

# Requests for information about smokefree legislation

<b>Legislation</b>	Official Information Act 1982, ss 9(2)(f)(iv), 30(1)(b)
<b>Agency</b>	Associate Minister of Health
<b>Ombudsman</b>	Peter Boshier
<b>Case number(s)</b>	008038 and 009584
<b>Date</b>	June 2024

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*Requests for official information about the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022—Associate Minister refused requests under section 9(2)(f)(iv)—Chief Ombudsman identified issues in the Associate Minister’s decision-making process—Chief Ombudsman’s opinion the Associate Minister’s decisions were unreasonable and contrary to law under section 30(1)(b)*

## Background

The Chief Ombudsman received complaints from two requesters concerning decisions by the Associate Minister of Health (Associate Minister) on their requests for information about the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022 and its proposed repeal. The requests also covered information on tobacco and vaping policies.

Both requests were quite detailed in nature and sought a range of information including reports, briefings, aides-memoire, and other communications (for example, WhatsApp and Signal messages).

The first request was made to the Associate Minister on 28 December 2023. The second request was initially made to the Department of the Prime Minister and Cabinet, which transferred it to the Associate Minister on 23 January 2024.

On 12 and 21 February 2024, respectively, the Associate Minister made and communicated decisions refusing the requests in full, pursuant to section 9(2)(f)(iv) of the Official Information Act 1982 (OIA). The Associate Minister’s decisions advised both requesters:

*The information you have requested is withheld in full under section 9(2)(f)(iv) of the Act, to maintain the constitutional conventions that protect the confidentiality of advice tendered by Ministers and officials. The advice provided to the Government currently remains under active consideration and releasing this information would prejudice the orderly and effective conduct of government decision-making processes. I have considered the countervailing public interest in releasing information and consider that it does not outweigh the need to withhold at this time.*

The requesters individually complained to the Ombudsman about the Associate Minister's decisions to refuse their requests. Both requesters considered there was public interest in the information. The first requester highlighted the number of tobacco-related deaths in New Zealand and stated:

*New Zealanders must know how the government intends to tackle this and they must know whether the interests of the tobacco industry have found their way into influencing these decisions.*

## Investigation

The Ombudsman commenced an investigation of both complaints in tandem.

During the investigation, some of the information at issue<sup>1</sup> was published on the website of the Ministry of Health, with some redactions under various withholding grounds.

After discussion with the Ombudsman, the Associate Minister provided a response which she advised included the remaining information at issue.

### Section 9(2)(f)(iv) of the OIA

Unless there is a stronger public interest in release, section 9(2)(f)(iv) provides good reason to withhold information if, and only if, it is necessary to:

*maintain the constitutional conventions for the time being which protect [...] the confidentiality of advice tendered by Ministers of the Crown and officials.*

The information at issue was relevant to decision making by Cabinet and Ministers, where the constitutional conventions protecting confidentiality might be in play. However at this point, the Ombudsman considered it necessary to first consider the Associate Minister's decision making process.

### Associate Minister's decision making process

Before concluding that there is good reason to refuse requests for official information, agencies and Ministers must review all information within the scope of a request. Agencies and

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<sup>1</sup> Cabinet papers, minutes and briefings.

Ministers' responsibilities in this regard were described in the case of *Kelsey v Minister of Trade* [2015] NZHC 2497 at [108], which found that it was a:

*...fundamental point that the [OIA] required the Minister to assess each piece of information requested...that was held by the Minister...against the criteria in the [OIA] for withholding official information before that request could be refused.*

The *Kelsey* decision makes it clear that agencies and Ministers must assess each piece of information that is captured in the scope of a request before concluding that there is good reason to withhold it.

During the course of the investigation, the Ombudsman identified a range of concerns with the Associate Minister's handling of the requests and her response to his investigation. This included that:

- her scoping of the requests was inadequate and incomplete, as it seemed there would have been a large volume of information within the scope of the requests that she had not accounted for;
- email chains the Associate Minister provided to the Ombudsman as within the scope of the requests referenced numerous attachments that also appeared to be within the scope of the requests, but the Associate Minister had omitted to provide those attachments;
- the information the Associate Minister provided to the Ombudsman contained redactions pursuant to sections 9(2)(a), 9(2)(g)(i) and 9(2)(f)(iv) of the OIA—it was unclear where, when or why the redactions originated, considering that the Associate Minister refused the requests in full pursuant to section 9(2)(f)(iv), with no mention of other withholding grounds;
- the Associate Minister omitted to provide the Ombudsman with the unredacted information, which is required for the purposes of his investigation;
- the Associate Minister omitted to provide any explanation of why she considered section 9(2)(f)(iv) (or any other withholding ground) provided good reason to withhold the information; and
- the Associate Minister provided no explanation of her decision making on the requests, including what public interest factors she considered when concluding that the need to withhold the information was not outweighed by the public interest in its release.

## Outcome

The Ombudsman formed the opinion there were issues with the Associate Minister's decision-making process, which meant the Associate Minister's decisions were *'unreasonable and contrary to law'*.<sup>2</sup>

In particular, the Chief Ombudsman highlighted that the Associate Minister refused the request without first fulfilling her legal obligation to:

- confirm and scope the information requested;
- locate and assemble the information she held within the scope of the requests;
- consider the strength of the need to withhold each piece of information under section 9(2)(f)(iv) or other withholding grounds; and
- identify and assess the strength of any public interest factors that favoured the release of each piece of information.

The Chief Ombudsman recommended that the Associate Minister:

- without delay, undertake a thorough, fresh search for all information within the scope of both complaints, and make and communicate fresh decisions to the requesters; and
- make written apologies to the requesters for the deficiencies identified.

The Associate Minister accepted and gave effect to the recommendations.

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

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<sup>2</sup> Section 30(1)(b) of the OIA refers.