

## The OIA and parliamentary privilege

The impact of the Parliamentary Privilege Act and the reasons for withholding parliamentary proceedings

*In 2014 the [Parliamentary Privilege Act \(PPA\)](#) was passed with the dual purpose of:*

- *reaffirming and clarifying the law relating to privilege; and*
- *ensuring adequate legal protection for parliamentary proceedings.*

*Questions have arisen about whether the PPA has:*

- *changed the reasons that might exist for withholding official information that constitutes parliamentary proceedings; and/or*
- *limited the Ombudsman's jurisdiction to investigate the withholding of such information.*

*This guide explains that there is no specific ground for withholding information that constitutes parliamentary proceedings **just because** it constitutes parliamentary proceedings. The reasons for refusal must be found in sections 6, 9 or 18 of the Official Information Act (OIA), as usual.*

*It also explains that the PPA does not prevent the Ombudsman from investigating and reviewing the withholding of information that constitutes parliamentary proceedings under the OIA.*

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### Glossary

**The House of Representatives (the House)** is comprised of the elected Members of Parliament (MPs)

**Parliament** is the House plus the Sovereign (in practice, the Governor-General)<sup>1</sup>

**The Speaker of the House (the Speaker)** is an MP chosen by the House to act as a spokesperson. The Speaker chairs meetings of the House and maintains order.

**The Clerk of the House (the Clerk)** provides the Speaker and members of the House expert advice on parliamentary procedure.

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<sup>1</sup> See s 14(1) Constitution Act 1986.

## What is parliamentary privilege?

The role of the [House of Representatives](#) is to make laws and scrutinise the Executive (Ministers and government agencies). To do this effectively, it is granted certain privileges and immunities. These are collectively known as parliamentary privilege. Three fundamental privileges are [freedom of speech](#), Parliament's right to control its own proceedings (exclusive cognisance), and the power to punish for [contempt](#).

### Freedom of speech

Freedom of speech is the idea that people should not be sued or prosecuted for what they say in Parliament so that they are able to speak freely.

This concept goes back a long way, to the Bill of Rights 1688 (UK), which is part of New Zealand law.<sup>2</sup> Article 9 of the Bill of Rights provides that *'freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'*.

Put very simply, this means that parliamentary proceedings cannot be *'impeached'* (made subject to liability in civil or criminal proceedings) or *'questioned'* (examined critically) in a court or tribunal.<sup>3</sup>

In 2014, the PPA reaffirmed and clarified aspects of Article 9. It defined *'proceedings in Parliament'*, and explained what *'impeached or questioned'* meant.

### Proceedings in Parliament

Proceedings in Parliament means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of [the House](#) or of a committee.<sup>4</sup> This includes *'reasonably apprehended'* business.<sup>5</sup>

Parliamentary proceedings include, but are not limited to:<sup>6</sup>

- the giving of evidence (and the evidence so given) before the House or a committee;
- the presentation or submission of a document to the House or a committee;
- the preparation of a document for purposes of or incidental to the transacting of any business of the House or a committee; and

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<sup>2</sup> See s 3 and schedule 1 of the Imperial Laws Application Act 1988.

<sup>3</sup> [Parliamentary Practice in New Zealand](#) (chapter 45) notes: *'Freedom of speech is "impeached" where it is sought to make a member or person liable in criminal or civil proceedings for what they have said or done in Parliament; whereas freedom of speech is "questioned" when it is sought to undertake a critical examination in legal proceedings of what a member or person has said or done in Parliament.'*

<sup>4</sup> See s 10(1) PPA.

<sup>5</sup> See s 10(3) PPA.

<sup>6</sup> See s 10(2) PPA.

- the formulation, making, or communication of a document, under the House's or a committee's authority (and the document so formulated, made, or communicated).

## Impeached or questioned

The prohibition on impeaching or questioning means that—in proceedings in a court or tribunal—evidence must not be offered or received, and questions must not be asked or statements, submissions, or comments made, concerning [proceedings in Parliament](#), by way of, or for the purpose of, all or any of the following:

- questioning or relying on the truth, motive, intention, or good faith of anything forming part of those proceedings in Parliament;
- otherwise questioning or establishing the credibility, motive, intention, or good faith of any person;
- drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament;
- proving or disproving, or tending to prove or disprove, any fact necessary for, or incidental to, establishing any liability; and
- resolving any matter, or supporting or resisting any judgment, order, remedy, or relief, arising or sought in the court or tribunal proceedings.

## What 'official information' constitutes parliamentary proceedings?

Agencies may hold a range of information that constitutes parliamentary proceedings. This can include:

- draft legislation;
- drafting instructions;
- draft and final advice, briefings or reports prepared for select committees;
- draft answers to parliamentary questions;
- preparatory material, drafts and final speeches or statements to the House or committees; and
- preparatory material held by witnesses or advisers appearing at select committee hearings.

This information is subject to the OIA,<sup>7</sup> which means it must be released on request unless there is a legitimate reason for refusal.

## Reasons for refusal

Official information cannot be withheld just because it constitutes parliamentary proceedings.

The PPA does not provide a reason for withholding such information. Releasing it under the OIA would not be *'contrary to'* the PPA.<sup>8</sup> Nor would it *'derogate'* from the PPA.<sup>9</sup>

The PPA does not restrict the disclosure of information under the OIA, although it does limit what can be done with information that constitutes parliamentary proceedings that may be disclosed under the OIA (that is, it cannot be used in court or tribunal proceedings for the purpose of impeaching or questioning parliamentary proceedings).

Discussed below are some of the more common reasons for refusing OIA requests for information that constitutes parliamentary proceedings.

### Contempt of the House—section 18(c)(ii)

Section 18(c)(ii) of the OIA provides that a request may be refused if *'the making available of the information requested would constitute contempt ... of the House of Representatives'*.

The [Standing Orders](#) (SO 409) say that the House may treat as contempt any act or omission which:

- obstructs or impedes the House in the performance of its functions;
- obstructs or impedes a member or officer of the House in the discharge of their duty; or
- has a tendency, directly or indirectly, to produce such a result.

SO 410 lists examples of conduct that may constitute contempt. One example is *'divulging the proceedings or the report of a select committee or a subcommittee contrary to the Standing Orders'*. Relevant orders include:

- SO 219, which allows a committee to declare evidence to be secret;

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<sup>7</sup> Subject to the exceptions contained in paragraphs (a)-(l) of the definition of *'official information'* in s 2 of the OIA.

<sup>8</sup> Section 18(c)(i) of the OIA provides that a request may be refused if *'the making available of the information requested would be contrary to the provisions of a specified enactment'*.

<sup>9</sup> Section 52(3)(b) of the OIA (which is a savings provision), provides that *'nothing in [the OIA] derogates from ... any provision which is contained in any other enactment and which ... imposes a prohibition or restriction in relation to the availability of official information; or ... regulates the manner in which official information may be obtained or made available'*.

- SO 239(1), which says that *‘the proceedings of a [committee] other than during the hearing of evidence are not open to the public and remain strictly confidential to the committee until it reports to the House’*; and
- SO 240(1), which says that *‘a report or a draft of the report of a select committee or a subcommittee is strictly confidential to the committee until it reports to the House’*.

Accordingly, releasing:

1. evidence that has been declared to be secret; or
2. the proceedings of a committee, other than evidence heard in public,<sup>10</sup> before it has reported to the House; or
3. the report of a committee, before it has been presented to the House;

is likely to constitute contempt of the House. A request for such information may be refused under section 18(c)(ii) of the OIA.

Absent these special circumstances, parliamentary proceedings are generally very transparent. Where it is not clear that release would constitute contempt, agencies should consult the Office of [the Clerk of the House](#)) before relying on section 18(c)(ii) of the OIA.

The application of section 18(c)(ii) of the OIA was considered in cases [180074](#), [177763](#), [165413](#) and [W44156](#).

## **Confidential advice to Government—section 9(2)(f)(iv)**

Section 9(2)(f)(iv) of the OIA provides good reason to withhold official information if, and only if:

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

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

Section 9(2)(f)(iv) will usually apply to draft answers to parliamentary questions tendered by officials to Ministers (see cases [W45495](#) and [175076](#)). Other withholding grounds have also applied to information of a similar nature (see [470699](#), [W49982](#) and [W44156](#)).

More detailed guidance on [section 9\(2\)\(f\)\(iv\)](#) and the [public interest test](#) is available on our website.

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<sup>10</sup> [Parliamentary Practice in New Zealand](#) (chapter 46) notes: *‘In principle, all evidence heard by select committees is heard at public meetings and all written evidence received is available to the public. Questions of contempt can arise only if the committee has taken special steps to protect evidence from public disclosure’*.

## Confidentiality—section 9(2)(ba)

Section 9(2)(ba) of the OIA provides good reason to withhold official information if, and only if:

- it is necessary to protect information subject to an obligation of confidence, where disclosure would be likely to:
  - prejudice the ongoing supply of information that is in the public interest; or
  - otherwise damage the public interest; and
- the need to withhold is not outweighed by the public interest in release.

The application of section 9(2)(ba) was considered in cases [180074](#) (correspondence between an MP and the Registrar of Pecuniary interests held by the Prime Minister) and [W44156](#) (draft answer to a parliamentary question tendered by HNZ staff).

More detailed guidance on [section 9\(2\)\(ba\)](#) and the [public interest test](#) is available on our website.

## Free and frank opinions—section 9(2)(g)(i)

Section 9(2)(g)(i) of the OIA provides good reason to withhold official information if, and only if:

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

Section 9(2)(g)(i) is about maintaining the effective conduct of public affairs through the free and frank expression of opinions. It recognises that the effective conduct of public affairs requires the candid and unreserved expression of opinions, and that public exposure of those opinions can sometimes have a chilling effect on people's willingness to express themselves openly, honestly and completely in future.

The application of section 9(2)(g)(i) was considered in cases [470699](#) (emails between officials discussing the advice that should be tendered on the answering of parliamentary questions), and [W49982](#) (draft answers to parliamentary questions prepared by Police staff, but not 'tendered').

More detailed guidance on [section 9\(2\)\(g\)\(i\)](#) and the [public interest test](#) is available on our website.

## Legal professional privilege—section 9(2)(h)

Section 9(2)(h) of the OIA provides good reason to withhold official information if, and only if:

- it is necessary to maintain legal professional privilege; and
- the need to withhold is not outweighed by the public interest in release.

This section most often applies to confidential communications between a solicitor and client for the purpose of giving or receiving legal advice (known as solicitor-client privilege).

It can also apply to drafting instructions and draft legislation. Section 61 of the Legislation Act 2012 makes it clear that drafting instructions received by the Parliamentary Counsel Office (PCO), and draft legislation prepared by, or on behalf of, the PCO, are subject to legal professional privilege. See case [469770](#) (drafting instructions on the Injury Prevention, Rehabilitation and Compensation Bill).

More detailed guidance on [section 9\(2\)\(h\)](#) and the [public interest test](#) is available on our website.

## Impact of the PPA on the Ombudsman's jurisdiction

Under the PPA, 'courts and tribunals' are prohibited from [impeaching or questioning proceedings in Parliament](#). The Ombudsman falls within the PPA's definition of a 'tribunal',<sup>11</sup> and is thereby also precluded from impeaching or questioning proceedings in Parliament.

This does not fundamentally alter the position that existed previously. Ombudsmen were always prevented from impeaching or questioning parliamentary proceedings by Article 9 of the Bill of Rights 1688 (see [Freedom of speech](#)).

However, neither Article 9 nor the PPA prevent the Ombudsman from carrying out their investigative role under the OIA, in relation to complaints about the withholding of information that constitutes parliamentary proceedings.

The Speaker of the House has said he does not see a general conflict arising from the Ombudsman performing the duties of that office, including conducting investigations into the withholding of official information that may also be a proceeding of the House (see cases [470699](#) and [469770](#)).

The Ombudsman may need to exercise caution if, when investigating the withholding of information that constitutes parliamentary proceedings, it appears that there may be a basis for forming an opinion that could be seen as questioning (or critically examining) those proceedings. In such circumstances, the Ombudsman would consult the Speaker before proceeding.

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<sup>11</sup> See s 2 PPA, 'tribunal' means 'any person or body ... with power to summons witnesses and take evidence on oath or affirmation, or with power to require (by, or without, a summons) the giving or supply (on, or without, oath or affirmation) of any kind or form of evidence or information'.



### Ombudsman cannot investigate responses to parliamentary questions

While parliamentary privilege does not prevent the Ombudsman from investigating the withholding of information that constitutes parliamentary proceedings in response to an OIA request, it does prevent the Ombudsman investigating the actual response made to a written or oral question in Parliament.

In case [W46007](#), an MP lodged a series of related written parliamentary questions. The Minister's replies to these questions purported to withhold some information in reliance on section 9(2)(a) of the OIA. In addition, the reply incorrectly informed the MP of a right to seek, by way of complaint to an Ombudsman, an investigation and review of the refusal to provide the information.

The Chief Ombudsman advised the complainant that he could not investigate and review a Minister's answers to parliamentary questions, as this would breach the prohibition on impeaching or questioning Parliament. However, there was nothing to prevent the MP from making a request for the same information under the OIA, and if he was dissatisfied with the Minister's response, complaining to the Ombudsman.

## Further information

[Appendix 1](#) of this guide has a summary of the key information contained in this guide.

[Appendix 2](#) has a list of relevant case notes and opinions.

Related guidance material includes:

- [Confidential advice to government—A guide to section 9\(2\)\(f\)\(iv\) of the OIA](#)
- [Confidentiality—A guide to section 9\(2\)\(ba\) of the OIA and section 7\(2\)\(c\) of the LGOIMA](#)
- [Free and frank opinions—A guide to section 9\(2\)\(g\)\(i\) of the OIA and section 7\(2\)\(f\)\(i\) of the LGOIMA](#)
- [Legal professional privilege: A guide to section 9\(2\)\(h\) of the OIA and section 7\(2\)\(g\) of the LGOIMA](#)
- [Public interest—A guide to the public interest test in section 9\(1\) of the OIA and section 7\(1\) of the LGOIMA](#)

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

If you are dealing with an OIA request for information that constitutes parliamentary proceedings, and you need guidance on whether those proceedings are confidential or not, you can approach the Office of the Clerk ([clerk@parliament.govt.nz](mailto:clerk@parliament.govt.nz)).

You can also contact our staff with queries about the OIA and parliamentary privilege by email [info@ombudsman.parliament.nz](mailto:info@ombudsman.parliament.nz) or freephone 0800 802 602. Do so as early as possible to ensure we can answer your queries without delaying your response to a request for official information.

## Appendix 1. Summary

<b>Parliamentary privilege</b>	<i>'Parliamentary privilege'</i> describes the set of privileges and immunities that the House of Representatives has in order to fulfil its functions.
<b>Freedom of speech</b>	A key privilege is <i>'freedom of speech'</i> , which means that <b>parliamentary proceedings</b> (things that are said or done in Parliament) cannot be <b>impeached</b> (made subject to liability in civil or criminal proceedings) or <b>questioned</b> (examined critically) in a court or tribunal.
<b>The information is subject to the OIA</b>	Information about parliamentary proceedings is <b>official information</b> in the hands of a Minister or agency subject to the OIA (unless it is covered by one of the exclusions to the definition of 'official information' in section 2 of the OIA). This means it must be released on request unless there is a <b>good reason</b> to withhold it.
<b>Types of information</b>	Information that may constitute parliamentary proceedings includes draft legislation, drafting instructions, information prepared for select committees or witnesses and advisers appearing before select committees, draft answers to parliamentary questions, and draft speeches or statements to the House or committees.
<b>Can't withhold just because it is parliamentary proceedings</b>	This information cannot be withheld just because it constitutes parliamentary proceedings, or because of the Parliamentary Privilege Act 2014. Reasons for refusal must be found in sections 6, 9 or 18 of the OIA.
<b>Common reasons for withholding under the OIA</b>	Common reasons for withholding information that constitutes parliamentary proceedings include sections 18(c)(ii) (contempt of the House), 9(2)(f)(iv) (confidential advice to Government), 9(2)(ba) (confidentiality), 9(2)(g)(i) (free and frank opinions) and 9(2)(h) (legal professional privilege). Section 9(2)(f)(iv) often applies to draft answers to parliamentary questions (see case <a href="#">W45495</a> ). Section 9(2)(h) often applies to draft legislation and drafting instructions (see case <a href="#">469770</a> ). Remember that section 9 withholding grounds are subject to a <a href="#">public interest test</a> .
<b>Contempt of the House</b>	Agencies should consult the Clerk before relying on section 18(c)(ii) of the OIA, unless it is clear that release would breach Standing Orders.
<b>Ombudsman can investigate</b>	Requesters can complain to the Ombudsman if they are unhappy that official information about parliamentary proceedings has been withheld. The prohibition on impeaching or questioning parliamentary proceedings does not prevent the Ombudsman from investigating such complaints. The Ombudsman will consult the Speaker if there appears to be a basis for forming an opinion that could be seen as questioning (or critically examining) parliamentary proceedings.

## Appendix 2. Relevant case notes and opinions

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

Case number	Year	Subject	Outcome
470699	2019	<p><a href="#">Request for emails between officials discussing the advice that should be tendered on the answering of parliamentary questions</a></p> <p><i>PPA did not provide a statutory bar on the Ombudsman's investigation of a complaint under the OIA—section 9(2)(g)(i) applied—release would prejudice the free and frank expression of similar communications in future—no public interest override</i></p>	Good reason to withhold under section 9(2)(g)(i)
469770	2019	<p><a href="#">Request for drafting instructions on the Injury Prevention, Rehabilitation and Compensation Bill</a></p> <p><i>PPA did not provide a statutory bar on the Ombudsman's investigation of a complaint under the OIA—section 9(2)(h) applied—withholding necessary to maintain legal professional privilege—no public interest override</i></p>	Good reason to withhold under section 9(2)(h)
180074	2010	<p><a href="#">Request for correspondence between MP and Registrar of Pecuniary interests held by the Prime Minister</a></p> <p><i>Correspondence subject to the OIA because it was held by the Prime Minister for official purposes—section 18(c)(ii) did not apply—release by the Prime Minister, to whom the information had properly been disclosed, would not constitute contempt of the House—s 9(2)(h) did not apply—the Registrar was not a lawyer and there was no solicitor-client relationship—section 9(2)(ba)(i) applied—implied obligation of confidence—release would inhibit the future supply of information from Ministers to Ministerial Services—no public interest override because the matter had already been the subject of a comprehensive inquiry by the Auditor-General</i></p>	Good reason to withhold under section 9(2)(ba)(i)
177763	2008	<p><a href="#">Request for information about issues raised by the Legislation Advisory Committee in relation to the Public Transport Management Bill</a></p> <p><i>Section 18(c)(ii) did not apply—information was not advice to select committee but advice to Minister about what the advice to select committee might be—sections 9(2)(f)(iv) and 9(2)(h) applied—no public interest override</i></p>	Good reason to withhold under sections 9(2)(f)(iv) and 9(2)(h)

Case number	Year	Subject	Outcome
175076	2007	<p><a href="#">Request for draft answers to parliamentary questions</a></p> <p><i>Section 9(2)(f)(iv) OIA applied—release of confidential draft would undermine the Minister’s ability to answer parliamentary questions, and the quality of accountability to Parliament</i></p>	Good reason to withhold under section 9(2)(f)(iv)
165413	2002	<p><a href="#">Request for draft amendments to the Terrorism (Bombings and Financing) Bill</a></p> <p><i>Section 18(c)(ii) did not apply—once a select committee has reported back to the House all proceedings of that committee, oral and written, can be referred to and used without any confidentiality restrictions stemming from parliamentary privilege</i></p>	Release in full
W49982	2003	<p><a href="#">Request for draft answers to parliamentary questions prepared by Police staff</a></p> <p><i>Section 9(2)(g)(i) applied—release would prejudice the free and frank expression of similar communications in future—no public interest override</i></p>	Good reason to withhold under section 9(2)(g)(i)
W44156	2001	<p><a href="#">Request for draft answer to parliamentary question tendered by HNZ staff</a></p> <p><i>Section 18(c)(ii) did not apply—the House had no interest in maintaining the confidentiality of a draft answer to a parliamentary question after it had been given—s 9(2)(ba)(ii) applied—release of confidential draft would undermine the Minister’s ability to answer parliamentary questions, and the quality of accountability to Parliament</i></p>	Good reason to withhold under section 9(2)(ba)(ii)
W45495	2001	<p><a href="#">Request for draft answer to parliamentary question tendered by DPMC officials</a></p> <p><i>Section 9(2)(f)(iv) applied—release of confidential draft would undermine the Minister’s ability to answer parliamentary questions, and the quality of accountability to Parliament</i></p>	Good reason to withhold under section 9(2)(f)(iv)