's indicative budget in out-years—these figures were subject to change, not linked to specific medicines, and only provided generalised insight into PHARMAC's projected capacity to purchase medicines</i></p>	Release in part
428652	2017	<p><a href="#">List of proposed Significant Natural Areas for the Grey district</a></p> <p><i>Section 7(2)(i) LGOIMA did not apply—negotiations had been concluded</i></p>	Release in full
424906	2017	<p><a href="#">Information about Hauraki Treaty negotiations</a></p> <p><i>Section 9(2)(j) OIA applied—release would prejudice the goodwill of the parties and the progress of the negotiations</i></p>	Good reason to withhold
379452	2016	<p><a href="#">Information held by the Ministry of Health about dispute between South Link Health and Southern District Health Board</a></p> <p><i>Section 9(2)(j) OIA applied to information that would reveal negotiating position and strategy or further deteriorate the relationship between the parties—section 9(2)(j) OIA did not apply to some factual information and information the other party to the negotiation was aware of</i></p>	Release in part
358693	2016	<p><a href="#">Information held by Southern District Health Board about dispute with South Link Health</a></p> <p><i>Section 9(2)(j) OIA applied to DHB's statement of claim and report analysing other party's claims—releasing statement of claim in breach of confidentiality agreement would disadvantage the DHB by diminishing trust and goodwill between the parties—releasing report would disadvantage the DHB by assisting the other party counter its position—public interest in disclosure outweighed the need to withhold the statement of claim but not the report</i></p>	Release in part
348838	2015	<p><a href="#">Rent paid for transmission and broadcast sites</a></p> <p><i>Section 9(2)(j) OIA applied—requester could use knowledge of other site rental rates to try and obtain a higher rate in their rent review</i></p>	Good reason to withhold



Case number	Year	Subject	Outcome
356243	2013	<p><a href="#">CERA property valuation reports</a></p> <p><i>Section 9(2)(j) OIA did not apply—much of the information already available to the requesters—disclosing the remaining information about how the valuations were reached would not prejudice or disadvantage CERA in negotiations with property owners, but make the negotiations more robust with both sides fully informed—strong public interest in disclosure to address power disparity between negotiating parties</i></p>	Release in full
353000	2013	<p><a href="#">Groups interested in sponsoring a charter school</a></p> <p><i>Section 9(2)(j) OIA did not apply—information not relevant to the negotiations—section 9(2)(j) does not protect the negotiations of third parties—the risk of lobbying and media attention is not a prejudice or disadvantage in terms of section 9(2)(j)</i></p>	Release in full
323046	2013	<p><a href="#">Costs and limits on liability for the grounding of the MV Rena</a></p> <p><i>Section 9(2)(j) OIA applied to information about costs incurred in responding to the grounding—release would give advance notice of the Crown’s negotiating position—section 9(2)(j) did not apply to information that was known to both parties and in the public domain</i></p>	Release in part
328698	2012	<p><a href="#">Emails between Costamare and Maritime New Zealand regarding the MV Rena</a></p> <p><i>Section 9(2)(j) OIA applied—releasing emails between the parties during the negotiations would prejudice willingness of the parties to participate in the negotiation in an open manner</i></p>	Good reason to withhold
302561 302600	2013	<p><a href="#">Information about the production of <i>The Hobbit</i></a></p> <p><i>Section 9(2)(j) OIA did not apply—no link between the information at issue and the claimed prejudice—possibility of future unspecified negotiations not sufficient—section 9(2)(j) does not protect the negotiations of third parties</i></p>	Release in part
330600	2012	<p><a href="#">Advice about SkyCity convention centre</a></p> <p><i>Section 9(2)(j) OIA applied—withholding strategy and bottom lines necessary to enable the Crown to carry on negotiations with SkyCity</i></p>	Good reason to withhold
313674	2012	<p><a href="#">EQC cost estimates</a></p> <p><i>Section 9(2)(j) OIA applied—withholding cost estimates necessary to enable EQC to carry on negotiations with contractors—release would enable contractors to pitch their quotes close to the estimates, when they might otherwise have been lower</i></p>	Good reason to withhold

Case number	Year	Subject	Outcome
292427	2012	<a href="#">Landcare report on the Balmoral Pastoral Lease</a> <i>Section 9(2)(j) OIA did not apply—the risk of lobbying and media attention is not a prejudice or disadvantage in terms of that section—section 9(2)(j) is not available to prevent public input into discussions</i>	Release in full
316311	2011	<a href="#">Record of meeting with neighbour</a> <i>Section 7(2)(i) LGOIMA applied—releasing the record of a meeting conducted on a confidential and without prejudice basis would make it harder to resolve the matter and disadvantage the Council in its negotiations</i>	Good reason to withhold
288181	2014	<a href="#">Information about Whanganui River Treaty negotiations</a> <i>Section 9(2)(j) OIA applied—Treaty negotiations are ‘negotiations’ in terms of section 9(2)(j)—release of the parties’ negotiating positions would harm the relationship between them, which would prejudice or disadvantage the Crown’s ability to conclude the negotiations</i>	Good reason to withhold
285033	2010	<a href="#">Initiatives to end whaling in the Southern Ocean</a> <i>Section 9(2)(j) OIA applied—release would jeopardise relations with other parties to IWC negotiations and prejudice their willingness to share information</i>	Good reason to withhold
179213	2009	<a href="#">Draft agreement to investigate, construct and operate a wind farm</a> <i>Section 7(2)(i) LGOIMA applied—releasing draft agreement would damage the relationship between the Council and the company, and make it more difficult for the Council to conclude the negotiations successfully</i>	Good reason to withhold
176463	2007	<a href="#">Risk assessment report on Hut Creek Mine</a> <i>Section 9(2)(j) OIA applied—release would prejudice or disadvantage agency’s negotiations to acquire the mining permit</i>	Good reason to withhold
W47755	2007	<a href="#">Projected quantum of Treaty settlement claims</a> <i>Section 9(2)(j) OIA applied—current claimants would question settlement amounts where a higher figure had been contemplated—future claimants aware of a ‘top dollar’ figure would have a negotiating advantage</i>	Good reason to withhold
W34975	1996	<a href="#">Costs for prison escort buses</a> <i>Section 9(2)(j) OIA applied—costs could be used by the successful tenderer to ‘negotiate-up’ rates during the negotiation stage of the tendering process</i>	Good reason to withhold

### Case 456080 (2017)—KiwiRail business case

In a self-initiated investigation under the Ombudsmen Act 1975, the Chief Ombudsman considered the reasonableness of KiwiRail's processing of an OIA request for a business case for a third main rail line.

In the course of that investigation, the Chief Ombudsman considered the suggestion that section 9(2)(j) of the OIA provided good reason to withhold unsuccessful budget bids in order to protect budget negotiations between agencies and Ministers.

The Chief Ombudsman did not consider that *'the discussions which would occur between Ministers and officials or agency employees in the context of preparing the budget constitute "negotiations" in the sense that is envisaged in section 9(2)(j)'*.

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

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### Case 451764 (2017)—Budget for staff remuneration

A ratepayer asked Palmerston North City Council for the amount budgeted for staff remuneration. The Council refused the request under section 7(2)(i) of the LGOIMA and the requester complained to the Ombudsman.

The Council confirmed that negotiations over staff remuneration would occur the next year, and that it had a budget assumption that would inform that negotiation.

The Ombudsman accepted that releasing this information would undermine the Council's bargaining position and prejudice its ability to negotiate effectively with staff and their representatives in the upcoming remuneration discussions. The Council must be able to enter into and negotiate satisfactorily such agreements in order to ensure the prudent use of ratepayers' funds.

The public interest in accountability could be met by disclosure of the amount spent, rather than the amount budgeted. While the requester sought the information to participate in public consultation on the annual budget, the public interest in participation was met by the opportunity to submit on what had been publicly released by the Council in its consultation documents. The public interest in submitting on the specific proposed changes to remuneration did not outweigh the need to withhold the information in this case.

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### Case 446128 (2017)—Consultant's reports on ICT issues

A requester sought a copy of two consultant's reports on ICT issues at Auckland Council. The Council refused the request under sections 7(2)(c)(ii) (confidentiality) and 7(2)(i) of the LGOIMA, and the requester complained to the Ombudsman.

The Council argued that release of the reports would impair its ability to carry on negotiations with its ICT services provider. It stated that negotiations were frequently held with its ICT services provider in respect of any number of product offerings or variations to existing contracts. However, in respect of the two reports at issue, it also conceded there were no negotiations currently underway that could be prejudiced by the material in the reports.

The Ombudsman accepted that contract negotiations between the Council and its ICT services provider occurred frequently, and that, therefore, negotiations were in a sense ongoing. However, he did not consider that release of the reports would prejudice or disadvantage the Council in respect of those 'ongoing' negotiations. Much of the first report had already been published as part of the agenda to a Council Committee meeting. The second report related to a specific negotiation that had already taken place. The Council had confirmed there were no specific negotiations underway at the time that could be prejudiced by the material in the reports.

The Ombudsman concluded that section 7(2)(i) did not apply, and that in any event, there was a significant public interest in release of the reports to promote transparency of the Council's decision making processes in respect of its ICT issues, and accountability for the expenditure of ratepayer money on ICT systems.

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### Case 440126 (2017)—Correspondence about the Total Mobility Scheme

Environment Canterbury issued a media release regarding potential irregularities identified in relation to payments made to the Total Mobility Scheme (TMS). The TMS provides a community service by assisting eligible people with mobility issues to access appropriate transport. Users with a smart card receive subsidised fares with approved taxi companies that participate in the scheme. The TMS is subsidised by the New Zealand Transport Agency (NZTA) and Environment Canterbury.

A requester sought correspondence between Environment Canterbury and the taxi companies involved in the TMS, relating to Environment Canterbury's belief that taxi drivers had billed for work that was not done. Environment Canterbury refused the request under section 7(2)(i) of the LGOIMA, and the requester complained to the Ombudsman.

The Ombudsman concluded that section 7(2)(i) applied, and was not outweighed by the public interest in disclosure. At the time of its decision, Environment Canterbury had initiated the dispute resolution mechanism in its contracts with the taxi companies involved. The first step under that mechanism was to carry out good faith negotiations about the issue at hand. Therefore, at the time of its decision, negotiations between Environment Canterbury and the taxi companies were in the process of being scheduled.

Broadly speaking, the purpose of the negotiations was to reach an understanding on the extent and value of the contested trips. The correspondence in question related directly

to, and was the subject of, the negotiations. The information indicated the respective positions and concerns of the parties to the negotiation. The Ombudsman was doubtful that the negotiations could have been carried on successfully had the information been released. He stated:

*Ombudsmen have generally accepted that the disclosure of information related to negotiations can decrease cooperation between the parties. Decreased cooperation curtails the ability of parties to participate in negotiations in good faith. This may result in reduced information sharing, and a reduced willingness to take account of one another's interests and to reach a level of compromise.*

The Ombudsman acknowledged that *'the public has a right to know and to be assured that when such allegations arise, Environment Canterbury takes these allegations seriously and acts appropriately to investigate and address them'*. However, this did not outweigh the need to protect Environment Canterbury's ability to negotiate the best possible outcome to the dispute. The media statement explained what had happened, the actions being taken to address the issue, and the steps being taken to prevent the issue from reoccurring. This information substantially addressed the transparency and accountability issues.

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

Lincoln University refused a request for the total cost of recruiting the Vice-Chancellor under sections 9(2)(b)(ii) (unreasonable commercial prejudice)<sup>24</sup> and 9(2)(j) of the OIA, and the requester complained to the Ombudsman.

In relation to section 9(2)(j), the University argued that release would impact on its ability to negotiate favourable terms with recruitment consultants in future.

The Ombudsman noted that the University had not cited any specific negotiations that would be likely to be prejudiced if the information was released. He also noted that recruitment agencies would be aware that all government agencies in New Zealand are subject to the OIA and, as such, there is always the possibility that the information they provide to such agencies may be released. He did not consider this would dissuade them from putting forward their most competitive price in order to secure work in a competitive market.

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

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<sup>24</sup> The application of s 9(2)(b)(ii) in this case is discussed in our [Commercial information](#) guide.

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

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

Opposition Research Units requested the cost of leases held at MSD's current and former premises. MSD refused the requests under sections 9(2)(b)(ii) (unreasonable commercial prejudice) and 9(2)(j) of the OIA, and the requesters complained to the Ombudsman. The Ombudsman concluded that neither of these provisions provided good reason to withhold the information.<sup>25</sup>

The Ministry was concerned about the precedent effect of disclosing this type of information. It suggested that prospective lessors would use that information to set their prices, thereby prejudicing the ability of government agencies to negotiate the best lease terms possible.

However, the Ombudsman said it was *'not sufficient that the information could be relevant to negotiations at some undefined point in the future'*. Section 9(2)(j) did not apply because there did not appear to be any specific negotiations underway or in reasonable contemplation.

He noted that landlords will already have some idea of the market value of office space, as this is how the market operates. Agents and owners of multiple spaces will likely be well aware of the amounts paid by various agencies. It is not uncommon to receive the details of the asking rate for accommodation space when making inquiries about particular leases. Further, there are multiple factors that are relevant to the negotiation of rent costs, which cannot be seen from the total cost. Government agencies, as a large component of the Wellington office market, would appear to hold a position within the market that would not necessarily be impaired by the disclosure of this information. Information of this nature had been publicly disclosed by other agencies at times.

The Ombudsman did not consider that disclosure of the information at issue in this case would be likely to prejudice negotiations (if in fact negotiations were reasonably contemplated). He noted that MSD vacated its former premises to allow a full redevelopment of the site. The rent paid before redevelopment would bear no correlation to the rent that might be expected after redevelopment. The latter information was therefore highly unlikely to be relevant to any future negotiations. The rent paid for MSD's current premises was based on a long-term tenancy. It seemed unlikely that the rent to be paid for a long-term tenancy, with negotiated incentives and various expenditures, could impact on a possible negotiation for that premises when the lease concluded.

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<sup>25</sup> The application of s 9(2)(b)(ii) in this case is discussed in our [Commercial information](#) guide.

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

The Ombudsman commented that although section 9(2)(j) represents a public interest in ensuring that agencies are able to negotiate effectively for the expenditure of public money, this must be balanced against the very strong interest in transparency of information that will establish that negotiations were conducted appropriately, and accountability for large and long-term expenditure such as in this case.

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

The Ombudsman recommended that the information be disclosed.

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

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

A requester sought deleted sections of an Auckland Council Committee meeting agenda. The deleted sections contained the business case and public private partnership (PPP) procurement plan for the SkyPath project.<sup>26</sup> The Council withheld some of the information under sections 7(2)(b)(ii) (unreasonable commercial prejudice),<sup>27</sup> 7(2)(c)(i) (confidentiality) and 7(2)(i) (negotiations) of the LGOIMA, and the requester complained to the Ombudsman.

#### **Negotiations**

At the time, the Council was negotiating the terms of the PPP with the private partner to that agreement, the Public Infrastructure Partners (PIP) Fund. The terms under negotiation included the Council's underwrite obligation, including the point at which it would be triggered, the breakeven point at which it would be removed, and the '*upside share*' (or rate of return at which the Council would receive a share of the revenue generated).

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<sup>26</sup> A project to construct a semi-enclosed pathway underneath the city-side of the Auckland Harbour Bridge.

<sup>27</sup> The application of s 7(2)(b)(ii) in this case is discussed in our [Commercial information](#) guide.



The redacted passages contained information about the Council's approach to the negotiations, the strengths and weaknesses of that approach, identified negotiation risks, and terms put forward to date by the PIP Fund. The Ombudsman accepted that release of this information would prejudice the ability of the Council to carry out negotiations in respect of the underwrite agreement. There was a significant public interest in protecting the negotiating position of the Council, so as to ensure that the financial implications of the Council's underwrite obligation and the overall cost of the project were minimised.

### **Public interest**

The Ombudsman identified a public interest in disclosure of information to promote the Council's accountability in its dealings with public funds. However, in his opinion, that interest had been met by disclosure of the majority of the business case and procurement plan. The released information included a detailed history of the project, patronage forecasts, design specifications and detailed analysis of procurement options. It also detailed the policy approach underlying the Council's preference for a hybrid PPP, as well as the criteria applicable to approval and negotiation of any final PPP agreement.

The Ombudsman concluded that section 7(2)(i) provided good reason to withhold information about the negotiations. However, he noted that section 7(2)(i) would only apply for the duration of the negotiations, and it was open to the requester to make a fresh request once they were concluded.

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### **Case 431098 (2017)—PHARMAC budget bid**

The Minister of Health refused a request for information associated with PHARMAC's 2016/17 budget bid, and the requester complained to the Ombudsman. While the Minister initially relied on section 9(2)(b)(ii) of the OIA (unreasonable prejudice to PHARMAC's commercial position),<sup>28</sup> the Ombudsman considered that section 9(2)(j) was the applicable withholding ground.<sup>29</sup>

### **Background**

The Ombudsman noted the following relevant background information.

PHARMAC's function is to secure, for eligible people in need of pharmaceuticals, the best health outcomes that are reasonably achievable from pharmaceutical treatment, within the amount of funding provided.<sup>30</sup> As pharmaceutical prices are not regulated in New Zealand, PHARMAC uses its position to negotiate prices with suppliers. PHARMAC uses a

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<sup>28</sup> The application of s 9(2)(b)(ii) in this case is discussed in our [Commercial information](#) guide.

<sup>29</sup> The Ombudsman can consider the application of any withholding ground, even if it has not been advanced by the agency.

<sup>30</sup> See s 47(a) of the New Zealand Public Health and Disability Act 2000.



variety of purchasing strategies to negotiate the best value from its budget. The success of negotiations is a critical factor in any decision by PHARMAC to fund a new medicine.

Medicines approved by PHARMAC are funded from the Combined Pharmaceutical Budget (CPB), which is set by the Minister of Health following consideration of the joint budget bid submitted by PHARMAC and District Health Boards (DHBs). PHARMAC's fixed budget precludes the funding of all potentially beneficial medicines that become available. The CPB is set annually and, as well as funding medicines already on the schedule, funds all medicines that are added to the schedule or approved under exceptional circumstances. PHARMAC does not hold the funds but monitors DHB spending to ensure that expenditure does not exceed the agreed notional budget. While the total CPB is fixed, its components (amounts spent on scheduled medicines and/or exceptional circumstances subsidies) are not.

As noted above, PHARMAC is concerned with getting the best possible deal within the amount of funding available. This means that no funding application is considered in isolation. PHARMAC must undertake a comparative analysis of all funding applications, which results in a priority ranking on a confidential list of investment options that is then matched against the available headroom in the CPB to determine what investments PHARMAC will work towards progressing.

#### **Advice to Minister of investments with budgetary impact**

The Ombudsman accepted that there was good reason to withhold information that would reveal PHARMAC's *'willingness to pay'* for pharmaceuticals deemed to be very good value for money. Negotiations with the suppliers of these pharmaceuticals were either underway at the time, or in reasonable contemplation.

While the advice was partly released, the medicine names and additional expenditure/purchasing options were withheld. This information would provide insight into PHARMAC's capacity to purchase new medicines deemed very good value, and enable suppliers to make an educated guess about PHARMAC's interest in particular medicines. Suppliers would likely be emboldened to adopt a more robust negotiating position, including with respect to their pricing expectations. This would disadvantage PHARMAC in carrying on those negotiations.

The Ombudsman was mindful of *'the significant public interest in PHARMAC's ability to negotiate the best possible price for pharmaceuticals, which ultimately impacts on the level of access New Zealanders have to medicines'* on the one hand, and the *'strong public interest in receiving meaningful information about PHARMAC's funding'* on the other. In light of the fact that PHARMAC agreed to release summary information about the 2016/17 budget, including an explanation of the process by which PHARMAC had obtained additional funding through the Treasury's social investment process, the Ombudsman concluded that the public interest in disclosure did not outweigh the need to withhold.

### Indicative funding pathway

Government funding for the 2016/17 year was publicly announced, but indicative funding in out-years (2017/18 to 2019/20) was withheld. PHARMAC argued that this would give suppliers an indication of the likely funds available for future investments, and that *'uncertainty over future funding levels is important for PHARMAC to maintain competitive prices'*.

The Ombudsman rejected this argument. The indicative budget in out-years would not give suppliers any useful indication of PHARMAC's willingness to pay. The figures were subject to change, not linked to specific medicines, and only provided generalised insight into PHARMAC's projected capacity to purchase medicines. The Ombudsman concluded that section 9(2)(j) did not apply, and recommended that the Minister release the information.

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### Case 428652 (2017)—List of proposed Significant Natural Areas for the Grey district

The Grey District Council withheld a list of all proposed Significant Natural Areas<sup>31</sup> (SNAs) under a number of grounds, including section 7(2)(i) of the LGOIMA. The requester complained to the Ombudsman.

The Council suggested that releasing the list would prejudice negotiations with individual landowners related to the identification and boundaries of SNAs.

However, the Council also advised that consultation with landowners would not lead to further refinement of the list, and a planner would be engaged to *'take the process to its final conclusion'*. The Council did not explain what further negotiations with landowners were contemplated or would involve, and this could not be assumed given the Council's view that the list would not be further refined.

The Ombudsman concluded that section 7(2)(i) did not apply as the negotiations with landowners regarding the existence and boundaries of the proposed SNAs appeared to be complete. The Council also failed to demonstrate the nature of the prejudice or disadvantage that would arise, in terms of any negotiations contemplated in the future, if the list was released.

The Ombudsman recommended that the list be released.

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<sup>31</sup> The Resource Management Act (RMA) 1991 requires regional and district councils to protect *'areas of significant indigenous vegetation and significant habitats of indigenous fauna'* (s 6(c)).

### Case 424906 (2017)—Information about Hauraki Treaty negotiations

An iwi trust board asked the Office of Treaty Settlements (OTS) for information relating to the Crown’s negotiations with the Hauraki Collective. OTS withheld some information under section 9(2)(j) of the OIA, and the trust complained to the Ombudsman.

OTS explained that the Hauraki Treaty negotiations involved 12 individual iwi and two collective negotiations. The Hauraki Collective Framework Agreement recorded the intentions of the Crown and the Hauraki Collective to undertake the negotiation process confidentially and in good faith. Confidentiality was an important principle in this process, and possible redress was a very sensitive issue.

OTS also explained that the passage of time during Treaty negotiations will often mean that information previously withheld can be disclosed. This is generally where a milestone has been reached, such as a Deed of Mandate, Agreement in Principle, or Deed of Settlement. However, such milestones had not yet occurred in the Hauraki negotiations.

The Ombudsman accepted that disclosure of information which might:

- show the Crown’s negotiating position;
- reveal redress or possible redress options;
- reveal correspondence on negotiation terms with mandated iwi representatives;
- reveal officials’ assessment of situations which have arisen and possible strategies to resolve those situations; or
- reveal officials’ discussions on issues of concern;

would jeopardise the negotiation to the extent that settlement would stall.

The concern was less about the Crown’s ability to achieve favourable settlement terms, and more about the likely damage to negotiating relationships. Disclosure would cause real prejudice to the goodwill of parties and the progress of negotiations.

In addition, disclosing information about redress options could impact on the expectations and demands of parties with whom OTS was negotiating, or be detrimental to negotiating positions with other parties.

The Chief Ombudsman was satisfied that this would disadvantage the Crown’s negotiations with the Hauraki Collective. He did not consider that the need to withhold the information was outweighed by the public interest in release.

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### Case 379452 (2016)—Information held by the Ministry of Health about dispute between South Link Health and Southern District Health Board

A requester complained to the Ombudsman about the Ministry of Health's refusal to disclose information concerning a long-running dispute between South Link Health (SLH) and the Southern District Health Board (the DHB), in reliance on section 9(2)(j) of the OIA. The Ministry's Audit and Compliance Team was acting on behalf of the DHB in relation to the recovery of Crown-sourced funds.

The information at issue comprised reports and file notes on the dispute by the Audit and Compliance Team. The Ombudsman formed the opinion that there was good reason to withhold all of this information, barring three file notes.

The dispute was likely to go to mediation at the time, and so negotiations were reasonably in contemplation. The information referenced the position of the respective parties, provided some analysis of the dispute, and discussed future strategy. It therefore disclosed the bargaining position of the Ministry and the DHB, and would be beneficial to SLH in terms of countering this. The length and intractable nature of the dispute suggested to the Ombudsman that SLH would likely make use of such information to the disadvantage of the Ministry. The information also contained description and analysis of events in terms that, if disclosed, might further deteriorate the relationship between the parties, causing disadvantage to the Ministry in the negotiations.

However, the position was different with regard to three of the file notes at issue. One of the file notes recorded a meeting between the parties. It therefore contained information SLH was already well aware of. There could be no suggestion that release of this information could prejudice or disadvantage the Ministry's negotiating position. The other file notes recorded factual information about the chronology of the dispute. The Ombudsman was not satisfied that release of this information would prejudice or disadvantage the Ministry in carrying on negotiations.

The Ombudsman noted competing factors favouring withholding and disclosure of information about this issue. The public interest in ensuring the Ministry and DHB could achieve a favourable outcome at mediation was strong. However, there was also a public interest in disclosure of information to promote accountability for the handling of this long-running dispute involving significant sums of public money. The Ombudsman noted that release of the three file notes would help to address the public interest. The public interest in disclosure of the remaining substantive information was not sufficient to outweigh the interests in allowing the Ministry to effectively pursue further negotiation.

The Ministry agreed to release the three file notes and the complaint was resolved.

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### Case 358693 (2016)—Information held by Southern District Health Board about dispute with South Link Health

A requester complained to the Ombudsman about the Southern District Health Board's (the DHB's) refusal to disclose information about a long-running dispute with South Link Health (SLH), in reliance on section 9(2)(j).

The information at issue included the DHB's statement of claim, and a report analysing SLH's claim. The Ombudsman found that section 9(2)(j) of the OIA applied to this information.

The DHB's statement of claim had been withheld following SLH's objection to the disclosure of information subject to a confidentiality agreement. The Ombudsman accepted that goodwill between the parties may be undermined if information subject to the confidentiality agreement was disclosed. This would disadvantage the DHB's negotiating position by diminishing the trust and willingness of SLH to engage in the negotiation.

The other report outlined and responded to the various claims made by SLH, and discussed possible options for the DHB. The Ombudsman considered that disclosure of this information would undermine the position of the DHB by disclosing its considerations and approach, without reciprocal obligations of disclosure on SLH. The DHB would then be disadvantaged in negotiations, and SLH would be better placed to counter the DHB's position.

The Ombudsman noted competing factors favouring withholding and disclosure. The public interest in ensuring the DHB could achieve a favourable outcome at mediation was strong. However, there was also a public interest in disclosure of information to promote accountability for the handling of this long-running dispute involving significant sums of public money. The Ombudsman concluded that the public interest would be addressed by release of the DHB's statement of claim. The public interest in release did not outweigh the need to withhold the report analysing SHL's claim.

The DHB agreed to release the statement of claim and the complaint was resolved.

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### Case 348838 (2015)—Rent paid for transmission and broadcast sites

A valuer representing lessors in a rent review asked for details of rental arrangements between the lessee (Kordia) and other lessors. The information sought included the current rental, last date of review, and special features of the lease. Kordia refused the request under section 9(2)(j) of the OIA and the requester complained to the Ombudsman.

Kordia argued there was a real risk that the valuer could use the information about rent paid by Kordia at other sites against it in negotiations. It noted it had participated in the

rent review process prescribed under the lease by providing both a certificate of the current market rental and a copy of its independent valuer's report.

The Ombudsman accepted that Kordia would be prejudiced if the valuer used knowledge of other rental rates to his advantage in an attempt to obtain higher rental rates for his clients. Withholding was therefore necessary to enable Kordia to carry on negotiations with the valuer's clients, without prejudice or disadvantage.

The Ombudsman noted that the valuer's desire to obtain the information for the purpose of the rent review reflected a private interest rather than a public one, and concluded there was no public interest in disclosure of the information that would outweigh the need to withhold.

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### Case 356243 etc (2013)—CERA property valuation reports

The former Canterbury Earthquake Recovery Authority (CERA) refused requests by property owners for valuation reports in respect of properties subject to compulsory acquisition notices under section 9(2)(j) of the OIA. The property owners complained to the Ombudsman.

The valuations were undertaken for the purpose of negotiating a sale/purchase with the property owners. It was understood that if agreement could not be reached, CERA would proceed with compulsory acquisition. CERA argued that release of the valuation reports would prejudice or impair its ability to negotiate a sale/purchase with the property owners. In CERA's view, these transactions were no different from other sale and purchase transactions, where each party obtains their own valuation *'to assist with the negotiation of a price for their own benefit'*.

The Chief Ombudsman commented that *'when it comes to the application of the OIA, CERA has to do more than simply claim that there will be prejudice if the information is released'*. CERA is obliged to specify how the claimed prejudice or disadvantage would occur if the information at issue was released.

The valuation reports comprised the property descriptions, the methodology, and the valuation figure. The Chief Ombudsman noted that much of this information, including the valuation figure, had already been released to the requesters, or was publicly available through Land Information New Zealand. Release of this information could not prejudice or disadvantage CERA in its negotiations with the property owners.

The withheld information contained more detail than what had been disclosed previously about how the valuation had been calculated. However, it did not seem to follow that providing an explanation of how a certain value was reached would be damaging to negotiations, as opposed to making the negotiations more robust with both sides fully informed.

The Chief Ombudsman also noted that the argument that valuation reports are not usually disclosed was vigorously disputed by the requester's lawyer, who maintained that he had been involved in about 100 Public Works Act acquisitions, and it was standard practice for valuation reports to be exchanged at the preliminary stages when there is an attempt to reach agreement. The lawyer had acted consistently with this practice by providing his client's valuation report to CERA, and requesting CERA's valuation report in exchange.

The Chief Ombudsman also considered that, even if section 9(2)(j) was engaged, there were strong public interest considerations in favour of release. She noted that this was not *'a buyer and seller of property meeting on equal ground'*. There was a significant power disparity, with the Crown (despite initially negotiating under a *'willing buyer, willing seller'* model) having, as a back-up, the power and certainty of making a compulsory acquisition. As market competition between prospective purchasers was not a factor in this situation, it was reasonably conceivable that disclosure of the reports would not impair CERA from acting in a fiscally sound manner in relation to these property owners and others with whom CERA was negotiating.

Further, these negotiations were occurring against a broader backdrop of considerable trauma and vulnerability for property owners in Christchurch *'red zones'*. Given this, there was social value in those affected property owners being able to walk away from their land believing that they had been treated fairly. Providing the property owners with valuation reports would enable those required to sell their land to the Crown with a possible reassurance that they were getting a fair deal in the circumstances, and an assurance that the Crown was acting in good faith in negotiating these matters. The reports should help them to understand, for themselves, how the valuation methodologies had been applied and the basis for the Crown's offer. Such information, at an early stage in the acquisition process, could encourage property owners to reach agreement on a valuation which would expedite the acquisition process.

In keeping with this, release would also demonstrate transparent and accountable decision making by CERA and a continuation of its stated intent of engagement with property owners in a collaborative and constructive relationship. Transparency would serve to increase public confidence in CERA's dealings with property owners throughout the Canterbury region.

After considering the Chief Ombudsman's opinion, CERA agreed to release the valuation reports.

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### Case 353000 (2013)—Groups interested in sponsoring a charter school

The New Zealand Educational Institute complained when the Ministry of Education refused its request for the names of groups that had expressed an interest in sponsoring a charter school under section 9(2)(j) of the OIA.

The Ministry argued that release would undermine the process of selecting and negotiating with potential sponsors. Its concern was two-fold:

*First, those applicants who had submitted an [Indication of Interest (IOI)] would be prejudiced if the information at issue were disclosed now. As applicants had not been obliged to submit an IOI, not all of them had done so. Disclosure of the names of applicants who had submitted an IOI would mean that those applicants would be lobbied by those opposed to the creation of partnership schools and receive media enquiries. The Ministry suggested that named applicants might also be subject to harassment or threats. Dealing with media enquiries, lobbying, harassment or threats would mean that named applicants would be at a disadvantage during the negotiations with the Ministry compared to applicants who had not submitted an IOI, and whose names were not publicly available. Secondly, this imbalance between applicants would prejudice the process as a whole.*

The Ombudsman considered ‘*the proximity and the relevance of the information at issue to the contemplated negotiations*’. He accepted that the negotiations, while some months away, were ‘*reasonably proximate*’. However, he did not accept that the information was relevant to the negotiations:

*...it is clear that the information at issue was not generated for the purposes of the contemplated negotiations, which concern the applications to sponsor a partnership school. Rather, the IOI enabled the Partnership Schools Working Group to provide guidance to groups that had submitted an IOI. Consideration of the IOIs and negotiations on the applications are two distinct processes; there was no obligation on applicants to submit a prior IOI and I understand that around half did not. It is also clear that the issues to be negotiated between applicants and the Ministry will turn on the substance of the applications, not the identity of those previously interested. I do not accept that the mere identity of those who submitted an IOI is sufficiently relevant to the issues to be negotiated with applicants.*

The Ombudsman also stated that section 9(2)(j) applies to the agency’s ability to negotiate, and to any prejudice or disadvantage to the agency’s position. Prejudice to a partnership school applicant’s ability to negotiate is not the harm which section 9(2)(j) addresses.

The Ombudsman noted that one of the purposes of the OIA is to increase the availability of official information in order to enable effective public participation in the making and administration of laws and policies. Participation can legitimately include lobbying and media attention. ‘*The OIA should not be used as a shield in a negotiation process to avoid public pressure.*’

The Ombudsman did not accept that disclosure of the names would disadvantage or prejudice the Ministry’s ability to carry on the negotiations.

Read the full opinion [here](#).



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### Case 323046 (2013)—Costs and limits on liability for the grounding of the *MV Rena*

The Minister of Transport refused a request for information about the grounding of the *MV Rena*, and the requester complained to the Ombudsman. The Minister withheld information about:

- the costs of responding to the grounding; and
- the limits on liability for the grounding;

under section 9(2)(j) of the OIA. The Ombudsman concluded that ground applied to the costs of responding, but not the limits on liability.

#### **Costs of responding to the grounding**

At the time, the Crown was negotiating with Costamare (the owner of the *MV Rena*) for compensation for the costs incurred by the Government in its response to the grounding. Information about the costs was therefore a crucial aspect of the negotiations. Release of the costs would have prejudiced or disadvantaged the Crown in carrying on the negotiations by giving Costamare advance notice of its negotiating position.

The Ombudsman acknowledged a strong public interest in release of information about costs incurred in responding to the grounding of the *MV Rena*. However, while the negotiations were ongoing, the public interest in release of the costs did not outweigh the interest in withholding them to enable the Crown to continue the negotiations without prejudice or disadvantage.

#### **Limits on liability for the grounding**

This information related to the limitation of liability, as per the Limitation of Liability for Maritime Claims Convention 1976, and the Convention on Limitation of Liability for Maritime Claims 1996 protocol. The Ombudsman noted that these matters were public knowledge at the time, as they had already been reported in the media. He therefore could not see that release would have prejudiced or disadvantaged the Crown in its negotiations with Costamare. The Minister's assertion that release of information already known to both parties to the negotiations and reported by the media would prejudice the Crown in its negotiations with Costamare was not credible.

The Ombudsman recommended this information be disclosed.

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### Case 328698 (2012)—Emails between Costamare and Maritime New Zealand regarding the *MV Rena*

A requester sought communications between Maritime New Zealand (MNZ) and Costamare about costs and the recovery of costs following the grounding of the *MV Rena*. MNZ withheld emails with Costamare under section 9(2)(j) of the OIA, and the requester complained to the Ombudsman. The Ombudsman concluded that section 9(2)(j) provided good reason to withhold the emails.

The emails related to negotiations between the two parties for recompense for the costs incurred by the Government as a result of the grounding of the *MV Rena*. The Ombudsman accepted that *‘releasing the parties’ positions during the negotiations would be likely to prejudice the willingness of those parties to carry out the negotiations in an open manner’*.

He also stated that *‘it would detrimentally affect the participation of Costamare and its representatives in those negotiations either by withdrawing or by reducing its participation in those negotiations’*. It was therefore necessary to withhold the emails to enable the Crown to carry on the negotiations with Costamare, without prejudice or disadvantage.

The Ombudsman identified a public interest in knowing the total costs incurred by the government in responding to the grounding of the *MV Rena*, and the extent to which those costs were mitigated through compensation from Costamare. However, at that stage of the negotiations, the public interest in disclosure did not outweigh the need to withhold.

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

Requesters sought information regarding the production of *The Hobbit*. The Minister for Economic Development withheld a range of information, including communications between film industry third parties and Ministers, under a number of withholding grounds, including section 9(2)(j) of the OIA.

The Minister argued that disclosure would prejudice or disadvantage any subsequent negotiations with film industry third parties, because they would be less forthcoming about their negotiating positions and the reasons for them, if they believed such information would be released.

The Ombudsman found no link between the information at issue and the predicted harm. The argument appeared to be that being subject to the OIA would disadvantage the Government in future unspecified negotiations. However, in the Ombudsman’s view, this is one of the consequences of the OIA. It is militated against by withholding grounds,

including section 9(2)(j), which can permit the withholding of information relating to specific negotiations. No specific negotiations had been identified here.

A concern was also raised about the effect of the disclosure of some of the information on the negotiating positions of third parties. However, section 9(2)(j) does not provide protection for the negotiating positions of third parties, only the current or reasonably anticipated positions of Ministers, departments or organisations which hold the requested information. This concern was not relevant to section 9(2)(j).

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

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### Case 330600 (2012)—Advice about SkyCity convention centre

The Minister for Economic Development withheld advice regarding negotiations with SkyCity about funding a convention centre in Auckland under section 9(2)(j) of the OIA, and the requester complained to the Ombudsman.

The Ombudsman concluded that withholding some of the information (for example, the Crown’s strategy and bottom lines) was necessary to enable the Crown to carry on the negotiations without prejudice or disadvantage. In addition, if the SkyCity negotiations broke down, release of the information would give other potential bidders an unfair advantage by disclosing information about the Government’s position and the key areas of contention between the Government and SkyCity.

The Ombudsman acknowledged that *‘when business interfaces with government, there is a public interest in the transparency of the interaction’*. Some information relating to the negotiations had already been disclosed, including the fact that SkyCity had asked the Government to consider some alterations to gambling regulations and legislation. Given the public concern about the social impact of casinos, there was a genuine public interest in matters which were the subject of the negotiation and the associated advice.

However, the advice reflected public assurances given by Ministers that *‘any proposed changes to gambling legislation would be subject to a full public submission process’*. This would ensure that the outcome of any negotiations would be subject to full public scrutiny before any agreed changes could be implemented. The requested information was a *‘snapshot’* in the negotiation timeline. The Ombudsman did not consider that at that point (prior to the completion of the policy and negotiation process) the public interest in disclosure outweighed the reasons for withholding.

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### Case 313674 etc (2012)—EQC cost estimates

A number of requesters sought the *‘Scope of Works’* document held by EQC in respect of their properties that had been damaged in the Canterbury earthquakes. EQC released the Scope of Works, which details the repair strategy in respect of a property, but

withheld the estimate of the costs involved in carrying out the repairs in reliance on section 9(2)(j) of the OIA. The requesters complained to the Chief Ombudsman.

EQC explained that it was withholding the cost estimates in a particular category of cases only. That category was building claims between \$10,000 and \$100,000, which were being managed by Fletcher Construction, and where agreements had not yet been reached with contractors to carry out the repairs. In other cases, where cash settlements had been reached, and where red zone properties were to be cash settled as part of the Crown's purchase offer, it had agreed to provide this information.

EQC explained that although it used to provide cost estimates in all cases, it found itself disadvantaged in its negotiations with contractors, whose quotes then tended to be at least as much as EQC's estimates. EQC argued that the cost estimates needed to be kept confidential until a contract was agreed and awarded in order to ensure that all quotes were independently arrived at.

The Chief Ombudsman accepted that there were ongoing negotiations. These negotiations involved the awarding of contracts to outside contractors. Should the details of EQC's estimates be known, its negotiating position could be disadvantaged by contractors pitching their quotes close to the estimates, when in some instances their quotes may otherwise have been lower.

The Chief Ombudsman noted that EQC has a responsibility to negotiate a fair assessment of cost, and it would be more difficult to do this if contractors had access to EQC's estimates. The Chief Ombudsman therefore concluded that withholding the estimates was necessary to enable EQC to carry on negotiations with contractors, without prejudice or disadvantage.

The Chief Ombudsman considered whether the need to withhold the information was outweighed by any public interest considerations favouring release. She acknowledged the general public interest in promoting accountability and transparency of government agencies, as well as a particular public interest in homeowners being in a position to challenge decisions which affect them. However, the Chief Ombudsman was not persuaded that these public interest considerations outweighed the interest in EQC being able to negotiate repair costs in a fiscally sound manner, especially when considering that public money is involved.

The Chief Ombudsman was concerned that there should be some way in which claimants could be assured that EQC's assessments and costings had integrity. She discussed this with EQC, and in cases where such information had not already been supplied, EQC agreed to provide the homeowners with additional details to enable them to determine the range of damage identified by EQC's assessment, as well as the intended method of repair.

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

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### Case 292427 (2012)—Landcare report on Balmoral Pastoral Lease

The Department of Conservation refused a request for a copy of the Landcare report on Balmoral Pastoral Lease under section 9(2)(j) of the OIA. The Department considered release would lead to lobbying and media attention, which would prejudice negotiations between the parties. The Ombudsman noted that one of the purposes of the OIA is to increase the availability of official information to enable more effective participation in the making and administration of laws and policies. ‘Participation’ can legitimately include lobbying and inducing media attention. The Ombudsman discounted the prospect of this kind of ‘prejudice’ falling within section 9(2)(j) at all. Public pressure is something for all parties to take account of, and the OIA is not there to help agencies avoid public pressure. Section 9(2)(j) was not available to prevent public input into the discussions.

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### Case 316311 (2011)—Record of meeting with neighbour

Auckland Council withheld the record of a meeting with the requester’s neighbour under section 7(2)(i) of the LGOIMA, to enable it to carry on negotiations with the neighbour, without prejudice or disadvantage. The requester complained to the Ombudsman.

The negotiations in question were between the Council and the requester’s neighbour about a shed constructed on the boundary of their properties. The Council granted retrospective resource consent for the shed, but it appeared to have been constructed over an easement in common.

The requester had also been in discussions with the Council about the shed. He strongly believed that the Council should institute enforcement proceedings concerning the shed, rather than negotiate with the neighbours to have the shed removed or relocated.

The meeting with the neighbours was held on a confidential and without prejudice basis in the context of endeavouring to avoid unnecessary litigation in the Environment Court.

The Chief Ombudsman considered that releasing the record of the meeting with the neighbours to the requester would make it harder to conduct and conclude the negotiations with the neighbour. Withholding was therefore necessary to enable the Council to carry on negotiations with the neighbour, without prejudice or disadvantage. The Chief Ombudsman did not consider that the need to withhold the information was outweighed by the public interest in release.

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### Case 288181 (2014)—Information about Whanganui River Treaty negotiations

A requester sought information about the Crown’s negotiations with Whanganui Iwi regarding water co-management. The Office of Treaty Settlements (OTS) withheld the

information at issue under section 9(2)(j) of the OIA on the basis that its release would prejudice or disadvantage the Crown's negotiations with the Whanganui Iwi.

The information at issue comprised communications between the negotiating parties, which revealed their negotiating positions. After a Deed of Settlement was reached in relation to the Whanganui River, some of the information was released to the requester. OTS confirmed the decision to withhold the remaining information under section 9(2)(j).

The Chief Ombudsman identified the negotiations at issue as *'the Crown's continuing negotiations with the Whanganui Iwi relating to the Whanganui River ... and their land claims'*. These were clearly within the expression *'negotiations'* as found in section 9(2)(j).

While the Crown and the Whanganui Iwi had agreed a Deed of Settlement in relation to the Whanganui River, they had not yet agreed on all the details of the settlement legislation to be presented to Parliament giving effect to that Deed. Further, the Deed did not settle the Whanganui Iwi land claims. In these respects, the negotiations between the Crown and the Whanganui Iwi remained very much *'on-foot'*.

Although the information was nearly 10 years old, it still formed part of the negotiations. There was a real risk that the Crown's ability to finalise its negotiations with the Whanganui Iwi about outstanding issues would be prejudiced or disadvantaged if the balance of the information was released. There were still many sensitive issues to be discussed and settled in the negotiations.

Release of the balance of the information at issue would adversely affect the relationship of trust between the Crown and the Iwi. The undermining of that trust would disrupt and inhibit the negotiation process and prejudice or disadvantage the Crown's ability to conclude the negotiations. It was relevant that *'the relationship between the Crown and the Whanganui Iwi has, until comparatively recently, been difficult and fraught, as is evidenced by the extensive litigation and discussions between the parties over an extraordinarily long period before the present negotiations commenced'*.

The Chief Ombudsman acknowledged the public interest in transparency of the negotiations between the Crown and the Whanganui Iwi. However, this interest had been partly met by the disclosure of other information, including the Deed of Settlement. The Chief Ombudsman also noted that the public was entitled to make submissions to the parliamentary Select Committee considering the Bill presented to Parliament to give effect to the Deed of Settlement. That right also went some way to satisfying the public interest under section 9(1). The Chief Ombudsman concluded that the public interest in disclosure did not outweigh the need to withhold the information in order to enable the negotiations to be brought to completion.

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

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### Case 285033 (2010)—Initiatives to end whaling in the Southern Ocean

A requester sought all information about initiatives to end whaling in the Southern Ocean. The Minister of Foreign Affairs refused the request on multiple grounds, and the requester complained to the Ombudsman.

The information withheld under section 9(2)(j) of the OIA included advice on negotiations with the International Whaling Commission, including the positions of the New Zealand Government and other countries that were party to the negotiations.

The Ombudsman noted that the negotiations were ongoing at the time of the request, and that the participants to the negotiation had agreed that their discussions would remain confidential.

The Ombudsman concluded that disclosure of the information would jeopardise the New Zealand Government's relations with the other parties to the negotiations and that this, in turn, would prejudice the willingness of those parties to share information and engage constructively with the New Zealand Government during negotiations on the issue of whaling. The Ombudsman did not consider that the need to withhold the information was outweighed by the public interest in release.

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### Case 179213 (2009)—Draft agreement to investigate, construct and operate a windfarm

Greater Wellington Regional Council withheld a draft agreement with a company to investigate, construct and operate a windfarm on Council-owned land under section 7(2)(i) of the LGOIMA, and the requester complained to the Ombudsman.

At the time, the agreement had not been finalised or executed. The Council was in negotiations with the company regarding the terms of the replacement agreement, and bringing an end to the existing agreement.

The Ombudsman found there was a clear expectation between the parties that the draft agreement would remain confidential while it was under active negotiation. The company had made its opposition to release while the negotiations were ongoing clear. Release in this context was likely to damage the relationship between the company and the Council, and make it more difficult for the Council to conclude the negotiations successfully.

The Ombudsman therefore concluded the withholding of the draft agreement was necessary to enable the Council to carry on negotiations with the company without prejudice or disadvantage.

The requester submitted that disclosure would serve the public interest in ensuring that the Council was acting within the law and according to its resolutions. However, this could be assessed once the negotiations had concluded. It did not require disclosure of



the draft agreement prior to execution. There was also nothing to suggest the Council had acted inconsistently with the law or its own resolutions.

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### Case 176463 (2007)—Risk assessment report on Hut Creek Mine

A mine owner requested a risk assessment report commissioned by Solid Energy in respect of the Hut Creek Mine. At the time, Solid Energy was considering purchasing the relevant mining permit. The report was commissioned as part of the due diligence process. Solid Energy refused the request under section 9(2)(j) of the OIA, and the requester complained to the Ombudsman.

The Ombudsman found the report was material to the negotiations, and its release would reveal Solid Energy’s negotiating strategy. She stated:

*A party’s ability to negotiate effectively is liable to be undermined if the opposite party becomes aware of its full negotiating hand. In the absence of any obligation to disclose, it is not improper for information relevant to a negotiating strategy to be kept confidential in a commercial environment.*

The Ombudsman concluded that section 9(2)(j) applied, and was not outweighed by the public interest in release.

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### Case W47755 (2007)—Projected quantum of Treaty settlement claims

The Office of Treaty Settlements (OTS) refused a request for the projected quantum of Treaty settlement claims under section 9(2)(j) of the OIA, and the requester complained to the Ombudsman. The information at issue included the projected quantum of the financial settlements of different claims and the detailed methodology behind the projections.

With regard to the negotiations, the Ombudsman noted that OTS is charged with negotiating deeds of settlement with claimant groups for the settlement of Treaty claims. A key part of the negotiation process was reaching agreement on the settlement quantum or dollar value of the financial component of the redress. OTS explained that quantum offers are made to claimant groups in negotiation only, after discussions have taken place between the parties and after the scope and nature of the claims have been investigated in detail. It was these negotiations which OTS considered were at risk by disclosure of the information.

With regard to the predicted prejudice or disadvantage, OTS expressed concern that disclosure would call into question settlement amounts that had already been reached where the consequences of a higher pay-out had been considered (note, settlement negotiations are not complete until the enabling legislation is passed). It would also give future parties a bargaining advantage by falsely creating the impression that a ‘top dollar’



figure existed. Further, disclosure of the methodology used in arriving at such figures would reveal OTS's negotiating approach in current and future discussions, which would impact adversely on the Crown's bargaining position as well as on the ability of OTS to effectively carry out its role in what was already a complex negotiation environment.

The Ombudsman identified a public interest in release of information to show how the Crown evaluated the financial value of a settlement in order to be assured that the approach adopted was fair and balanced, particularly given that public money is involved. However, he concluded that the public interest in disclosure did not outweigh the need to withhold the information at issue, in view of the information that was already available to inform the public and claimants about how the Crown arrived at quantum offers.

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

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### Case W34975 (1996)—Costs for prison escort buses

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

The Ombudsman did not accept that section 9(2)(i) applied.<sup>32</sup> However, he did accept that section 9(2)(j) applied, on the basis that disclosure of the information could be used by the successful tenderer to '*negotiate-up*' rates during the negotiation stage of the tendering process.<sup>33</sup> This would prejudice or disadvantage the Department in its negotiations with the successful tenderer. The Ombudsman did not consider that the need to withhold the information was outweighed by the public interest in release.

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

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<sup>32</sup> The application of s 9(2)(i) in this case is discussed in our [Commercial information](#) guide.

<sup>33</sup> The Ombudsman can consider the application of any withholding ground, even if it has not been advanced by the agency.