

The OIA and the public tender process

A guide to how the OIA applies to information generated in the context of a public tender process

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

These reasons relate to the withholding grounds in sections 9(2)(b)(ii) (unreasonable commercial prejudice), 9(2)(ba) (confidentiality), and 9(2)(j) of the OIA (negotiations).¹

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

There are some related guides that may help as well:

- Our detailed guide on **section 9(2)(b)(ii)** can be found [here](#).
- Our detailed guide on **section 9(2)(j)** can be found [here](#).
- Our detailed guide on the application of the **public interest test** can be found [here](#).

¹ References to the OIA should be taken as references to the LGOIMA; references to s 9(2)(b)(ii) OIA should be taken as references to s 7(2)(b)(ii) LGOIMA; references to s 9(2)(ba) OIA should be taken as references to s 7(2)(c) LGOIMA; and references to s 9(2)(j) OIA should be taken as references to s 7(2)(i) LGOIMA.

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The public tender process

The ‘*public tender process*’ refers to tender processes carried out by public sector agencies.

Tendering is a way of procuring (or buying) goods, services or works. It is aimed at delivering best value for money (which is not always the cheapest price) by generating competition among potential suppliers.

The public tender process usually involves the following steps:

- Agency specifies its requirements and expectations, and invites tenders through a ‘*Request for Proposals*’ (RFP),² or ‘*Request for Tenders*’ (RFT).³
- Suppliers submit their proposals to meet the agency’s requirements and expectations.
- Agency evaluates the proposals according to pre-determined and transparent criteria.
- Agency negotiates with and awards contract to successful tenderer.
- Agency notifies and debriefs unsuccessful tenderers.

Some public tenders can involve more than one step, where a ‘*Registration of Interest*’ (ROI, also known as an ‘*Expression of Interest*’) is issued before the RFP or RFT.⁴ Multi-step processes are more commonly used for high-value, unique or complex projects, or where there are a large number of potential suppliers.

The Government has issued Rules to ensure that tender processes are carried out fairly and in accordance with international best practice. Compliance with the *Government Procurement Rules*⁵ is mandatory for some agencies (including public service departments), and expected or encouraged for others. The Rules apply to procurement that exceeds the value of \$100,000 for goods or services, or \$10m for new construction. Many tenders will not reach that threshold.

Guidance on procurement more generally

This guide is about the tender process specifically, not the procurement process more generally. There may be other aspects of the procurement process, for example, the

² An RFP is defined as: ‘A formal request from an agency asking suppliers to propose how their goods or services or works can achieve a specific outcome, and their prices. An agency may be open to innovative ways of achieving the outcome’, see the *Government Procurement Rules*, available at www.procurement.govt.nz.

³ An RFT is defined as: ‘A formal request from an agency asking for offers from potential suppliers to supply clearly defined goods or services or works. Often there are highly-technical requirements and a prescriptive solution’, see the *Government Procurement Rules*.

⁴ An ROI is defined as ‘A formal request from an agency asking potential suppliers to register their interest in an opportunity to supply specific goods, services or works and provide information that supports their capability and capacity to deliver the goods, services or works’, see the *Government Procurement Rules*.

⁵ *Government Procurement Rules (fourth edition in force as of 1 October 2019)* replaced *Government Rules of Sourcing*

management of supplier panels, where information may need to be withheld under the OIA.

New Zealand Government Procurement and Property, which is part of the Ministry of Business, Innovation & Employment, provides guidance on procurement. The guidance, including the *Government Procurement Rules*, can be accessed at www.procurement.govt.nz.

The need to withhold

This guide discusses the main reasons why it can sometimes be necessary to withhold official information generated in the context of the public tender process. Other reasons that may be relevant are not discussed in this guide. For example, it may be necessary to withhold personal details under section 9(2)(a);⁶ or legal advice under section 9(2)(h);⁷ or material that, if disclosed, would inhibit the future generation of free and frank opinions necessary for the effective conduct of public affairs, under section 9(2)(g)(i).⁸ Guidance on other withholding grounds can be found [here](#).

Consulting third parties

If you are considering whether it is necessary to withhold official information in order to protect the interests of a third party, consider whether it would be appropriate to consult them. You can find detailed guidance on how to do that, including template letters, in our guide: [Consulting third parties](#).

Unreasonable commercial prejudice

Tender proposals may include commercial information that, if disclosed, would prejudice the tenderer and/or advantage their competitors.

The withholding ground that is relevant in this regard is section 9(2)(b)(ii) of the OIA, which provides good reason to withhold official information if, and only 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’*; and
- the need to withhold is not outweighed by the [public interest in release](#).

⁶ Section 7(2)(a) LGOIMA.

⁷ Section 7(2)(g) LGOIMA.

⁸ Section 7(2)(f)(i) LGOIMA.

Put simply, the test is whether release of the information at issue would be likely unreasonably to prejudice the tenderer's (or some other third party's) commercial position. It is important to note that a tenderer will only have a '*commercial position*' if it engages in '*commercial activities*'. Commercial activities are ones carried out for the predominant purpose of generating profit or gain.⁹

A mere assertion that release will prejudice a tenderer's commercial position will not be sufficient; nor will vague and unsubstantiated references to '*commercial sensitivity*' or '*confidentiality*'. Agencies must be able to:

1. demonstrate that the tenderer has a commercial position; and
2. explain how release of the information at issue would be likely unreasonably to prejudice that position.

Relevant factors in assessing the likelihood of any prejudice include the nature and content of the information, the age and currency of the information, the extent to which it is in the public domain, and the relevant commercial context.

Detailed information about the application of section 9(2)(b)(ii) can be found in our [Commercial information](#) guide.

Non-profit organisations

The requirement for a commercial activity to have a profit motive will mean that section 9(2)(b)(ii) cannot protect information provided by, or relating to, tenderers carrying out activities on a not-for-profit basis. However, there may be good reason to withhold such information under other relevant provisions, for example, the [confidentiality](#) withholding ground (see case [176647](#)).

⁹ The Ombudsman's approach to the meaning of '*commercial*' is based on dictionary definitions, which refer to the conduct of commerce and trade for the purposes of profit and loss, and case law, which has established that a profit motive is implied by the term '*commercial*' activities. For example, see *Calgary (City) v Alberta (Assessment Appeal Board)* (1987) 77 AR 23 (QB); *Mayor of Timaru v South Canterbury Electric Power Board* [1928] NZLR 174; *M K Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405; *Commissioner of Inland Revenue v Carey's (Petone and Miramar) Limited* [1963] NZLR 450; *Commissioner of Inland Revenue v United Dominions Trust Ltd* [1973] 2 NZLR 555 (CA); *Bevan Investments Ltd v Blackhall and Struthers (No 2)* [1978] 2 NZLR 97 (CA); *Lowe v Commissioner of Inland Revenue* [1981] 1 NZLR 326 (CA); *New Zealand Rail Ltd v Port Marlborough New Zealand Ltd* [1993] 2 NZLR 641 (CA); *Controller & Auditor-General, KPMG Peat Marwick & Brannigan v Davison* [1996] 2 NZLR 278 (CA); and *New Zealand Racing Industry Board v Attorney-General* [2003] NZAR 85.

Confidentiality

Confidentiality is a common characteristic of tender processes. It is often expressly promised, but may also be implied from the circumstances.

Rule 4 of the *Government Procurement Rules*¹⁰ (which are not applicable to all agencies or all tender processes—see [above](#)) states that:

- ‘each agency must protect suppliers’ confidential or commercially sensitive information’; and
- ‘an agency must not disclose confidential or commercially sensitive information’ unless agreed to by the supplier or required by law (eg, under the OIA).

There may be a legitimate concern that disclosure of confidential information would inhibit the future supply of information needed to make an informed decision on the proposal that represents best value for money, or that it would deter some suppliers from participating in the public tender process.

As the committee that recommended the OIA noted:¹¹

Much commercial information is gathered by government, some compulsorily and some voluntarily, for various purposes. As in other fields, confidentiality for such miscellaneous inputs of information will often be a necessary condition for their continuing and effective supply.

The purpose of the public tender process is to deliver best value for money. Release of information that would impede the fair and efficient operation of that process would not be in the public interest.

The withholding ground that is relevant in this regard is section 9(2)(ba) of the OIA, which 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](#).

Detailed information about the application of section 9(2)(ba) can be found in our Practice Guideline: [Confidentiality](#).

Advantages of tendering for public sector contracts

There are significant advantages to tendering for public sector contracts that should be

¹⁰ Rule 4, formerly Rule 5 of Government Rules of Sourcing

¹¹ Committee on Official Information. [Towards Open Government: General Report](#). (December 1980) at 18.

borne in mind when assessing the likelihood that release of information under the OIA would deter tenderers from providing supporting information or participating in the tender process. For example, public sector contracts provide a reliable source of business, and contractors may gain reputational benefits and experience from contracting with public sector agencies that make them more attractive to other agencies in both the public and private sectors.

Negotiations

Finally, there may be a legitimate concern that release of information would prejudice or disadvantage the agency in carrying on post-evaluation negotiations with the preferred supplier.

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

- it is necessary to enable the agency ‘*holding the information*’ to carry on negotiations without prejudice or disadvantage; and
- the need to withhold is not outweighed by the [public interest in release](#).

For section 9(2)(j) to apply, 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.

Relevant factors in assessing the likelihood of any prejudice or disadvantage include the nature and content of the information, the extent to which the information is in the public domain, the background to the negotiations, the relationship between the parties, and the timing of the request.

Detailed information about the application of this withholding ground can be found in our [Negotiations](#) guide.

The public interest in release

There are some very strong public interest considerations in favour of releasing information related to public tender processes. Some of the main ones are discussed below. This list is not intended to be exhaustive.

Transparency

There is a general public interest in the tender process being as transparent as possible.

The public can be assured that agencies are spending public money wisely if they know how much is being spent; with whom; exactly what goods, services or works that money is buying; and what redress is available if those goods, services or works are below an agreed standard.

If people have a better understanding of how public money is spent, this may give them more confidence in the integrity of the agency and in its ability to effectively allocate public funds. Alternatively, it may enable them to make more informed challenges to the spending of public money by agencies.

Transparency also encourages fair and robust processes and decision making within agencies, and discourages corruption, bias and other bad practices.

See cases [414862](#), [178592](#), [W2700](#) and [A41](#).

Accountability to the public

There is a public interest in promoting the accountability of officials, which is one of the purposes of the official information legislation.¹² This includes accountability for the conduct of the tender process, demonstrating that it was carried out fairly and equitably. It also includes accountability for the decision to award the tender, demonstrating that the successful tenderer was in fact the best candidate, as assessed against the relevant evaluation criteria. Finally, there is accountability for the spending of public money. 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’.¹³

See cases [437752](#), [416641](#), [314933](#) and [311481](#).

Accountability to participants in the tender process

There is also a special accountability to participants in the tender process. They should receive sufficient information to see that the tender process was conducted fairly and equitably, and to understand the reasons for the decision taken. This is essential to maintain their trust and

¹² See s 4(a)(ii) OIA and LGOIMA.

¹³ [1991] 2 NZLR 180 at 191.

confidence, and promote participation—and therefore competition—in public tender processes.

This is the basis on which unsuccessful tenderers are offered a debrief. Rule 49 of the *Government Procurement Rules* says that, at a minimum, agencies should address unsuccessful tenderers' concerns and questions. Agencies should:

- Give all suppliers an opportunity to be debriefed
- Debrief the supplier within 30 business days the contact was signed by all parties, or 30 business days when the request was received
- Ensure that no other suppliers confidential or commercially sensitive information is disclosed ([Rule 4](#))

At the debrief an agencies should provide information that helps the supplier in future tenders. At the minimum, an agency must explain:

- the reason/s the proposal was not successful;
- how the supplier's proposal performed against the criteria or any pre-conditions and its relative strengths and weaknesses; and
- the relative advantage/s of the successful proposal.

This is subject to Rule 4 (discussed [above](#)), that agencies should not disclose another supplier's confidential or commercially sensitive information.

Some further guidance on [Requests by tenderers](#) is provided below.

Promoting fairness and competition

There is a public interest in ensuring that tenderers can compete on a fair and equal footing. It can be difficult for new suppliers to put in a viable proposal. The incumbent, on the other hand, generally knows what is needed, and can put in the best proposal. The disclosure of information can help level the playing field between the incumbent and new suppliers.

There is also a public interest in promoting competition, as that increases the likelihood of getting value for public money. The disclosure of information can encourage suppliers to take part in public tender processes, and help them to improve their bids.

Factors that can affect the weight of the public interest

There are numerous factors that can affect the weight of the public interest in disclosure in a particular case. A detailed list of these can be found in our [Public interest](#) guide. Ones that might be particularly relevant in this context include the amount of public money involved, and any concerns about the conduct or outcome of the tender process.

Proactive release

The public interest in information about tendering, procurement and contracts is so strong that it is one of the classes of information that agencies should consider proactively releasing.

Proactive release is where information is published without the need for a request under the OIA or LGOIMA.

The Ombudsman strongly encourages agencies to adopt a proactive release policy that specifies the types of information that will be proactively released, including information about tendering, procurement and contracts.

This could include basic information about the tender process (such as a description of the goods, services or works, the length of the contract, service levels and performance measures, the decision making process and any evaluation criteria), the identities of tenderers, total prices tendered, and information about the evaluation of tenders, including tender scores.

Timing of the request

The timing of a request for tender information is likely to be a critical factor in whether or not there is good reason to withhold. The risk of harm to the tender participants and the integrity of the tender process will be highest while that process is ongoing. Agencies are more likely to be able to release information after the tender process and related negotiations have concluded. This is also when the public interest in transparency and accountability for the conduct of the tender process and the decision taken comes into play. Most of the cases considered by the Ombudsman and discussed in this guide relate to circumstances after the tender process has concluded.

General principles

Some general principles that apply to information generated in the context of the public tender process are described below.



Important note

There is no blanket basis for withholding tender information as an exempt class or category of official information.

Agencies must consider the content and context of the actual information at issue and [the timing of the request](#). The need to withhold will depend on factors including (but not limited to) the level of detail, the age and currency of the information, whether it is in the public domain, and the nature and custom of the particular market.

In preference to outright refusal, agencies should explore partial release, release of summary information, or release of other information, in recognition of the strong public interest considerations discussed [above](#).

More detailed information about the withholding grounds and the public interest test can be found [here](#).

Type of information	Ombudsman position
Basic information about the tender process	<ul style="list-style-type: none"> • Basic information about the tender process that is made available to tenderers should usually be capable of release to others, either proactively (see Proactive release above), or under the OIA. • This includes information that would be in the notice of procurement (for example the RFP or RFT), such as: <ul style="list-style-type: none"> - a description of the goods, services or works; - the quantity of the goods, services or works; - the estimated timeframe for delivery / length of the contract; - service levels and performance measures; and - preconditions and evaluation criteria. • This also includes information that would be in the Contract Award Notice, if one was required to be published under Rule 48¹⁴ of the <i>Government Procurement Rules</i>, such as: <ul style="list-style-type: none"> - the agency's name and address - the successful supplier's or suppliers' name/s and address/s - a description of the goods, services or works - the date the contract/s was awarded - the term of the contract/s - the expected spend under the contract/s, or the highest and lowest offers the agency evaluated to award the contract

¹⁴ Formerly, Rule 45 of the Government Rules of Sourcing

Type of information	Ombudsman position
	<ul style="list-style-type: none"> - the type of procurement process used - if the agency claimed an exemption from open advertising (Rule 14), the circumstances that justify the exemption - a New Zealand Business Number (NZBN) where available - any other information, as requested by the Procurement Functional Leader, for example information on broader outcomes. - the expected spend under the contract (either the contract price, if this is fixed, or an estimate of the total value of the contract), or the highest and lowest offers the agency evaluated to award the contract. <ul style="list-style-type: none"> • There is a strong public interest in release of this information in order to promote transparency and accountability. • There may be exceptions to this, for example, if the procurement process relates to matters of national security.
Identities of tenderers	<ul style="list-style-type: none"> • There is usually no need to withhold the identities of tenderers. Release of this information helps to promote the public interest in transparency and accountability for the decision. See case 178592.
Tender submissions Relevant provisions: 9(2)(b)(ii) OIA / 7(2)(b)(ii) LGOIMA 9(2)(ba) OIA / 7(2)(c) LGOIMA	<ul style="list-style-type: none"> • Releasing detailed information about the tenderer's business (for example, detailed information about its internal organisation, plans, or products, or explanations as to how it proposes to meet the agency's expectations and requirements) may confer a competitive advantage on the tenderer's competitors, with a corresponding adverse effect on the tenderer. Competitors could copy or adopt the tenderer's submission in future negotiations or tenders, which would unreasonably prejudice their commercial position. See cases 437752, 357489, 350528, 337131, 318802, 314933, 176546. • Releasing information that tenderers would regard as confidential, due to its commercial sensitivity or otherwise, could make tenderers cautious about sharing detailed information with agencies in future, which would make it harder for agencies to make informed decisions about the best tender to award a contract (see cases 410754, 350528, 176647). It could also deter suppliers from participating in the

Type of information	Ombudsman position
	<p>public tender process in future (see case 454285). This can be a particular problem with large international companies for which New Zealand represents a small market. They may calculate the benefits of entering that market as not outweighing the risk of disclosure of information regarded as confidential (see cases 454285 and 350528).</p> <ul style="list-style-type: none"> • However, it is important to remember that tender submissions are the primary material that informs tender decisions. There may be a public interest in release of some information in order to promote accountability for those decisions. This is particularly so in relation to the successful tenderer's submission. In case 314933, the public interest required partial release of an unsuccessful tenderer's submission. In case 437752, the public interest required release of summary information.
<p>Pricing information</p> <p>Relevant provision: 9(2)(b)(ii) OIA / 7(2)(b)(ii) LGOIMA</p>	<ul style="list-style-type: none"> • The Ombudsmen have rarely been persuaded that it is necessary to withhold total prices. Releasing the total price of the successful tender may reduce the incumbent's competitive advantage in the next tender round (if there is one), but this would not be unreasonable. Rather, it enables competitors to enter the new tender round on a level playing field (see cases 297004 and A41). The release of total prices also promotes the public interest in transparency and accountability for the decision, and the expenditure of public money. Note, where the <i>Government Procurement Rules</i> apply, agencies must publish a Contract Award Notice including the expected spend under the contract and the highest and lowest offers evaluated (see Rule 48). See cases 414862, 314933, 297004, 281322, 178592, 176647 W2700 and A41. • However, Ombudsmen have accepted that it is necessary to withhold suppliers' detailed pricing structures (ie, detailed descriptions of the component elements of a tender price), where that information is current. Releasing detailed pricing structures may confer an advantage on the tenderer's competitors, with a corresponding adverse effect on the tenderer. See cases 410754, 314933, 281322, W2793.
<p>Detailed plans submitted by</p>	<ul style="list-style-type: none"> • Tenderers may submit detailed plans as to how they propose to meet the agency's expectations and requirements. For example, in case 454285, the tenderer submitted a business

Type of information	Ombudsman position
<p>tenderers</p> <p>Relevant provisions: 9(2)(b)(ii) OIA / 7(2)(b)(ii) LGOIMA</p> <p>9(2)(ba) OIA / 7(2)(c) LGOIMA</p>	<p>plan for operating the Christchurch Convention and Exhibition Centre; in case 311481, the tenderer submitted project and hazard management plans in relation to the Mount Victoria tunnel refurbishment; and in case 330400, the tenderer submitted a salvage plan in relation to the <i>MV Rena</i>.</p> <ul style="list-style-type: none"> It may be necessary to withhold information from these detailed plans that would reveal the tenderer's methodology and strategy or '<i>genuinely innovative methods</i>' that would give other companies a competitive advantage in future tenders. Release may also inhibit the future supply of information from tenderers, or deter suppliers from participating in the public tender process. However, there may also be a public interest in disclosure of detailed plans submitted by the successful tenderer, because they reveal how the tenderer proposes to deliver goods, services or works for the public good, at the public's expense. In case 311481, the public interest required partial release of the successful tenderer's detailed plans.
<p>Evaluation of tenders, including tender scores</p> <p>Relevant provisions: 9(2)(b)(ii) OIA / 7(2)(b)(ii) LGOIMA</p> <p>9(2)(ba) OIA / 7(2)(c) LGOIMA</p>	<ul style="list-style-type: none"> Agencies should be able to release basic information about how the tenders were evaluated. Releasing this kind of information helps to promote the public interest in transparency and accountability for the conduct of the tender process. See case 176546. Agencies should also consider whether it is possible to release tender scores and their evaluation of the tenders. Whether this is possible will depend on the likely commercial impact of releasing the scores, and the level of detail contained in the evaluation information. Releasing this kind of information helps to promote the public interest in transparency and accountability for the conduct of the tender process and the decision taken. Partial release (for example, release of total scores rather than a breakdown), and release of summary information, should be considered before refusing in full. Tender scores were released in cases 357489, 337131, 314933 (total tender scores only), and 306315. In case 337131, the Ombudsman noted that release of the minutes of the evaluation panel addressed the public interest. However, it will not always be possible to release tender scores and information about the evaluation of tenders. In case 350528, the Ombudsman concluded that the evaluation

Type of information	Ombudsman position
	<p>information revealed the detail of the tender submissions, and release would therefore <i>‘make bidders reluctant to share full information in future’</i> and <i>‘reduce the appeal of investing in New Zealand’</i>. In case 176546 (which concerned the evaluation of applicants for default provider status under the KiwiSaver scheme), the Ombudsman concluded that release of the evaluation and scoring material would have an unreasonably prejudicial effect on the reputation of some of the default providers, and a damaging effect on the success of the KiwiSaver scheme itself.</p>
<p>Evaluative material</p> <p>Relevant provision: 9(2)(ba) OIA / 7(2)(c) LGOIMA</p>	<ul style="list-style-type: none"> • In this context, <i>‘evaluative material’</i> means <i>‘evaluative or opinion material compiled solely for the purpose of determining the suitability, eligibility or qualifications of a tenderer for the awarding of a contract’</i>.¹⁵ It commonly refers to information gathered as part of reference checks. • It is general practice that reference checks are subject to an obligation of confidence. Release of information gathered as part of reference checks may deter referees from providing full and complete information in future. It is in the public interest that agencies should be able to obtain full and complete information from a tenderer’s referees before awarding a contract. See cases 416641 and 310785. • However, there may be a public interest in disclosure of information to show that an agency has <i>‘undertaken appropriate reference checks’</i>. In case 416641, the Chief Ombudsman concluded that the public interest required disclosure of summary information to show that references were obtained, the number of references, the position of the referees, and the general nature of the references. • There may also be a public interest in accountability to the tenderer who was subject to the reference checks, for the decision taken in relation to them. One way of meeting this is through provision of a statement of the reasons for the decision (see Requests for reasons for a decision below).
<p>Due diligence investigations</p> <p>Relevant provisions:</p>	<ul style="list-style-type: none"> • Due diligence refers to the investigation of a potential (usually preferred) supplier, in order to independently verify whether it is able to fulfil the agency’s expectations and requirements,

¹⁵ Based on the definition of *‘evaluative material’* in s 27(2) OIA and s 26(3) LGOIMA.

Type of information	Ombudsman position
<p>9(2)(b)(ii) OIA / 7(2)(b)(ii) LGOIMA</p> <p>9(2)(ba) OIA / 7(2)(c) LGOIMA</p>	<p>before awarding the contract.</p> <ul style="list-style-type: none"> Agencies should be able to release basic information about their due diligence investigations. For example, in case 176546, the agency released its due diligence plan and worksheets used in the due diligence visits (without any commentary on the supplier). Releasing this kind of information helps to promote the public interest in transparency and accountability for the conduct of the tender process and the decision taken. It may be necessary to withhold some information generated or gathered during due diligence investigations. Release of information provided by third parties in confidence may prejudice the ongoing supply of information that is necessary in order to enable the agency to carry out due diligence investigations. Release of supplementary and detailed business information provided by tenderers may be likely unreasonably to prejudice their commercial positions. However, there is also a public interest in promoting the accountability of the agency for the steps taken to satisfy itself regarding the tenderer's performance. In case 416641, the Chief Ombudsman concluded that the appropriate balance was struck by releasing the overall findings and recommendations of the agency's due diligence report.
<p>Negotiations with the preferred supplier</p> <p>Relevant provision: 9(2)(j) OIA / 7(2)(i) LGOIMA</p>	<ul style="list-style-type: none"> 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 preferred supplier to argue for more favourable terms or extract concessions. See case W34975.

Communication with potential tenderers

It is good practice to let prospective tenderers know about the agency's obligations under the OIA (or LGOIMA), and the information about the tender process that the agency plans to proactively release (see [Proactive release](#) above). As the Ombudsman noted in case [314933](#):

It is incumbent on any public sector agency calling for tenders to advise parties who submit a tender that any promises of confidentiality are subject to the [agency's] obligations under the OIA.

Agencies should ask tenderers to clearly identify any specific information they would not wish to be released in response to an OIA (or LGOIMA) request, and why.

It may also be appropriate to consult with the tenderer before making a decision on a request for official information they supplied. More information about how to consult third parties (including template letters) can be found in our guide [Consulting third parties](#).

Example statement for inclusion in tender documents

1. [Agency name] is subject to the [Official Information Act (OIA) / Local Government Official Information and Meetings Act (LGOIMA)]. This means we must release information in response to a request, unless there is a good reason to withhold it.
2. As part of our commitment to openness and transparency, [agency name] also intends to publish the following information about this tender process:
 - a. [For example, basic information about the tender process (such as a description of the goods, services or works, the length of the contract, service levels and performance measures, the decision making process and any evaluation criteria), the identities of tenderers, total prices tendered, and information about the evaluation of tenders, including tender scores].

[Use if applicable] This is in addition to the information we are required to release under the *Government Procurement Rules* (Rules 36 and 37).

3. [Agency name] undertakes to keep confidential any information provided by you in this tender process, subject to:
 - a. disclosure of the information specified at 2 above; and
 - b. [agency name]'s obligations under law, including the [OIA/LGOIMA].
4. You are asked to consider if any of the information supplied by you in this tender should not be disclosed because of its sensitivity (other than that referred to at 2 above). If this is the case, you should clearly identify the sensitive information and specify the reasons for its sensitivity. [Agency name] will consult with you about sensitive information before making a decision on any [OIA/LGOIMA] request received.

5. If you consider that none of the information supplied by you is sensitive, please make a statement to that effect. Such information may be released in response to an [OIA/LGOIMA] request.

Requests by tenderers

Requests for information about the public tender process are often made by participants in that process. Most OIA or LGOIMA requests are considered under Part 2 of the legislation, but there are some special rules to be aware of in this scenario.

Requests for personal information

Where the requester is an **individual** seeking personal information about themselves, the request must be considered under the Privacy Act. For more information about the Privacy Act, visit the website of the Privacy Commissioner www.privacy.org.nz.

Where the requester is a **corporate entity** (like a company or incorporated society) seeking personal information about itself, the request must be considered under Part 4 of the OIA or LGOIMA.

The reasons for refusing Part 4 requests are more limited than they are for ordinary Part 2 requests. In particular, they cannot be refused under section 9(2)(g)(i) of the OIA (the '*free and frank*' withholding ground).¹⁶ More guidance on requests by corporate entities for their personal information can be found [here](#). Case [310785](#) is an example of a Part 4 request by a tenderer.

Requests for internal decision making rules

Where the requester is seeking the rules (eg policies, principles or guidelines) for how the decision on the tender will be made, the request must be considered under section 22 of the OIA.¹⁷ Again, the reasons for refusing such requests are more limited. More guidance on requests for internal decision making rules can be found [here](#).

Requests for reasons for a decision

Where the requester is seeking reasons for the decision not to award them the contract, the request must be considered under section 23 of the OIA.¹⁸ Section 23 gives people a right to request a statement of the reasons for a decision that affects them personally. In response, agencies must set out their findings on material issues of fact, a reference to the information

¹⁶ Section 7(2)(f)(i) LGOIMA.

¹⁷ Section 21 LGOIMA.

¹⁸ Section 22 LGOIMA.

on which the findings were based (with limited exceptions), and the reasons for the decision. More guidance on requests for reasons can be found [here](#).

Further information

Appendix 1 has a step-by-step [work sheet](#) for dealing with OIA requests for public tender information.

Appendix 2 has [case studies](#) illustrating the application of sections 9(2)(b)(ii), 9(2)(ba) and 9(2)(j) to public tender information.

Related guidance material includes:

- [Commercial information](#)
- [Confidentiality](#)
- [Negotiations](#)
- [Public interest](#)
- [Consulting third parties](#)
- [Requests for internal decision making rules](#)
- [Requests for reasons for a decision or recommendation](#)
- [Requests by corporate entities for their personal information](#)

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

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

Appendix 1. Work sheet for dealing with public tender information

Before an OIA request is received	
1. Proactive release Relevant part of guide: Proactive release	<ul style="list-style-type: none"> Before starting the public tender process, think about the information you will proactively release about that process, and when. This could include basic information about the tender process (such as a description of the goods, services or works, the length of the contract, service levels and performance measures, the decision making process and any evaluation criteria), the identities of tenderers, total prices tendered, and information about the evaluation of tenders, including tender scores.
2. Communication with potential tenderers Relevant part of guide: Communication with potential tenderers	<ul style="list-style-type: none"> Let potential tenderers know about the agency's obligations under the OIA / LGOIMA, and the information that you will proactively release about the tender process. Invite them to identify any information they would not want to be released under the OIA / LGOIMA. See our Example statement for inclusion in tender documents.
After an OIA request is received	
3. Is the requester a tenderer? Relevant part of guide: Requests by tenderers	<ul style="list-style-type: none"> If the requester is a tenderer, check whether any special rules apply. If they are an individual seeking personal information about themselves, the Privacy Act will apply. If they are a corporate entity seeking personal information about themselves, Part 4 of the OIA/LGOIMA will apply. Click here for more guidance on Part 4 requests. If they want the rules for how the decision on the tender was or will be made, section 22 of the OIA (section 21 of the LGOIMA) will apply. Click here for more guidance on section 22 requests. If they want the reasons for the decision not to award them the tender, section 23 of the OIA (section 22 of the LGOIMA) will apply. Click here for more guidance on section 23 requests. For any other requests, go to step 4.

4. Do any of the withholding grounds apply?

Relevant part of guide:

[Unreasonable commercial prejudice](#)
[Confidentiality](#)
[Negotiations](#)

- The most common withholding grounds that apply to public tender information are:
 - Unreasonable commercial prejudice (section 9(2)(b)(ii) OIA / 7(2)(b)(ii) LGOIMA)—see [above](#) and our [Commercial information work sheet](#).
 - Confidentiality (section 9(2)(ba) OIA / 7(2)(c) LGOIMA)—see [above](#) and our [Confidentiality](#) practice guidelines.
 - Negotiations (section 9(2)(j) OIA / 7(2)(i) LGOIMA)—see [above](#) and our [Negotiations work sheet](#).
- Guidance on other withholding grounds is available [here](#).
- If you think it might be necessary to withhold some or all of the information in order to protect the interests of a third party, consider consulting that third party. Find detailed advice and template letters in our [Consulting third parties](#) guide.
- Note that the Ombudsman has developed general principles in relation to common types of public tender information including:
 - [Basic information about the tender process](#)
 - [Identities of tenderers](#)
 - [Tender submissions](#)
 - [Pricing information](#)
 - [Detailed plans submitted by tenderers](#)
 - [Evaluation of tenders, including tender scores](#)
 - [Evaluative material](#)
 - [Due diligence investigations](#)
 - [Negotiations with the preferred supplier](#)
- If none of the withholding grounds apply, the information must be released. Otherwise, go to step 5.

<p>5. Apply the public interest test</p> <p>Relevant part of guide: The public interest in release</p>	<ul style="list-style-type: none"> • Identify any public interest considerations in favour of disclosure, for example, transparency; accountability for the conduct and outcome of the tender process, and spending public money; accountability to tender participants; and promoting fairness and competition. • Are there any factors that strengthen the public interest in disclosure, such as the amount of public money involved, or any concerns about the conduct or outcome of the tender process? • Consider whether the public interest in disclosure outweighs the need to withhold. • See Public interest—A guide to the public interest test in section 9(1) of the OIA and section 7(1) of the LGOIMA for more information. • Go to step 6.
<p>6. Make a decision on the request</p>	<ul style="list-style-type: none"> • 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. • 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. • See our Template letter 6: Letter communicating the decision on a request.

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
454285	2018	Business plan in tender to operate Christchurch Convention and Exhibition Centre <i>Section 9(2)(b)(ii) OIA applied—competitors could copy or adopt the tenderer's methodology and strategy and devise plans based on its established operating systems which would unreasonably prejudice its commercial position—section 9(2)(ba)(ii) OIA applied—information subject to an explicit obligation of confidence and of a confidential nature—release would damage the public interest by making suppliers reluctant to participate in future procurement processes</i>	Good reason to withhold
437752	2018	Corporate culture information contained in bus tender submissions <i>Section 7(2)(b)(ii) LGOIMA applied—competitors could compare and refine their own submissions, potentially reducing the successful tenderers' competitive advantage in future tender rounds—this would be likely unreasonably to prejudice the commercial position of the successful tenderers—public interest in accountability for the Council's decision required release of a summary statement</i>	Release summary
416641	2017	Due diligence report, site visit reports and reference checks <i>Section 9(2)(ba)(i) OIA applied in part to due diligence report—specific comments supplied by overseas officials protected, but not overall findings and recommendations that were not attributed to anyone in particular—public interest in accountability of Department for steps taken to satisfy itself regarding supplier's performance—section 9(2)(ba)(i) OIA applied in part to correspondence from supplier to the Department—detailed operational information protected but not general information—public interest in accountability of Department for steps taken to satisfy itself regarding supplier's performance—sections 9(2)(ba)(i) and 9(2)(g)(i) OIA applied to information obtained from site visits, but not to the executive summary of the reports—public interest in accountability for decision to award contract—section 9(2)(ba)(i) OIA applied to reference checks—release would deter referees from providing full and complete information in future—however,</i>	Release in part

Case number	Year	Subject	Outcome
		<i>public interest required release of summary information about the reference checks</i>	
414862	2017	Price of successful tenderer (weekly license fee to operate and occupy Riverbank Market) <i>Section 7(2)(i) LGOIMA did not apply—public interest in release to promote integrity and transparency of tender process</i>	Release in full
410754	2016	Tender submissions to replace jetty at Philomel Landing <i>Section 9(2)(b)(ii) OIA applied—release of tenderers’ pricing strategy would give an unfair advantage to their competitors and unreasonably prejudice their commercial position—section 9(2)(ba)(i) OIA applied—release would make tenderers reluctant to provide as much detail about their design specifications in future—it was in the public interest for NZDF to receive full and detailed submissions as this would otherwise undermine its ability to make an informed decision on the best tenderer to award a contract</i>	Good reason to withhold
357489	2015	Successful tenderer’s scores and submission <i>Section 9(2)(b)(ii) OIA did not apply to tender scores—section 9(2)(b)(ii) OIA applied to tender submission—competitors could copy or adopt successful tenderer’s submission in future negotiations or tenders, which would unreasonably prejudice their commercial position</i>	Release in part
350528	2015	Anadarko’s application for petroleum exploration permits and evaluation of that application <i>Sections 9(2)(ba)(i) and (ii) OIA applied—application subject to express obligation of confidence—evaluation, which revealed information in application, subject to implied obligation of confidence—release would make bidders reluctant to share full information in future, which would undermine MBIE’s ability to carry out statutory functions—release would also reduce the appeal of investing in New Zealand and MBIE’s ability to administer the Crown Minerals Act, which would otherwise damage the public interest—section 9(2)(b)(ii) OIA applied—revealing information about particular prospects or reserves would disadvantage third party vis-à-vis their competitors—revealing information about projected costs would disadvantage third party in its negotiations with service companies—public interest met by available information</i>	Good reason to withhold

Case number	Year	Subject	Outcome
311481	2014	Project and hazard management plans in relation to Mount Victoria tunnel refurbishment <i>Section 9(2)(b)(ii) OIA applied to genuinely innovative methods that competitors could copy or adapt in future tenders, but not to the plans in their entirety—strong public interest in disclosure to promote accountability for adherence to the plans and effective participation in the consultation process</i>	Release in part
337131	2013	Successful tenderer's submission <i>Section 9(2)(b)(ii) OIA applied—release would reveal successful tenderer's marketing strategy which would unreasonably prejudice its commercial position—public interest met by disclosure of tender scores and minutes of evaluation panel</i>	Good reason to withhold
318802	2012	Copy of winning tender for Lawrence Oliver Park <i>Section 7(2)(b)(ii) LGOIMA applied—release would enable competitors to anticipate winning tenderer's strategy in future bids, which would unreasonably prejudice their commercial position</i>	Good reason to withhold
330400	2012	Salvage plan in relation to MV Rena <i>Section 9(2)(b)(ii) OIA applied—revealing salvage company's detailed methodology would give other companies a competitive advantage in future tenders, which would be likely unreasonably to prejudice its commercial position</i>	Good reason to withhold
314933	2012	Information about Hillside Engineering's failed tender to supply 300 CFT wagons <i>Section 9(2)(b)(ii) and 9(2)(i) OIA applied to a breakdown of price and tender scores for successful and unsuccessful tenderers, but not to total price and tender scores—public interest in releasing total price and tender scores to promote integrity and transparency of tender process—section 9(2)(i) OIA applied in part to Hillside Engineering's tender submission—release of detailed information about design, engineering, and manufacturing capabilities would prejudice or disadvantage KiwiRail in carrying out commercial activities—executive summary could be released without harm—public interest in releasing executive summary to promote accountability for decision making on the tender</i>	Release in part
306315	2012	Tender scores for successful tenderer <i>Section 9(2)(b)(ii) OIA did not apply—release of tender scores would not be likely unreasonably to prejudice successful tenderer's commercial position</i>	Release in full

Case number	Year	Subject	Outcome
310785	2011	Reference checks <i>Section 26(1)(c) LGOIMA applied to request by unsuccessful tenderer for reference checks—information was evaluative material and release would breach an implied promise that this material would be held in confidence</i>	Good reason to withhold
297004	2011	Total amounts paid for parking services <i>Sections 7(2)(b)(ii) and 7(2)(i) LGOIMA did not apply—release of total amounts paid would not unreasonably prejudice the commercial position of the incumbent providers in future tender rounds, nor would it disadvantage the Council in carrying on negotiations</i>	Release in full
281322	2009	Tender submission pricing schedule <i>Section 9(2)(b)(ii) OIA applied to detailed pricing schedule but not total price—strong public interest in disclosure of total price</i>	Release in part
178592	2009	Names of tenderers and prices <i>Section 7(2)(b)(ii) LGOIMA did not apply—release of names and total prices, as opposed to detailed pricing or market strategy, would not be likely unreasonably to prejudice the tenderers' commercial positions—public interest in release to promote integrity and transparency of the tender process</i>	Release in full
176647	2008	Tender submissions, evaluation of tenders and negotiation brief relating to 'Ageing in Place' contract <i>Section 9(2)(ba)(ii) OIA applied to tender submissions—release of detailed proposals and component prices would have an adverse effect on tenderers' responses to future tenders issued by the DHB, which would damage the public interest—section 9(2)(g)(i) applied to evaluation of tenders and negotiating brief—release would have an inhibiting effect in future on the quality of the documentation associated with the DHB's contract negotiations and tender evaluation, which would be prejudicial to the future conduct of such tenders</i>	Good reason to withhold
176546	2008	Tender proposals and evaluation and scoring material relating to the appointment of default KiwiSaver providers <i>Section 9(2)(b)(ii) OIA applied to tender proposals—release of detailed organisational information including information about products and fees would be likely unreasonably to prejudice the default providers' commercial positions—section 9(2)(ba)(ii) OIA applied to evaluation and scoring information—explicit obligation of confidence—release would make it more difficult for MED to</i>	Good reason to withhold

Case number	Year	Subject	Outcome
		<i>monitor compliance of default providers with their instruments of appointment and have a damaging effect on the success of the KiwiSaver scheme itself</i>	
W34975	1996	Costs for prison escort buses <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
W2793	1992	Copies of tender submissions for the removal of bodies <i>Section 9(2)(b)(ii) OIA applied—there was no total tender price that could be released—release of detailed pricing information would be likely unreasonably to prejudice the successful tenderer’s commercial position</i>	Good reason to withhold
W2700	1992	Price of successful tender to supply disposable syringes and needles <i>Sections 9(2)(b)(ii) and 9(2)(i) OIA did not apply—public interest in release to promote integrity and transparency of tender process</i>	Release in full
A41	1992	Price of successful tender to supply medical product <i>Section 9(2)(b)(ii) OIA did not apply—public interest in release to promote integrity and transparency of tender process</i>	Release in full

Case 454285 (2018)—Business plan in tender to operate Christchurch Convention and Exhibition Centre

A requester asked Ōtākaro Limited (a Crown company leading regeneration projects in Central Christchurch) for the basis or source for the estimated \$300-400m direct economic benefit of the Christchurch Convention and Exhibition Centre (CCEC).

Ōtākaro responded by releasing an extract from a business plan setting out the estimated direct and indirect economic benefits of the CCEC. The requester, concerned that the extract did not show how the estimate had been calculated, sought the full business plan. He complained to the Ombudsman when this follow-up request was refused.

The information at issue was a business plan produced by the company that had been designated as the preferred operator following the CCEC Operator Services Tender. The tender opportunity had been posted on the GETS website, which provided details about the application process and assessment criteria for tenders, but not copies of documents submitted by tenderers, such as the business plan. At the time of the request, Ōtākaro had announced that it had recommenced the process to select the preferred operator.

The Ombudsman described the business plan as commercially sensitive information about the author company's prospective business operations. It included budgets and marketing strategies, revenue targets, projected operating costs, proposed personnel structure, IT plans and supplier procurement. The Ombudsman found that sections 9(2)(b)(ii) and 9(2)(ba)(ii) of the OIA applied.

Section 9(2)(b)(ii)

Release would be likely unreasonably to prejudice the company's commercial position by disclosing the detailed methodology and strategy behind its tender, acquired through worldwide operation of convention centres and other hospitality venues, together with specific adaptations for the Christchurch market. This would give the company's competitors an advantage over it in similar tender processes, or in the operation of convention centres and other hospitality venues generally. Given that the company had worldwide operations, release of the business plan would likely prejudice its ability to bid for other projects internationally, as competitors could devise plans based on its established operating systems.

Section 9(2)(ba)(ii)

The Preferred Operator Agreement between Ōtākaro and the company provided that information would be kept confidential except where required by law. Given this assurance and the sensitive nature of the information at issue, the Ombudsman was satisfied that an '*obligation of confidence*' existed in respect of the business plan.

The Ombudsman identified '*a public interest in maintaining a good level of private sector participation in government tender processes, including in relation to the Christchurch anchor projects to be delivered by Ōtākaro*'. If commercially sensitive information,

provided in the course of a confidential tender process was released, it was likely that suppliers would be reluctant to participate in government procurement processes in the future. This was particularly the case with large international companies for whom New Zealand is a small market, but where any proprietary information released could be used by competitors worldwide.

There was also a public interest in information of this nature remaining confidential where tender negotiations between a government agency and a private entity were not concluded, and a tender process needed to be re-commenced. This ensured alternative tenders would not be formulated with reference to previously agreed pricing arrangements, and an agency's bargaining power was not limited by terms agreed with previous tenderers.

Public interest in release

The request for the business plan was prompted by public statements by Ōtākaro as to the estimated economic benefits of the CCEC. The Ombudsman accepted that there was a public interest in release of adequate information to demonstrate that Ōtākaro's statement was credible and responsible. The excerpt from the business plan released by Ōtākaro did not show how the estimated economic benefit was calculated. Had there been further information in the business plan to provide a basis for the estimates, the Ombudsman would have been minded to recommend its release. However, there was no additional information in the business plan to explain how the figures contained in the excerpt were calculated. Ōtākaro confirmed that it did not hold any other information to indicate how the economic benefit estimates were calculated. In these circumstances, the Ombudsman considered that the extract released by Ōtākaro largely addressed the public interest considerations arising from the media statement that prompted the request.

The remainder of the business plan essentially comprised the proprietary information of the company that produced it. There was a significant public interest in protecting the ability of Ōtākaro to maintain confidentiality of counterparties' commercially sensitive information throughout its procurement processes. As against that, there was also a public interest in promoting the accountability of Ōtākaro for the expenditure of public funds, and to demonstrate the tender process was fair and robust.

However, release of this particular business plan would not increase accountability of the tender process. It comprised one party's views as to the day-to-day running of the CCEC, as opposed to elucidating the underlying rationale for the CCEC business model, or the selection criteria applied by Ōtākaro to the third parties engaged to manage the various aspects of the CCEC business. Further, while the Ombudsman was required to have regard to the circumstances as they were at the time of the request, he noted that Ōtākaro had recently recommenced the preferred operator selection process. This particular business plan may therefore have been superseded by a new plan submitted as part of the further tender process, which would further reduce the public interest in

its full release.

The Ombudsman concluded that the public interest in disclosure of the business plan did not outweigh the need to withhold it.

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Case 437752 (2018)—Corporate culture information contained in bus tender submissions

The Tramways Union requested corporate culture information contained in tender submissions made by two bus companies awarded contracts by the Greater Wellington Regional Council. The Council withheld the corporate culture information under a number of grounds, the most relevant of which was section 7(2)(b)(ii) of the LGOIMA (prejudice to commercial position). The Union complained to the Ombudsman.

The companies explained the competitive nature of the market in which they competed for contracts across New Zealand. They had developed significant experience in the industry and put a great deal of effort into developing their tender strategy over time. Considerable resources went into refining the content and presentation of their tender proposals to gain a competitive edge, particularly in regards to their corporate culture submissions.

The Ombudsman accepted that the information revealed a component of the tenderers' *'pitch'* that formed part of their overall market strategy. Access to this information would enable their competitors to compare and refine their own submissions, potentially reducing the successful tenderers' competitive advantage in future tender rounds. This would be likely unreasonably to prejudice the commercial position of the successful tenderers.

Having concluded that section 7(2)(b)(ii) applied, the Ombudsman considered the countervailing public interest in disclosure. The Ombudsman noted that the Council's assessment of the quality of the tenderers' submissions was based partly on their corporate culture statements. This was an important factor weighted in the quality score, in part because the Council is accountable to the wider Wellington community, ratepayers and the incumbent workforce, for awarding contracts to tenderers that can demonstrate that they comply with the *'good employer'* principles, and can effectively engage with unions and maintain effective working relationships.

There was a public interest in promoting accountability for the Council's decision to award the contracts to these companies. While this interest did not outweigh the need to withhold the specific information at issue, it did warrant disclosure of a summary statement demonstrating that the companies satisfied all lawful requirements (as prospective employers), and that their submissions were not inconsistent with what could be reasonably expected in terms of fulfilling these quality components of the evaluation.

The Council accepted the Ombudsman's opinion and released a summary statement.

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Case 416641 (2017)—Due diligence report, site visit reports and reference checks

A requester complained about the Department of Corrections' decision to withhold information about contracts awarded to Serco and G4S under sections 9(2)(ba)(i) (confidentiality) and 9(2)(g)(i) (free and frank opinions) of the OIA.¹⁹ The information related to:

- tenders for a contract to supply Electronic Monitoring (EM) services to the Department; and
- Serco's contract to manage Mt Eden Corrections Facility (MECF), which was awarded following a competitive tender process in 2011.²⁰

EM services tender

In May 2013, the Department issued a Registration of Interest (ROI) for EM services. Serco and G4S successfully made it past the ROI stage. Later in 2013, Serco and G4S were referred to the Serious Fraud Office (SFO) in the United Kingdom (UK) for overcharging the Ministry of Justice in EM contracts. In response, the Department placed its tender process for a new EM supplier on hold to conduct due diligence investigations.

The Department made enquiries with overseas jurisdictions and sought responses from Serco/G4S. It generated a report, which it sought to withhold under section 9(2)(ba)(i) of the OIA on the basis that it was subject to an obligation of confidence, and release would prejudice the ongoing supply of information from overseas jurisdictions and Serco/G4S.

The purpose of the report was to understand how other prison services responded to the UK SFO investigation and to identify if there were other vendors that could fulfil the Department's EM requirements. The report included a table summarising responses to five questions about the performance Serco/G4S. It also included a '*Summary of Findings*' and '*Recommended Next Steps*'. The report recommended that Serco/G4S remain in the procurement process, and that the process be extended to include additional vendors.

The Chief Ombudsman accepted that specific comments provided by overseas officials were subject to an obligation of confidence, and that '*there [was] a real risk that [disclosure] would make those involved reluctant in the future to assist the Department with these types of enquiries*'. However, the obligation of confidence did not extend to the overall findings and recommendations of the report, which included broad reference to the information provided, but did not attribute it to particular jurisdictions. Nor did it

¹⁹ The Department also relied on s 9(2)(b)(ii), but the Chief Ombudsman did not need to consider that provision because the relevant information was also protected by section 9(2)(ba)(i).

²⁰ The contract ended in March 2017 after allegations about the safety of prisoners and staff and the use of contraband.

apply to information about Serco/G4S's overseas contracts, which was already in the public domain.

The Chief Ombudsman also noted the public interest in releasing information about the steps the Department took to satisfy itself about the performance of Serco and G4S in light of the concerns raised. While neither was the successful bidder, both companies remained in the tender process despite the UK fraud investigation. Accordingly, even if section 9(2)(b)(ii) applied, some infringement of confidentiality would be warranted for reasons of accountability.

An appendix to the report contained correspondence between the Department and Serco/G4S. The Chief Ombudsman saw no basis for the Department's letters to Serco/G4S to be treated as confidential in terms of section 9(2)(ba)(i). They were not 'supplied' to the Department and contained material already reported in the media about the UK SFO investigation.

However, Serco/G4S could legitimately expect confidentiality in respect of the detailed operational information they supplied in response to the Department. If that information was released, the companies would not be so forthcoming in future. There was a clear public interest in the Department receiving a fulsome response to these types of enquiries, including any relevant operational details.

While the detailed operational information was protected, there was no reason to withhold more general information supplied by Serco/G4S. The Chief Ombudsman stated:

...given the commercial incentives for the companies to provide assurances to the Department, notwithstanding any confidentiality issues, I am not persuaded that the release of the more general information would create any prejudice to the future supply of information.

Overall, while I recognise the need to protect confidentiality in relation to the detailed information, I do not consider that section 9(2)(ba)(i) applies carte blanche. As referred to above, there is a public interest in information which demonstrates the steps that the Department took to confirm that G4S/Serco should remain involved in the procurement process, and the assurances received in response.

The Chief Ombudsman concluded that section 9(2)(ba)(i) provided good reason to withhold the due diligence report in part.

MECF tender

In the course of evaluating Serco's ultimately successful tender to manage MECF, the Department undertook site visits at existing Serco-run facilities overseas and carried out reference checks with Australian and UK government officials. It generated site visit reports (withheld under sections 9(2)(ba)(i) and 9(2)(g)(i) of the OIA) and reference check reports (withheld under section 9(2)(ba)(i) of the OIA).

Site visit reports

The Chief Ombudsman was satisfied that access to the Serco-run facilities and discussions with relevant parties which were summarised in the site visit reports occurred on a confidential basis. The reports were heavily reliant on the ability of the Department to have an open discussion about the operation and performance of the prisons. While Serco was unlikely to deny access to facilities under its management in future, there was a credible risk that participants would be more guarded in the information they provided. This would undermine the ability of the Departmental officials to make properly informed assessments during tender processes.

However, the Chief Ombudsman did not consider that the executive summary of the reports could be properly described as having been supplied in confidence. The opinions of the site visit reports were essentially internal Departmental communications. The only basis for claiming protection for such material under the OIA was if it disclosed confidential operational details, which it did not.

In relation to section 9(2)(g)(i) of the OIA, the Chief Ombudsman acknowledged the importance of site visit teams not feeling inhibited in expressing their free and frank opinions. However, the reports were written in a professional style and did not contain any comments of a cavalier or critical nature. The Chief Ombudsman believed the site visit team would continue to provide their honest and considered appraisals if the executive summary of the reports were released.

There was also a strong public interest in release of the executive summaries to promote accountability for the Department's decision to award the contract to Serco.

The Chief Ombudsman concluded there was no good reason to withhold the executive summaries of the site visit reports.

Reference check reports

The Chief Ombudsman commented that references and background checks or information about performance, otherwise known as evaluative material, are generally undertaken in a confidential environment. Assurances of confidentiality are often provided in order to ensure that candid comments about a subject's performance can be elicited. This encourages referees to supply information, which they may otherwise be reluctant to divulge. If the specific comments did not remain confidential, this is likely to deter participants from providing full and complete information to the Department in the future. This would hinder the Department's ability to make informed decisions about the risks of entering into commercial arrangements. It was in the public interest that the Department receives quality information and opinions in this context.

While the information obtained by the Department during the reference checks was justifiably regarded as confidential in terms of section 9(2)(ba)(i), the Chief Ombudsman identified a strong public interest in releasing information about this aspect of the tender process: *'It is important that the public has confidence that any government Department*

has undertaken appropriate reference checks'. The accountability interest was heightened by concerns about Serco's performance (which ultimately led to the contract ending). The Chief Ombudsman concluded that the public interest required disclosure of summary information to show that references were obtained, the number of references, the position of the referees, and the general nature of the references.

The Department accepted the Ombudsman's opinion and released the relevant information.

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Case 414862 (2017)—Price of successful tenderer (weekly license fee to operate and occupy Riverbank Market)

The Hutt City Council refused to disclose the weekly license fee paid to occupy and operate the Riverbank Market under section 7(2)(i) of the LGOIMA (negotiations), and the requester complained to the Ombudsman.

The Council considered that release of the fee would prejudice future tender negotiations when the license to occupy the market came up for renewal in 2019. It explained that the amount paid by the current operator was substantially higher than what previous operators had paid. Disclosure of that amount would deter other potential operators from tendering, as they would think they could not compete. This reduction in competition would remove its ability to negotiate on non-price components.

The Ombudsman noted the view of successive Ombudsmen that there is generally no need to withhold total tender prices. He commented that the information at issue in this case was the successful tender price (broken down into weekly amounts).

The Ombudsman accepted that negotiations in this case were reasonably contemplated. He also accepted that *'limiting competition to a smaller group could be described as a "disadvantage" as contemplated by section 7(2)(i)'*. However, this prejudice was not so likely to occur that withholding was reasonably necessary. In fact, it could be avoided by providing clear information about how the tenders would be evaluated.

The Ombudsman stated:

Presumably, to increase interest in the tender process and encourage offers from alternative operators, the Council will make it clear that non-price components (such the operating history of the tenderer and their references) will be given significant consideration and price alone will not determine the Council's decision.

This would lessen the likelihood of a potential tenderer being discouraged by the current high weekly amount.

The Ombudsman also noted that the Council could release the amount with a contextual statement outlining the factors it would be considering during the tender process and advising that other operators should be encouraged to apply, even if they could not

match the current fee.

The Ombudsman did not consider that section 7(2)(i) of the LGOIMA applied, and commented that even if it did, the need to withhold would be outweighed by the public interest in promoting integrity and transparency of the tender process. The Council agreed to release the amount after considering the Ombudsman's views and the complaint was resolved.

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Case 410754 (2016)—Tender submissions to replace jetty at Philomel Landing

An unsuccessful tenderer asked the New Zealand Defence Force (NZDF) for copies of other tenders submitted to replace the jetty at Philomel landing. The NZDF refused the request under sections 9(2)(b)(i) (trade secrets), 9(2)(b)(ii) (unreasonable commercial prejudice), 9(2)(i) (commercial activities) and 9(2)(j) (negotiations). The requester complained to the Ombudsman.

The requester noted that the contract was awarded to a former employee of the NZDF at a higher price. He considered that disclosure of the requested information was therefore important to ensure the integrity of the tender process.

The NZDF responded that the tender submissions contained commercially sensitive information and intellectual property of the tenderers, and release would unreasonably prejudice their commercial position.

The Chief Ombudsman found that sections 9(2)(b)(ii) and 9(2)(ba)(i) applied.

Section 9(2)(b)(ii)

It was clear that the information contained in each tender related to the commercial position of the other tenderers, including their pricing strategy for remaining profitable in a highly competitive and changeable environment. There was a *'serious or real and substantial risk'* that disclosure of the information at issue would unreasonably prejudice the commercial position of the other tenderers, because it would allow the requester to gain a competitive advantage in future tenders or negotiations with the NZDF.

Section 9(2)(ba)(i)

The Chief Ombudsman noted that the tender submission process was conducted *'in confidence'*. He also noted that the tender submissions contained the intellectual property of the tenderers. This information was necessary to advise the NZDF of the design features of the Philomel Landing proposals in sufficient detail. The Chief Ombudsman was satisfied that the tenderers that provided this information would have done so subject to an obligation of confidence owed to them by the NZDF.

The Chief Ombudsman also accepted that disclosure of the other submitted tenders would be likely to prejudice the future supply of information from those tenderers, or the supply of information by other prospective contractors tendering for work with

NZDF. Tenderers would be hesitant to provide as much detail about their design specifications if they feared that it subsequently would be made publicly available upon request under the OIA. It was in the public interest that the NZDF continued to receive full and detailed submissions by tenderers applying for such contracts, as the absence of detailed information such as design specifications would undermine the ability of the NZDF to make an informed decision on the best tenderer to award a contract.

Public interest in release

The Chief Ombudsman agreed with the requester that there was a public interest in ensuring the integrity of the Government tender process. The NZDF must be seen to be accountable for all of its expenditure of public money. The public also has an interest in knowing whether the NZDF had entered into agreements which might inappropriately favour certain parties. However, there was nothing in the tender documents to suggest that the NZDF acted with impropriety when awarding the tender. The Ombudsman noted that the requester could make a request under [section 23 of the OIA](#) for a statement of reasons for NZDF's decision on his tender submission.

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Case 357489 (2015)—Successful tenderer's scores and submission

The Ministry of Education awarded a contract to provide transport services to Tenderer A, on the basis that they received higher points during the qualification phase of the tender. Tenderer B sought the number of points awarded to Tenderer A, and the information they supplied during the qualification phase. The Ministry refused the request under section 9(2)(b)(ii) of the OIA (unreasonable commercial prejudice), and Tenderer B complained to the Ombudsman.

The Ministry released some of the information, including the score awarded to tenderer A, during the investigation. The Ombudsman formed the opinion that there was good reason to withhold the remaining information.

The Ombudsman described the information at issue as:

...consist[ing] of extensive information relating to [Tenderer A's] staff employment conditions, drivers' qualifications and experience, policies and procedures relating to staff induction, training, assessment and monitoring ... tender requirements, complaint handling and other matters.

The Ombudsman accepted that there was a '*serious or real and substantial risk*' that:

[Tenderer A's] commercial position would be prejudiced by other tenderers (in future tenders or negotiations with the Ministry) seeking to negate [Tenderer A's] competitive advantage by copying or adopting the information at issue.

This prejudice would be unreasonable because of the amount of time and effort Tenderer A put into developing the information at issue.

The Ombudsman identified a public interest in release of sufficient information to enable caregivers (and the broader public) to be able to see that successful tenderers have systems and practices in place to provide a ‘*quality transport service*’. During the investigation, the Ministry agreed to publish a summary of the steps taken to ensure provision of a ‘*quality transport service*’, and to provide that information to future tenderers. The Ombudsman considered that provision of this information on the Ministry’s website and to future tenderers satisfied the identified public interest.

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

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Case 350528 (2015)—Anadarko’s application for petroleum exploration permits and evaluation of that application

The New Zealand Government allocates petroleum exploration permits in an annual tender called a ‘Block Offer’. The tender process is run by New Zealand Petroleum and Minerals (part of the Ministry of Business, Innovation & Employment—MBIE).

After participating in the 2012 Block Offer, Anadarko Petroleum was awarded two petroleum exploration permits. A requester sought all information held about Anadarko’s application. MBIE refused the request under a number of grounds including sections 9(2)(ba)(i) and (ii) (confidentiality) and 9(2)(b)(ii) (unreasonable commercial prejudice) of the OIA, and the requester complained to the Ombudsman.

The information at issue comprised Anadarko’s application and the assessment panel’s evaluation of that application. It included:

- seismic data used to assess the chances of a commercial accumulation of petroleum being present;
- information reflecting Anadarko’s exploration strategy; and
- financial information, including projected costs for particular operations.

MBIE explained that, in the context of a competitive tender process, companies are expected to submit detailed and accurate bids, which include a large amount of confidential and commercially sensitive financial and geotechnical information. MBIE considered that if the information were to be released, current permit holders and potential bidders would not be willing to provide as much confidential or sensitive information as they currently did. Consequently, MBIE’s ability to obtain relevant information and a holistic view of a bidder would be compromised, hindering its ability to allocate mineral rights in accordance with the purpose of the Crown Minerals Act 1991.

The Chief Ombudsman accepted that section 9(2)(b)(ii) of the OIA applied. The information clearly related to Anadarko’s commercial position. The Block Offer bidders were all commercial entities, operating in a highly competitive market. Disclosure of information about the locations of particular prospects or reserves would be highly

valuable to Anadarko's competitors, including other permit holders and prospective applicants. Disclosure of information about projected costs would undermine their negotiations with service companies. Release would unreasonably prejudice the ability of Anadarko to compete in the market.

The Chief Ombudsman also accepted that section 9(2)(ba)(i) and (ii) of the OIA applied. The Invitation for Bids (IFB) stated:

NZP&M will treat information contained in a bid as confidential and will not disclose the information unless it is required to disclose the information under the Official Information Act 1982 or is otherwise required by law to do so or where the information is already in the public domain. NZP&M will notify any bidder before any information is released in accordance with that Act.

The IFB did not expressly state that information relating to the evaluation of applications would be confidential. However, the evaluation information referred to, interpreted, and commented on, information contained in the applications. In the Chief Ombudsman's view, this carried an implied obligation of confidence.

The Chief Ombudsman found that MBIE's concern regarding the willingness of current permit holders and prospective bidders to provide it with confidential and commercially sensitive information was valid. If the information at issue was to enter the public domain, current permit holders and prospective bidders would be more circumspect when supplying information to MBIE, for fear of disclosure to third parties. This would be likely to have an adverse effect on the supply of similar information, or information from the same source.

The Chief Ombudsman was satisfied that MBIE was reliant on the continued supply of such information in order to carry out its statutory functions and implement policy, including the awarding of mineral exploration permits, and that the continued supply of such information must be regarded as being in the public interest.

The Chief Ombudsman also accepted that the release of commercially sensitive information would reduce the appeal of investing in New Zealand, and the ability of MBIE to administer the Crown Minerals Act 1991 in accordance with its purpose. This would 'otherwise damage the public interest', in terms of section 9(2)(ba)(ii) of the OIA.

Having found that sections 9(2)(ba)(i)/(ii) and 9(2)(b)(ii) applied, the Chief Ombudsman considered the countervailing public interest in disclosure. The Ministry argued that the public interest was in disclosure of information about the environmental impact of petroleum exploration, but the Chief Ombudsman did not agree that the public interest was limited in this way. There was also a public interest in 'having sufficient information about the Block Offer process, including the process by which bids are evaluated', to promote transparency and the accountability of public officials. However, the Chief Ombudsman was persuaded that this interest was substantially met by information already in the public domain, including information contained in the IFB, which set out in some detail the information required by the Ministry and how the bids were evaluated.

The Chief Ombudsman concluded there was good reason to withhold Anadarko's application and the evaluation of that application.

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Case 311481 (2014)—Project and hazard management plans in relation to Mount Victoria tunnel refurbishment

The New Zealand Transport Agency (NZTA) initiated a project in 2010 to refurbish the Terrace and Mount Victoria tunnels in Wellington. A group of companies was selected by NZTA to carry out the work, including Leighton Contractors Pty Ltd (LCPL). Together with NZTA, these companies formed the Wellington Tunnels Alliance (WTA).

The Mount Victoria Residents Association sought the project and hazard management plans. NZTA identified two relevant documents—the Mount Victoria Project Management Plan (PMP) and the Project Construction Environmental Control Plan (PCECP). It allowed the Residents Association to inspect the plans, but refused to provide a copy of them under section 9(2)(b)(ii) of the OIA (commercial prejudice). The Residents Association complained to the Ombudsman.

Agencies may release information in a number of different ways, including by inspection, but are generally required to provide information in the way preferred by the requester when asked.²¹ One exception is where meeting the requester's preference would prejudice the interests protected by section 6 or 9 and, in the case of section 9, there is no countervailing public interest. The Ombudsman therefore considered whether there was good reason, under section 9(2)(b)(ii), to refuse to provide the Residents Association with a copy of the PMP and PCECP.

NZTA explained that under some competitive tendering arrangements, points were awarded during the selection process for tenderers' project management plans. These plans were the intellectual property of the WTA participants, and release would undermine their competitive advantage when participating in future tender processes. It stated:

As a practical example of this, it is possible that a competitor may use the documents to learn of practices that they do not employ, or equally practices that they do employ but were not used on the tunnel refurbishment project (or may have been used in different ways at different stages of the projects). In either case, the competitor would then be able to adjust either their methodology statements, the quality of their own approach, or their price in future tendering exercises where they are bidding against one or more of the tunnel alliance non-owner participants.

In other words, NZTA's position was that disclosure of the plans would unreasonably prejudice the commercial position of the WTA participants by enabling competitors to utilise the companies' intellectual property when submitting their own tenders for work

²¹ See s 16 OIA and s 15 LGOIMA.

in the future.

However, the Ombudsman considered the likelihood of the claimed prejudice was overstated. While there was good reason to withhold some of genuinely innovative methods used by the contractors, *'the blanket claim for withholding the document[s] was unsustainable'*.

The Ombudsman could see nothing in the PCECP which would unreasonably prejudice the commercial position of any of the WTA participants. There was some limited information about particular methodologies to be employed, but these seemed straightforward, and information about them had been disclosed at a public stakeholder meeting.

In relation to the PMP, most of it was not tailored to the project at all, but was simply a template generated from within LCPL's project management software, and was standard project management *'good practice'*.

Most of the detailed processes, procedures and policies to be operated by the contractors, which would be more likely to contain commercially sensitive intellectual property, were not contained in the PMP at all, but in the project management software and electronic document repository owned and operated by LCPL.

However, the Ombudsman did accept that section 9(2)(b)(ii) applied to some of the more detailed information contained within the PMP about LCPL's processes, procedures and policies, as it showed how LCPL had innovated in these areas, and would help to distinguish that company from its competitors.

In view of the Ombudsman's opinion that section 9(2)(b)(ii) did not apply to any of the PCECP and only small parts of the PMP, it was not strictly necessary to consider the countervailing public interest in disclosure.

However, the Ombudsman commented that withholding these two documents in their entirety did not meet the public interest reflected in section 4 of the OIA, in promoting accountability and enabling *'effective'* participation in the *'administration of laws and policies'*. He stated:

There is a significant public interest in ... the community group ... being able to hold the NZTA and its WTA contractors accountable for adherence to its own plans and proposals for implementing the project on time and with minimal detrimental impact on the community living around the work sites. To enable that, as well as effective participation in any consultation process on how the impacts of the work would be mitigated, ... the community group needed to have sufficient advance information to know what measures and standards applied in those areas so as to be able to ask appropriate questions during any consultation and make complaints during the work. These interests in turn depend on being able to refer to the [PMP] and the [PCECP].

The Ombudsman concluded that *'the public interest does not lie in the blanket application of section 9(2)(b)(ii) to withhold the entirety of project management*

documents such as these'. The NZTA accepted the Ombudsman's opinion and released most of the PMP and all of the PCECP.

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Case 337131 (2013)—Successful tenderer's submission

A company tendered unsuccessfully to develop and deliver national training for Smokefree enforcement officers. The company asked the Ministry of Health for a copy of the successful tenderer's proposal (without pricing information), the names of the members of the evaluation panel, the criteria used to evaluate the proposals, the timeframe and deliverables of the successful proposal, and documents recording the deliberations on the tender.

The Ministry released much of the requested information, but withheld the successful tenderer's proposal under section 9(2)(b)(ii) (unreasonable commercial prejudice), and some legal advice under section 9(2)(h) (legal professional privilege) of the OIA. The company complained to the Ombudsman.

The Ombudsman concluded the Ministry had good reason to withhold the successful tenderer's proposal under section 9(2)(b)(ii), notwithstanding the accepted omission of pricing information. The proposal *'contain[ed] throughout what can be seen as the successful tenderer's marketing strategy for seeking contracts of the nature at issue'*, and disclosure would be likely unreasonably to prejudice their commercial position.

The Ombudsman acknowledged the public interest in public sector tendering procedures being seen to be beyond reproach. Integrity and transparency in the tendering process is important. Release of adequate information about the successful and unsuccessful bids assists in achieving these objectives.

However, the public interest in disclosure of the proposal itself did not outweigh the interest in withholding. The public interest had been met substantially through release of the relevant internal communications. For instance, the minutes of the evaluation panel showed the history of how the competing proposals were considered, and the reasons why the successful tenderer's proposal was preferred. This included the panel's final scoring for the various criteria.

The Ombudsman also concluded that section 9(2)(h) provided good reason to withhold the legal advice, in order to maintain legal professional privilege, and this was not outweighed by a public interest in release.

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Case 318802 (2012)—Copy of winning tender for Lawrence Oliver Park

An unsuccessful tenderer requested information about the winning tender for Lawrence Oliver Park. The Western Bay of Plenty District Council disclosed the total tender price, but withheld a copy of the winning tender submission under section 7(2)(b)(ii) of the

LGOIMA (unreasonable commercial prejudice). The requester complained to the Chief Ombudsman.

The Chief Ombudsman concluded that section 7(2)(b)(ii) applied. Disclosing the tender submission would enable the winning tenderer's competitors to anticipate their strategy in future bids. They could then take steps to undermine that strategy or bolster their own, which would be likely unreasonably to prejudice the winning tenderer's commercial position.

The Chief Ombudsman did not consider that the public interest in disclosure of the winning tender submission outweighed the need to withhold it. The public interest had been met by disclosure of the winning tender price.

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Case 330400 (2012)—Salvage plan in relation to *MV Rena*

Maritime New Zealand (MNZ) withheld the salvage plan in relation to the *MV Rena* under section 9(2)(b)(ii) of the OIA, because release would be likely unreasonably to prejudice the commercial position of the salvage company, Svitzer. The requester complained to the Ombudsman.

MNZ explained that:

- there were only around half a dozen companies in the world who carried out these sorts of salvage operations;
- Svitzer had a relatively distinct way of operating within the marine salvage sector, and was one of the leading salvage companies;
- the salvage plan outlined Svitzer's methodology for this type of casualty, and the specific allowances made for these circumstances; and
- release of the salvage plan would disclose Svitzer's methodology, which could be used by other salvage companies in future competitive tenders.

The Ombudsman accepted that the commercial position of Svitzer would be likely to be prejudiced by release of the salvage plan, through the disclosure of its industry-leading methodology for salvaging such casualties, together with the specific adaptations for the circumstances of the *MV Rena* grounding. This would be unreasonable as the information was not available in regard to any other salvage company, and would be likely to give Svitzer's competitors an advantage over Svitzer in future tender situations.

The Ombudsman acknowledged a high public interest in the salvage plan, and in knowing that the initial plan was appropriate and fit for purpose. However, having reviewed the salvage plan, he considered that this interest did not outweigh the need to withhold the it.

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Case 314933 (2012)—Information about Hillside Engineering’s failed tender to supply 300 CFT wagons

In 2010, KiwiRail issued a Request for Proposals (RFP) to supply 300 container flat top (CFT) wagons. Hillside Engineering (a trading division within KiwiRail) submitted a tender, which was unsuccessful. The contract was awarded to Chinese-based company CNR.

A requester sought information about Hillside Engineering’s failed tender, including a copy of its proposal. KiwiRail released the relevant Board papers with redactions under a number of sections of the OIA. It withheld Hillside Engineering’s proposal in full.

Redactions to the Board papers

The redacted information included prices and tender scores for CNR and Hillside Engineering. The Ombudsman accepted that a breakdown of the price and tender scores could be withheld under the commercial withholding grounds.²² The breakdown of the prices would reveal CNR’s and Hillside Engineering’s pricing strategy, which would unreasonably prejudice CNR’s commercial position, and disadvantage KiwiRail’s commercial activities. The breakdown of the tender scores, which were awarded in four different categories, including three non-price categories, would assist competitors to anticipate CNR’s/Hillside Engineering’s level of investment in future similar bids.

However, the Ombudsman did not accept that the total prices and tender scores for CNR/Hillside Engineering could be withheld. The total prices would reveal relatively limited information about their pricing strategy. Knowledge of the total prices after the contract had been awarded seemed unlikely to unreasonably prejudice CNR’s commercial position, or disadvantage KiwiRail’s commercial activities. Knowledge of the total tender score would only allow a competitor to make general assumptions about the relative weighting of the component parts.

In addition, there was a public interest in the release of adequate information about the tenders to ensure the integrity of the tender process. The public interest in disclosure was stronger because there had been redundancies at Hillside Engineering occasioned by the loss of work. Even if the commercial withholding grounds applied, the public interest in disclosure of the total prices and tender scores outweighed the need to withhold.

Hillside Engineering’s tender submission

The Ombudsman accepted that section 9(2)(i) (commercial activities) provided good reason to withhold parts of Hillside Engineering’s proposal. The proposal contained detailed information about Hillside Engineering’s design, engineering, and manufacturing capabilities that would be of considerable interest to those who compete with KiwiRail’s

²² Section 9(2)(b)(ii) for CNR and s 9(2)(i) for Hillside Engineering, because, as a trading division of KiwiRail, it was KiwiRail’s own commercial activities at stake.

mechanical division in the global market for the supply of such products and service. It would enable competitors to take initiatives to bolster their own products, or help them develop similar products, which would serve to impede KiwiRail's entry into other markets.

However, KiwiRail *'should not have refused [the] request for the tender document in toto'*. In the Ombudsman's view, it was *'not realistic to expect that all tender information will remain confidential after the contract has been awarded'*. He stated:

...there is no blanket protection for tender information as an exempt category under the OIA. The issue of whether such information can be properly withheld must be considered in terms of the statutory reasons for refusal set out in the OIA, in each case. It is incumbent on any public sector agency calling for tenders to advise parties who submit a tender that any promises of confidentiality are subject to the [agency's] obligations under the OIA. I do not know whether KiwiRail did that in this case, but, even if it did not, that does not remove the tender process from the coverage of the OIA. It is a given that [information provided by] all participants in this tender process [is] subject to the OIA.

The Ombudsman concluded that the executive summary could be released without prejudice or disadvantage to KiwiRail's commercial activities, and that doing so would meet the public interest in accountability for the decision making on the tender.

After considering the Ombudsman's views, KiwiRail agreed to release the relevant information to the requester, and the complaint was resolved.

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Case 306315 (2012)—Tender scores for successful tenderer

An unsuccessful tenderer for the supply of vaccines asked the Institute of Environmental Science and Research (ESR) for the tender scores of the successful tenderer. This information was withheld under section 9(2)(b)(ii) of the OIA, and the requester complained to the Ombudsman.

The Chief Ombudsman noted that the tender scores did not disclose any pricing information; nor did they disclose tendering or marketing strategies. Rather, they illustrated the overall assessment of the tender by ESR, relative to the other tenders. This information was not of a commercially sensitive nature, and its disclosure would not prejudice the commercial position of the successful tenderer to an unreasonable extent.

The successful tenderer objected to disclosure of its tender scores. It said it submitted its tender on the understanding that the historic *'strict confidentiality'* of the tender process would be upheld. It suggested that disclosure of the tender information would compromise any future tender process for pharmaceuticals. However, the Chief Ombudsman stated:

[T]he OIA does not specify tender information as a class of information that is exempt from its provisions. There is also a relatively strong public interest in the transparency and

integrity of the tender process. It is not realistic to expect that all tender information will remain entirely shrouded by a veil of confidentiality after the contract has been awarded. The question of whether specific tender information requires protection under the OIA falls to be considered on the facts of a particular case.

The successful tenderer also argued that the tender scores demonstrated ESR's numeric evaluation of the relative difference between its pricing and marketing strategies and those of its competitors, to a greater extent than what had already been disclosed. In the successful tenderer's view, the scores could be used to deduce its approach to tenders and the marketing and sale of vaccines generally. This would be useful to its competitors' efforts to improve their position in the competitive vaccine market.

However, the Chief Ombudsman was not persuaded that any commercially sensitive information that might be deduced from the tender scores would unreasonably prejudice the successful tenderer's commercial position. The amount of information already released meant that release of the tender scores was unlikely to provide any greater insight into the successful tenderer's commercial interests. The scores represented a weighted evaluation matrix by the panel of the relative merits of the tenders. While it was possible that the total tender price might be deduced from the relevant score, successive Ombudsmen have taken the position that the total tender price cannot be withheld. The majority of the tender scores represented non-price criteria from which it would be difficult for competitors to form an accurate view of the confidential information on which they were based.

The Chief Ombudsman concluded that section 9(2)(b)(ii) did not apply to the tender scores and ESR agreed to release them.

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Case 310785 (2011)—Reference checks

An unsuccessful tenderer asked Bay of Plenty Regional Council for information about how its tender responses were evaluated. The Council released some information but withheld '*evaluative material*' about the requester under Part 4 of the LGOIMA. The requester complained to the Ombudsman.

Part 4 of the LGOIMA deals with requests by corporate entities for personal information about themselves. Section 26(1)(c) provides a reason for refusing such requests if the disclosure of '*evaluative material*' would breach an express or implied promise to the supplier that it would be held in confidence. Section 26(3) defines '*evaluative material*' as evaluative or opinion material compiled solely for the purpose of determining the requester's suitability, eligibility, or qualifications for the awarding or continuation of contracts, awards, or other benefits.

The information at issue was gathered as part of a reference check during the tender evaluation process. It comprised several pages of handwritten notes recording information that Council officers obtained by undertaking reference checks, and a memo

between Council officers regarding referees' comments in respect of a particular contract.

The Chief Ombudsman accepted that this information was compiled by the Council solely for the purpose of determining whether particular contracts should be awarded to the requester. In her view, the nature of the information and the circumstances in which it was obtained by the Council gave rise to an implied promise that the information and the identity of the supplier would be held in confidence.

The Chief Ombudsman concluded that the Council was justified in refusing the request under section 26(1)(c) of the LGOIMA.

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Case 297004 (2011)—Total amounts paid for parking services

A requester asked Wellington City Council for the total amounts paid per annum to Tenix for parking enforcement services, and to ADT for Parkwise and Walkwise services. The information was withheld under sections 7(2)(b)(ii) (unreasonable commercial prejudice) and 7(2)(i) (negotiations) of the LGOIMA, and the requester complained to the Ombudsman.

Section 7(2)(b)(ii)

The Council argued that release of the amounts would disadvantage Tenix and ADT in future tenders, because tenderers would know the overall cost tendered for the service, and adjust their own tender to reflect a better or lower offer.

The Ombudsman rejected this argument, noting:

...in respect of requests for total tender or total contract prices or total payments made to a successful tenderer under a contract (as opposed to an explanation of how the tender, contract price or total payment has been calculated or is made up), it has not generally been accepted that release of such information can be said to lead to 'unreasonable' commercial prejudice.

Releasing the total amount paid would not reveal the pricing methodology used by Tenix or ADT. They would have built a number of variables into their tendered sums for providing the services concerned, including various cost components and their projected profit margins. Competitors would not be privy to a detailed breakdown of the cost components or variables that Tenix and ADT used to calculate their unit rates and overall tender bids. Release of the total amount paid would not be likely unreasonably to prejudice the commercial position of Tenix or ADT.

The Ombudsman acknowledged that, because the total amounts paid had been kept confidential, Tenix and ADT would have a competitive advantage at the next tender round from knowing the details of the previously successful tenders, and if this information was made available to competitors some of that advantage would be lost.

He went on to say:

I also accept that this may prejudice the incumbent contractor's commercial position. But essentially this helps to neutralise an advantage arising from incumbency. Specifically, I do not accept that prejudice is 'unreasonable' where it simply allows competitors to redress an advantage created by confidentiality and to enter a new tender round on a more level playing field.

The Ombudsman concluded that section 7(2)(b)(ii) did not apply.

Section 7(2)(i)

The Council also argued that disclosure of the amounts would prejudice its ability to negotiate parking enforcement contracts. It suggested that prospective providers with knowledge of the amounts paid previously would be in a position to set their tender amounts in such a way that it left the Council with little room to negotiate.

The Ombudsman did not accept this argument, noting that two potential parties with which the Council was likely to negotiate (Tenix and ADT) already had the information. Suppression of the information could only create an advantage for them compared to any other prospective providers.

The Ombudsman concluded that section 7(2)(i) also did not apply. After considering the Ombudsman's opinion, the Council agreed to release the amounts at issue.

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Case 281322 (2009)—Tender submission pricing schedule

An unsuccessful tenderer asked Land Information New Zealand (LINZ) for 'all information to do with Waste Tyre Solutions (WTS) Proposal as submitted for the Tender for the Removal of Tyres from 50 Mersey St, Napier'. He noted he was particularly interested in the methodology, and what WTS proposed to do with the tyres. LINZ released a copy of the 'method statement' from the WTS tender submission.

The requester was dissatisfied and reiterated his request for all information to do with the tender submission. LINZ then disclosed a copy of the submission without the pricing schedule.

The requester further reiterated his interest in the pricing schedule, which LINZ then refused to supply under section 9(2)(b)(ii) of the OIA (unreasonable commercial prejudice). The requester complained to the Ombudsman. He argued that the price submitted was only one total price, and that as there was 'no reference to price per unit', releasing the pricing schedule could not prejudice the successful tenderer's commercial position.

LINZ confirmed that the price submitted by WTS was a fixed price for the removal of 15,000 cubic metres of car tyres, but from this 'it [was] a simple matter to calculate the cost of the removal of car tyres to the [cubic metre]'. Revealing the pricing strategy used

by WTS would provide an unfair advantage to their competitors.

The Ombudsman concluded there was good reason to withhold the pricing schedule. Given the manner in which this particular tender proposal was structured, release of the pricing schedule would allow calculation of the unit price upon which the WTS bid was partly based (that is, the price per cubic metre for disposal of tyres). Access to such information would provide competitors of WTS with a competitive advantage in the marketplace for tyre disposal. This, in turn, would be likely unreasonably to prejudice the commercial position of WTS, particularly in the context of future tender bids.

However, the Ombudsman acknowledged the strong public interest in disclosure of information about successful tender bids. In his opinion, the public interest required release of information about the total contract price agreed to between the parties, rather than the unit price used by WTS in its initial bid.

In response, LINZ noted it had already disclosed the contract value on the GETS website, which it believed was sufficient. It also noted that the requester had declined the opportunity to be debriefed on his submission.

The Ombudsman said the fact that the requester chose not to attend a debriefing on his tender submission did not affect his right to request information under the OIA. The Ombudsman was also aware that the contract price, in a \$250,000 band, was available on the GETS website. However, he could not identify any good reason under the OIA for withholding the precise total price paid by LINZ for the contract. The total tender price did not reveal the tenderer's pricing strategy or costing structure, and therefore section 9(2)(b)(ii) of the OIA did not apply. The Ombudsman noted his opinion in this regard was consistent with the approach taken by successive Ombudsmen that good reason does not exist to withhold total tender prices.

LINZ agreed to release the total tender price and the complaint was resolved.

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Case 178592 (2009)—Names of tenderers and prices

Masterton District Council refused a request for the names of all tenderers and prices submitted for the Riversdale Beach Professional Services Contract under section 7(2)(b)(ii) of the LGOIMA (unreasonable commercial prejudice). The requester complained to the Ombudsman, noting that this decision appeared to be inconsistent with the Council's release of the same information in relation to a different contract.

The Council acknowledged the inconsistency, saying it normally disclosed the names of companies which tender and tender prices. However, in this case, the Council was procuring '*a person's skill set*', rather than products, and although the label '*tender*' was used at times, this process was an assessment of individuals' responses to a request for proposals.

The Ombudsman was not persuaded that tender processes could be distinguished on this

basis. In his view, the same principles applied, notwithstanding the subject of the good or service being procured or the label given to the procurement process. He stated:

Ombudsmen have generally accepted that, where disclosure of tender information would be likely to reveal a tenderer's pricing/market strategy in a competitive market, such information is protected by section 7(2)(b)(ii). However, in respect of requests for total tender prices (as opposed to details of how the total price is made up) and the identities of successful and unsuccessful tenderers, the Ombudsmen would have to be persuaded in a particular case that such information requires protection under the official information legislation. There is no evidence to suggest that previous disclosures of such information have deterred participation in public tenders.

The Council raised a concern that the disclosure of information such as the assessment of weighted attributes, personnel details, charge out rates, and pricing strategies of the unsuccessful proposals would compromise the Council's relationship with the tenderers. However, this level of detail was not sought by the requester, and the fact that it might be sought in the future was not relevant to this investigation and review.

There was a public interest in public sector tendering procedures being seen to be beyond reproach. Integrity and transparency in the tendering process is important and the release of adequate information about the successful and unsuccessful bids assists in achieving these objectives.

The Ombudsman concluded there was no good reason to withhold the information and the Council agreed to disclose it.

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Case 176647 (2008)—Tender submissions, evaluation of tenders and negotiation brief relating to 'Ageing in Place' contract

An unsuccessful tenderer sought documentation about the 'Ageing in Place' contract awarded to Presbyterian Support Services by Hawkes Bay District Health Board (the DHB) in 2006. The DHB refused the request under sections 9(2)(b)(ii) and 9(2)(i) of the OIA, and the requester complained to the Ombudsman.

The Ombudsman was not persuaded that section 9(2)(b)(ii) applied because it had not been demonstrated that the tenderers had a 'commercial position'. The Ombudsman was also not persuaded that section 9(2)(i) applied because the DHB was not engaged in 'commercial activities'.

The Ombudsman told the DHB he could see no good reason to withhold the total tender price. The DHB agreed to release this information. The Ombudsman formed the opinion that there was good reason to withhold:

- the tender submissions, including the component prices from which the total was derived, under section 9(2)(ba)(ii); and

- the DHB's evaluation of tenders and brief for negotiating with the successful tenderer under section 9(2)(g)(i).

Tender submissions

The Ombudsman was persuaded that the tenderers would regard the details of their proposals, including the component prices from which the total was derived, as sensitive information that they would not wish to fall into the hands of anyone who might in future be one of their rival tenderers, whether the requester or anyone else.

He concluded that disclosure of this information would breach an obligation of confidence to the tenderers and that this breach would be likely to have an adverse effect on tenderers' responses to future tenders issued by the DHB. In his view, this would be damaging to the public interest.

Evaluation of tenders and negotiation brief

The Ombudsman noted that the contract negotiation brief documentation involved free and frank opinions expressed on the successful tender. The opinions were sensitive because they related to financial and related information about the contract. Disclosure of this information would breach obligations of confidentiality to the successful tenderer and provide information on the DHB's negotiation processes that could prejudice future such negotiations.

Other information involved the DHB's evaluation of tenders (not from the requester), the disclosure of which would breach obligations of confidence to the tenderers concerned.

The Ombudsman concluded that disclosure of this information would have an inhibiting effect in future on the quality of the documentation associated with the DHB's contract negotiations and tender evaluation, something that would be prejudicial to the future conduct of such tenders.

The Ombudsman was not persuaded that the public interest in disclosure of this information outweighed the need to withhold it.

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Case 176546 (2008)—Tender proposals and evaluation and scoring material relating to the appointment of default KiwiSaver providers

A requester sought information about the selection and evaluation of default KiwiSaver providers. The Ministry of Economic Development (MED) released some information, but withheld other information under sections 9(2)(b)(ii) and 9(2)(ba) of the OIA. The requester complained to the Ombudsman.

Some information was released at the Ombudsman's suggestion. The Ombudsman concluded there was good reason to withhold:

- information supplied to MED by the applicants for default provider status; and
- evaluation material including scoring and internal comments and discussions on the merits of each application.

Information released

The Ombudsman observed that only brief information about MED's process for evaluating the applicants for default provider status had been released. He identified a public interest in release of information that detailed the extent of the default provider selection process and the expertise that was involved in this task. He asked MED whether there was any concern with releasing some of the documentation underpinning the selection process, such as:

- papers detailing the evaluation methodology and process;
- the standard interview questions that were the basis of interviews with the default providers;
- the due diligence plan; and
- worksheets used in the due diligence visits (without any commentary on the specific provider).

MED agreed to release this information to the requester.

Section 9(2)(b)(ii)—Tender proposals

MED's explanation

MED explained that the information it held was obtained through the competitive tender process for selecting the default providers agreed to by the relevant Ministers. The information provided was extensive and included detailed information on the organisations' governance structures, key personnel, organisational capacity, superannuation administration capability, investment capability, and fee and pricing information in the context of providing a default KiwiSaver scheme.

Applicants were expected to provide MED with their proposed designs for a KiwiSaver savings package, including a detailed analysis of their proposed default investment product, as well as details of the range of other investment product options that would be offered. MED's evaluation of this information involved an examination of the investment strategies and the risk management practices for each proposal.

All of the default providers were commercial entities operating in a highly competitive market. Much of the information provided to MED was not in the public domain. If the information was released, this would seriously prejudice the ability of the default providers to compete in the market and thereby unreasonably prejudice their commercial position.

Ombudsman's opinion

The Ombudsman was satisfied that much of the information gathered from the default providers was commercially sensitive, and that its release would be likely to prejudice the commercial position of those default providers.

The commercial information ranged from the specifics of each default provider's proposed range of investment products and the investment strategies applied, through to negotiations about fees and prices. There was also significant detail about the financial and IT resources of each organisation and other details that would be likely to undermine the competitive edge of each provider, were this information to be released into the public domain. In the context of a competitive tender process, in which assurances of confidentiality resulted in the government accessing information that would not normally be made available to it, the likely commercial prejudice consequent upon release would be unreasonable.

The Ombudsman formed the opinion that section 9(2)(b)(ii) applied to the tender proposals supplied by the default providers to MED.

Section 9(2)(ba)—Evaluative and scoring information

MED's explanation

MED noted that the Request for Proposal (RFP) stated that, subject to the OIA, communications and negotiations under the RFP process, and information relating to the evaluation and comparison of proposals, was confidential to the Crown and the applicants.

MED explained that, for the purpose of evaluating the applications for default provider status, it had relied on the default providers to furnish detailed and commercially sensitive information. This information was supplied with the reasonable expectation that it, and any evaluative material generated by the government during the selection process, would remain confidential.

If this information were to be released, it would have a negative effect on the ongoing relationship MED must maintain with the default providers.

MED's role was to monitor the compliance of the default providers with their instruments of appointment. In this role, MED required an open and transparent relationship with the default providers to be confident that it would be alerted at the earliest possible time to any matters that might affect the ability of the default providers to meet the conditions of their appointment.

As part of its monitoring role, MED would at times need to request commercially sensitive information from the default providers. It was concerned that its ability to obtain such information would be compromised if there was an expectation that this type of information would enter into the public domain.

There was also a broader concern expressed by MED that release of any of the evaluative or scoring material could create a misleading perception that there was a difference in quality between default providers. This would have a potential impact on the commercial position of the default providers and would certainly have a negative impact on the relationship between MED and those providers.

Ombudsman's opinion

The Ombudsman was satisfied that the evaluation and scoring material was subject to an explicit obligation of confidence as per the RFP. He considered that, if it were to enter the public domain, it would be likely to have a prejudicial effect on the reputation of some of the default providers that would not be justified. MED's concerns about the effect of public release on its relationship with the default providers were therefore valid. The Ombudsman also said that, in the investment business, where success is inextricably linked with public confidence, release of this information could have a disproportionately damaging effect on the success of the KiwiSaver scheme itself.

The Ombudsman therefore formed the opinion that section 9(2)(ba)(ii) applied to the evaluative and scoring information.

Public interest

The Ombudsman noted that individuals cannot choose a preferred default provider. A person either joins the KiwiSaver scheme that he or she prefers or a default provider is automatically selected. In this context, he could not see how it was in the public interest to know which of the six default providers that were selected performed better or worse than another.

In the Ombudsman's view, the public interest lay in having sufficient information about the rigorousness and independence of the selection process itself and the standards that all default providers are required to meet. To that end, MED had agreed to release the documentation underpinning the selection process.

The Ombudsman concluded that the information already released by MED adequately addressed the public interest considerations at stake. He did not agree that there was a public interest in knowing how each of the six default providers were ranked against each other that outweighed the interests protected by sections 9(2)(b)(ii) and 9(2)(ba)(ii).

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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.²³ 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. This would prejudice or disadvantage the Department in its negotiations with the successful tenderer.

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

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Case W2793 (1992)—Copies of tender submissions for the removal of bodies

An unsuccessful tenderer requested copies of the other tenders submitted to the Police for the contract to remove bodies of deceased persons. There was, in fact, only one other tender.

The Ombudsman concluded that disclosure of the tender submission would be likely unreasonably to prejudice the successful tenderer’s commercial position under section 9(2)(b)(ii) of the OIA. This included the pricing information.

The tender was in a ‘multi-headed’ format which enabled each tenderer to structure the prices for particular headings according to its commercial strengths, practices and strategies for new business. There was no single amount which, standing alone, could appropriately be called the ‘tender price’. The ‘multi-headed’ nature of the pricing part of the tender document would therefore reveal the pricing strategy which would, in turn, disclose to competitors the tenderer’s commercial strategy.

The Ombudsman did not consider that the public interest in disclosure outweighed the need to protect the successful tenderer’s pricing information. This case was unusual: *‘In most cases of bulk tendering the disclosure of prices does not raise the issues of prejudice that were validly raised in this case’*. Because of those issues, the countervailing public interest in disclosure had to be compelling. In circumstances where the integrity of the tender process was not in any doubt, the public interest in disclosure was not sufficient to outweigh the need to withhold.

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

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Case W2700 (1992)—Price of successful tender to supply disposable syringes and needles

A requester sought the price of a successful tender to supply disposable syringes and needles. The Area Health Board refused the request, and the requester complained to the Ombudsman.

²³ The application of s 9(2)(i) in this case is discussed in our [Commercial information](#) guide.

The main concern with the release of the information requested was that it would enable competitors in the market for the products to undercut the tender price.

The Chief Ombudsman sought further arguments from the Board and the successful tenderer, and outlined the public interest considerations favouring disclosure of tender prices which had been identified in previous cases, namely:

- the public interest in public sector purchasing procedures being seen to be beyond reproach; and
- the public interest in the New Zealand public having access to how departments and organisations spend public funds.

After further consideration, the Board accepted the Chief Ombudsman's view of the public interest, and said it would release the information on receipt of a recommendation to that effect. The Chief Ombudsman made a recommendation which was acted on by the Board.

The Board also advised that in inviting tenders in future it would advise prospective tenderers that the names and finally negotiated prices from all tenderers would be released to those tendering and to requesters under the OIA. The Chief Ombudsman commented such a policy of disclosure could only enhance and promote the purposes of the Act in the eyes of the public.

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

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Case A41 (1992)—Price of successful tender to supply medical product

An unsuccessful tenderer for the supply of a medical product asked the Area Health Board (the Board) for the successful tenderer's price.

The Board noted that the successful tenderer had taken up the Board's offer to keep information about the price confidential. It refused the request under section 9(2)(b)(ii) of the OIA, and the requester complained to the Ombudsman.

The Ombudsman accepted that release would undermine the competitive advantage held by the incumbent supplier in the next tender round. However, she did not accept that this prejudice would be unreasonable. The advantage was only created as a result of the Board offering confidentiality, and it was not so significant that it would have been unreasonable to lose it.

The Ombudsman also concluded that, even if section 9(2)(b)(ii) applied, the need to withhold was outweighed by the public interest in '*purchasing procedures of public organisations being seen to be beyond reproach*' and '*the public having access to how public funds are spent*'.

The Board accepted the Ombudsman's opinion and advised that it had altered its

conditions of tender so that a successful tenderer could no longer nominate confidentiality.

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

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