The Official Information Act in the Corporatised World
Commercial Information and the Official Information Act

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Introduction

The nature of commercial activity and how it is conducted in New Zealand, particularly in respect of the commercial activities of the state, has changed markedly since July 1983 when the Official Information Act 1982 first came into force. However, information still remains the “oil” on which the commercial “machine” depends substantially to operate effectively. Rapid advances in technology have resulted in a ready ability to access, collate and analyse information in a manner and to an extent few may have imagined a decade ago. In this context, where the “corporatised world” intersects and interfaces with the activities of departments, Ministers of the Crown, organisations and local authorities subject to the Official Information Act or the Local Government Official Information and Meetings Act 1987, the potential application of official information legislation to commercial information which comes to be held by public sector agencies is a “fact of commercial life” which cannot be ignored.

Despite the privatisation and corporatisation policies pursued by successive governments over the last decade in relation to the commercial activities of the state, much commercial information continues to be gathered by government. In general, this “commercial information” can be seen to come within one of the following two broad categories:

1) information held by publicly owned commercial enterprises subject to the Act (such as state enterprises and Crown Research Institutes) about themselves; and

2) information held by public agencies about private or public sector enterprises whether:

   (a) generated by the public sector agencies themselves; or
   (b) supplied to them, either compulsorily or voluntarily, by the public or private sector agencies concerned.

While, from time to time, it has been argued that “commercial information” should not be subject to the Official Information Act, Parliament has decided otherwise. The purpose of this paper is to briefly summarise, with reference to the current approach of the Ombudsmen in the exercise of their investigative and review role under the Official Information Act, how the Act operates in practice to balance the right of the public to request

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1 Hereafter, where relevant, all reference to the Official Information Act should be read as including reference to the Local Government Official Information and Meetings Act.
access to commercial information, and the need for confidentiality in terms of generally accepted conditions of commercial negotiation and trade.

**Background to the current statutory regime**

Before discussing how the Official Information Act currently operates in respect of commercial information, it may be helpful to consider briefly the background to the enactment and continued application of the provisions which provide protection in certain circumstances for commercial information under the Act.

**The Danks Committee**

In its general report “Towards Open Government”, which led to the enactment of the Official Information Act, the Committee on Official Information (the Danks Committee) carefully considered the issue of “commercial confidences”. Notwithstanding its fundamental recommendation that a presumption of access rather than secrecy should in future underpin the activities of the state, the Danks Committee accepted that there was a need for protection, in appropriate circumstances, for information considered to be commercially sensitive. However, it concluded that “no general rule about protection will fit” and noted that each case would need to be judged on its merits. The Danks Committee recognised that in the context of the commercial activities of the state there is a distinction between:

- (a) commercial activities which have “the profit-seeking, competitive colour of private enterprise”; and
- (b) commercial activities where “commercial, social and economic objectives become conjoined”.

In respect of the former, the Danks Committee noted as follows at page 19 of its general report:

> When government itself engages in business a first view might hold that the conventions of confidentiality which are accepted for private commerce should equally apply to publicly operated activities. Where the activity can be readily related to commercial practice, as in buying and selling, it seems reasonable that government should “do and suffer”, on behalf of its taxpayer-shareholders, no less confidentially than does the private sector.

However, the Danks Committee went on to note that “the matter cannot end there”. As ultimately reflected in the legislation enacted in 1982, while the Official Information Act recognises that in certain circumstances there would be a public interest in withholding commercial information, it does not provide a blanket protection for commercial information as an exempt category or class. Whether such information could properly be withheld needs to be assessed against the statutory reasons for refusal under the Act. If a request is refused, then the requester could ask an Ombudsman to investigate and review that decision.

**Official Information Amendment Act 1987**

In 1987, following recommendations by the Information Authority based on careful consultation with users of the Act in respect of their experience during its early operation, 70
enactments which had until then provided special protection to commercial information were repealed or amended. Similarly, the provisions of the Act that provided protection for commercial information itself were amended to resolve perceived anomalies and to give a clearer indication of the circumstances in which the legislature expected that such information could be properly withheld. The most significant reform was that, with the repeal of s 8 and the consolidation of all reasons for refusal on grounds of predicted prejudice to commercial activities or commercial position or commercial confidences in s 9 of the Act, any assessment that such prejudice would occur was now subject to the requirement, under s 9(1), to consider whether “in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available”.

Report of the State-Owned Enterprises (Ombudsmen and Official Information Acts) Committee

In respect of SOEs, s 31 of the State-Owned Enterprises Act 1986 required a select committee of the House of Representatives to review the application of the Official Information Act (and the Ombudsmen Act 1975) to state enterprises after two years of their operation, and to report to the House on the matter by 1 April 1990. In its report, tabled in 1990, the select committee recommended that the Official Information Act (and the Ombudsmen Act) should continue to apply and that those Acts be amended to also cover subsidiaries of state enterprises. In effect, the select committee endorsed the earlier view of the Danks Committee and the Information Authority that commercial information did not require any special protection beyond that provided for in the Act itself.

The Ombudsmen’s current approach

The Ombudsmen’s review function

On a general level, the current approach of the Ombudsmen in an investigation and review of a decision to withhold commercial information can be summarised in the following manner.

Departments, Ministers of the Crown, organisations and local authorities can only refuse requests for information under the Act where their concerns about the detrimental effect of its disclosure satisfy the requirements of one of the reasons for refusal set out in the Act. In respect of requests for commercial information, it is not enough under the Act for holders of such information, or third parties to whom the information relates, to simply assert that they consider the information to be commercially sensitive. Good reason for refusal in terms of the Act must be established. In this regard, an Ombudsman’s statutory function on review is not to consider de novo whether there is now good reason to withhold the information at issue, but to investigate and review the decision to refuse the request and form his or her independent opinion as to “whether the request should have been refused” (s 30(1)(a) refers); in other words, whether at the time the decision was made, there was good reason for refusal under the Act.
Given the principle of availability in s 5 of the Act—namely that information should be made available unless there is good reason for withholding it—an Ombudsman’s investigation and review essentially seek to establish:

1) what precisely was the prejudice or “harm” which the holder of the information believed would be likely to result if the information was disclosed; and

2) whether that “harm” was protected by one of the withholding provisions which provide “good reason” for refusal under the Act.

The Ombudsmen’s current approach to interpretation of reasons for refusal relevant to requests for commercial information

The current approach of the Ombudsmen to interpretation of the specific withholding provisions which provide protection for commercial information is set out in the Ombudsmen’s Practice Guidelines No. 3 published in September 1993. A copy of these Practice Guidelines is attached and there is no need to comment further on their detailed content in this paper.

However, it may be more helpful to summarise, by reference to an issue which has arisen in recent months, the general advice provided by the Ombudsmen to two separate public sector agencies in respect of specific concerns they had about the ability of the Act to provide adequate protection in a commercial environment in which they are increasingly becoming more involved.

The general circumstances in which the concerns were raised related to:

1) public sector agencies holding information provided by, or generated for, third party commercial clients during the process of agencies tendering for commercial contracts; and

2) public sector agencies holding research information generated under contract for third party commercial clients.

In each of the above scenarios, it appeared that potential clients were concerned that commercial competitors may be able to use the Official Information Act to obtain access to the information, to the commercial disadvantage of the client. The public sector agencies concerned sought advice from the Office of the Ombudsmen as to how they might provide adequate assurances to their commercial clients that such information, which they believe to be commercially sensitive, will remain confidential.

The Ombudsmen noted that, given their statutory review function, it was not appropriate for them to form an opinion in advance on whether specific information can properly be withheld under the Official Information Act. Each case must be considered on its merits. However, they commented that they did understand and appreciate the concerns expressed. On a general level, based on their experience in investigations and reviews which have raised similar issues under the Act, they offered the following comments.

First, the Ombudsmen noted that although the Official Information Act does not allow for a blanket assurance to be given that all commercial information can be withheld as a
particular class or category of information in all cases, it seemed that the provisions of the Act would provide adequate protection in the circumstances described. Similar concerns have been expressed in the past by other public sector agencies about the incorrect perceptions of third parties in the private sector as to how the Official Information Act would be likely to apply to information which they consider to be “commercially sensitive”, and which has either been provided by them in confidence to a public sector agency, or generated for them pursuant to a commercial contract for advisory services.

The public sector agencies concerned generally appreciate that the Official Information Act does provide adequate protection. However, they have found it difficult to express that view in language which allays the fears, albeit misplaced, of third parties that such information could easily be accessed by their commercial rivals. In this regard, the Ombudsmen were advised that there is a concern that some private sector commercial competitors of public sector agencies have been using the “spectre” of possible release of “commercially sensitive” information under the Official Information Act as part of their “sales pitch” to win contracts which public sector agencies might otherwise expect to obtain. The agencies were concerned to dispel any perception that the Official Information Act prevents them from holding in confidence information which the potential client supplies in confidence, or which it believes will, if disclosed, unreasonably prejudice its commercial position.

The Ombudsmen referred to the practice of some public sector agencies of including confidentiality clauses in contracts with third party commercial clients and then arguing that the existence of such clauses provided a conclusive basis for withholding, under the Official Information Act, information covered by the clauses. The Ombudsmen commented that, as noted by the High Court, the provisions of the Official Information Act effectively exclude contracts of confidentiality from automatically preventing release of information. In the context of the similar provisions of the Local Government Official Information and Meetings Act 1987, the Ombudsmen referred to the following comments of Mr Justice Jeffries in *Wyatt Company (NZ) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR p 180, at p 191:

> There cannot be allowed to develop in this country a kind of commercial Alsatia beyond the reach of a statute. Confidentiality is not an absolute concept admitting of no exceptions . . . It is an implied term of any contract between individuals that the promises of their contract will be subject to statutory obligations. At all times the applicant would or should have been aware of the provisions of the Act and in particular s 7, which effectively excludes contracts on confidentiality preventing release of information.

In this context, the Ombudsmen commented that the existence of a confidentiality clause does not, on its own, provide good reason for refusal under the Official Information Act. However, they observed that the existence of such a clause is an important element in establishing whether good reason for refusal pursuant to s 9(2)(b)(ii) or s 9(2)(ba) or s 9(2)(i) is made out in the circumstances of a particular case. The existence of a confidentiality clause provides strong evidence of an understanding between the parties concerned that the information covered by it is “subject to an obligation of confidence” for the purposes of s 9(2)(ba). It also provides supporting evidence that the party to which
the information relates considers it “commercially sensitive” and, to that extent, disclosure may be likely to:

1) prejudice unreasonably the commercial position of that party (s 9(2)(b)(ii) refers); and
2) cause the party not to enter into future contracts with the public sector agency concerned to the detriment of that agency’s commercial activities (s 9(2)(i) refers).

In the context of concerns that disclosure would be likely to cause prejudice or disadvantage to the ability of the public sector agencies to obtain commercial revenue, the Ombudsmen commented that s 9(2)(i) is more likely to be relevant.

In short, it seems likely that where any public sector agency has entered into a commercial contractual arrangement to provide goods or services for a client, disclosure of information relating to the client, which has either been supplied by or generated for that client, to another party without the specific consent of the client, would prejudice the agency’s ability to obtain further contracts. In other words, s 9(2)(i) is always likely to apply in such circumstances. However, the Ombudsman noted that before good reason for refusal will exist under the Act, the public sector agency (and an Ombudsman on review) must still consider, pursuant to s 9(1), whether, in the circumstances of a particular case, there are any countervailing public interest considerations which outweigh the need to withhold under s 9(2)(i). Therefore, as a matter of law, one cannot give a blanket assurance that the countervailing public interest will never be strong enough to outweigh the need to avoid prejudice or disadvantage to a public sector agency’s commercial activities.

However, the fact that the ability to withhold information to avoid prejudice or disadvantage to the commercial activities of the Crown is subject to the countervailing public interest test in s 9(1) does not mean that there will always be a countervailing public interest in release in every case. For those public sector agencies engaged in purely commercial activities, the countervailing public interest in disclosure of information relating solely to such commercial activities is likely to be relatively weak. However, s 9 also applies to public sector agencies whose activities include regulatory or social policy functions. For these agencies, the countervailing public interest in disclosure of information it holds may, in particular cases, be high. In these circumstances, the Ombudsman commented that the public sector agencies concerned should feel reasonably confident that in all but the most unusual of circumstances, s 9(2)(i) would be likely to provide good reason to withhold information supplied in confidence by potential clients, or generated by the agencies under contract for commercial clients in a purely commercial environment.
Appendix

Practice Guidelines No.3

Current Approach of Ombudsman to Sections 9(2)(b), (ba), (i) (j) & (k) of the Official Information Act and Sections 7(2)(b), (c), (h) (i) & (j) of the Local Government Official Information & Meetings Act including Information Relating to Tenders

1. Introduction

1.1 These guidelines are designed to help Ministers of the Crown, Departments, organisations and local authorities in considering requests for commercial information. They do not detract from the need for each case to be considered on its own merits, as measured against the relevant statutory criteria, but reflect the approach which the Ombudsmen have developed to the relevant provisions of the legislation based on their experience. The provisions of the Local Government Official Formation & Meetings Act are referred to in square brackets.

1.2 Section 4 [Section 4]—Purposes

Section 4(a) [s. 4(a)] of the Act sets out the purposes which Parliament intended to be achieved in enacting the legislation, namely:

“To increase progressively the availability of official information to the people of New Zealand in order—

(i) to enable their more effective participation in the making and administration of laws and policies; and

(ii) to promote the accountability of Ministers of the Crown and officials,

and thereby enhance respect for the law and to promote the good government of New Zealand.”

[(a) To provide for the availability to the public of official information held by local authorities, and to promote the open and public transaction of business at meetings of local authorities, in order:

(i) to enable more effective participation by the public in the actions and decisions of local authorities; and

(ii) to promote the accountability of local authority members and officials,

and thereby to enhance respect for the law and to promote good local government in New Zealand.”]
Section 4(c) [s. 4(c)] provides, however, that a balance must be struck between the interests identified above and the need:

"To protect official information to the extent consistent with the public interest and the preservation of personal privacy."

["To protect official information and the deliberations of local authorities to the extent consistent with the public interest and the preservation of personal privacy."]

1.3 Section 5 [section 5]—Principle of availability

Section 5 of both Acts reflects the underlying principle of availability of official information:

"Principle of availability—The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it."

1.4 Section 9 [section 7]

Section 9(2) [s.7(2)] of the Act identifies a series of interests which Parliament recognised might need to be protected by the withholding of official information in certain circumstances. However, it also acknowledges that there is a need to balance those interests against any countervailing public interest considerations. Section 9(1) [s.7(1)] acknowledges that there will be cases where the interest in withholding specific information might be outweighed by other considerations which render it desirable, in the public interest, to make the information available.

2. The role of the decision-maker and an Ombudsman on review

2.1 The role of the decision-maker, and an Ombudsman on review, is to examine the information at issue and form an opinion as to whether or not the interests which the Act seeks to protect would be prejudiced by disclosure of that information. In the course of an Ombudsman’s investigation and review of a decision to withhold information, it is for the decision-maker to bring forward sufficient material and advance sufficient argument to support the proposition that good reason exists for withholding the information, in other words, to justify his, her or its decision with sufficient particularity to enable the Ombudsman to form an independent opinion on the complaint.

2.2 In Commissioner of Police v Ombudsman [1988] 1 NZLR 385, Cooke P said at p.391:

"If the decision-maker, be he Minister or departmental head or Ombudsman or Judge adjudicating on a claim of denial of right, is in two minds in the end, he should come down on the side of availability of information. I say this ... because the Act itself provides guidance in the last limb of s.5."
2.3 In the same case, Casey J said at p 411:

"... in conducting a review of the decision, the Ombudsmen are not engaged in an adversarial exercise. The provisions of the Ombudsmen Act apply (section 29 Official Information Act), and under sections 18 and 19 they are given wide powers of inquiry and are not confined to the material put before them by those immediately involved. In the nature of things he who alleges that good reason exists for withholding information would be expected to bring forward material to support that proposition. But the review is to be conducted and the decision and recommendations made without any presumptions other than those specified in the Act."

2.4 Furthermore, even where the decision-maker or an Ombudsman on review forms the view that s.9(2)(a)–(k) [s.7(2)(a)–(j)] applies to the information at issue, s.9(1) [s.7(1)] requires that consideration must still be given to the question of whether, in the circumstances of the particular case, the withholding of the information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.

3. Commercial information

3.1 Both in 1982, when the Official Information legislation was first considered by Parliament, and again in 1987, when amendments to the provisions relating to commercial information were addressed in Parliament, the clear intention was not to protect all commercial information held by the central and local government as a special exempt class of information. While Parliament recognised that there is a legitimate interest in citizens, including central and local government departments and organisations, being able to conduct commercial activities without prejudice or disadvantage, it also recognised that not all information relating to commercial activities needed to be protected to avoid prejudice or disadvantage. It also recognised that, on occasion, there would be situations where notwithstanding that disclosure of particular information would result in prejudice or disadvantage to one of the commercial interests identified in the legislation, there could be factors which, in the public interest, outweighed the need to withhold that information (s.9(1)).

3.2 The increasing market orientation of the public sector has focused attention on the need to protect what the holders label "commercially sensitive information". However, that term is misleading because it is used in neither the Official Information Act nor the Local Government Official Information and Meetings Act. Neither Act provides protection for such information per se. Instead, the legislation identifies certain commercial interests which might need to be protected in the circumstances of a particular case. Those interests are:

(i) trade secrets—s.9(2)(b)(i) [s.7(2)(b)(i)];

(ii) the commercial position of the supplier or subject of particular information—s.9(2)(b)(ii) [s.7(2)(b)(ii)];
(iii) information subject to an obligation of confidence or supplied under statutory compulsion—s.9(2)(ba) [s.7(2)(c)];

(iv) the commercial activities of central and local government—s.9(2)(i) [s.7(2)(h)]

(v) negotiations (including commercial and industrial negotiations) of the State—s.9(2)(j) [s.7(2)(i)];

(vi) avoidance of improper gain or improper advantage—s.9(2)(k) [s.7(2)(j)].

3.3 When considering a request for information, disclosure of which might prejudice one of the above interests, it is the decision-maker’s role, and the Ombudsman’s role on review, to:

(a) establish whether one of those interests would be prejudiced by disclosure of the information at issue, and, if so;

(b) to determine to what extent it is necessary to withhold the information at issue to avoid that prejudice.

For example, it may not be necessary to withhold all the information; or it may be possible to provide a summary of the information without disclosing those elements which prejudice the particular interest of concern.

4. Court Cases

4.1 There are two Court cases which provide decision-makers with some judicial guidance as to the protection which the Official Information Act and the Local Government Official Information and Meetings Act afford to some commercial interests. They are Wyatt Co v Queenstown-Lakes District Council [1991] 2 NZLR 180 and Television New Zealand Ltd v Ombudsman [1992] 1 NZLR 106.

4.2 In the Wyatt case, Jeffries J noted at page 190, line 42:

“It cannot be denied that some of the information recommended to be released by the Chief Ombudsman will reveal matters which Wyatt wants to keep entirely secret. The Official Information Act was passed in 1982 following an exhaustive investigation into the subject in New Zealand, which also reflected the same movements elsewhere in the world. Cooke P in Commissioner of Police v Ombudsman at p.391 was prepared to regard that Act as correctly described as a constitutional one. In 1987 the [Local Government Official Information and Meetings] Act under consideration was passed extending the right of the public to know and must similarly be regarded as of constitutional significance. Governments of different political philosophies have endorsed the principle of freedom of information so as to express support for the concept that knowledge and information about the conduct of public affairs, and the application of public money, in a democratically governed country are essential to its right to be so described. The Courts must zealously support those quite sweeping legislative intentions. It is fundamental to the Act that the public are to be given worthwhile
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information about how the public’s money and affairs are being used and conducted, subject only to the statutory restraints and exceptions. The allegations of errors, unreasonableness and failure to take into account relevant matters are attacks on the several judgments the Chief Ombudsman had to make in the functions ordained for him by the Act. That Act requires him to exercise his judgment using experience and accumulated knowledge which are his by virtue of the office he holds. Parliament delegated to the Chief Ombudsman tasks, which at times are complex and even agonising, with no expectation that the Courts would sit on his shoulder about those judgments which are essentially balancing exercises involving competing interests. The Courts will only intervene when the Chief Ombudsman is plainly and demonstrably wrong, and not because he preferred one side against another ... The Chief Ombudsman in his report carefully analyses the legal obligations of [s.7(2)(c)] and compares it to the facts. He finds it applies but in effect the matters not to be disclosed under the subsection are the same as for s.7(2)(b)(ii). The Court now faces the contractual issue. It was accepted that the contract between Wyatt and the council contained a term of confidentiality by the Council ... There cannot be allowed to develop in this country a kind of commercial Alsatia beyond the reach of a statute. Confidentiality is not an absolute concept admitting of no exceptions ... It is an implied term of any contract between individuals that the promises of their contract will be subject to statutory obligations. At all times the applicant would or should have been aware of the provisions of the Act and in particular s.7, which effectively excludes contracts on confidentiality preventing release of information.”

4.3 In the TVNZ case, Heron J noted at page 121, line 12:

“The Court does not sit in judgment on the Ombudsman’s decision but can for two reasons express its view. The first is that Judges are regularly called on to examine the probabilities of consequences of disclosure in the commercial environment. The second is that the criticism here is made about the reasonableness of the decision. Referring to it as the nub of the case Mr Mathieson contended that by referring to the case by case approach the Ombudsman shut herself out from considering the likelihood of disclosure in principle carrying the level of prejudice or disadvantage necessary to involve s. 9(2)(i). It is true that the final letter of the Ombudsman to TVNZ does not in its terms address that issue but it was a letter in response to arguments copied by TVNZ from their earlier letter to which the Ombudsman had replied and there addressed the point. She said, in summary, that based on information she received, a complete prohibition on disclosure was not necessary and she considered that in (sic) case the actual information should be examined.

My view is that looked at overall the Ombudsman on this critical issue has addressed and answered the argument raised. Any doubt as to this is removed when one looks at her advice to the Tobacco Institute at the conclusion of her inquiry ...

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(iii) information subject to an obligation of confidence or supplied under statutory compulsion—s.9(2)(ba) [s.7(2)(c)];
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information about how the public's money and affairs are being used and conducted, subject only to the statutory restraints and exceptions. The allegations of errors, unreasonableness and failure to take into account relevant matters are attacks on the several judgments the Chief Ombudsman had to make in the functions ordained for him by the Act. That Act requires him to exercise his judgment using experience and accumulated knowledge which are his by virtue of the office he holds. Parliament delegated to the Chief Ombudsman tasks, which at times are complex and even agonising, with no expectation that the Courts would sit on his shoulder about those judgments which are essentially balancing exercises involving competing interests. The Courts will only intervene when the Chief Ombudsman is plainly and demonstrably wrong, and not because he preferred one side against another ... The Chief Ombudsman in his report carefully analyses the legal obligations of [s.7(2)(c)] and compares it to the facts. He finds it applies but in effect the matters not to be disclosed under the subsection are the same as for s.7(2)(b)(ii). The Court now faces the contractual issue. It was accepted that the contract between Wyatt and the council contained a term of confidentiality by the Council ... There cannot be allowed to develop in this country a kind of commercial Alsatia beyond the reach of a statute. Confidentiality is not an absolute concept admitting of no exceptions ... It is an implied term of any contract between individuals that the promises of their contract will be subject to statutory obligations. At all times the applicant would or should have been aware of the provisions of the Act and in particular s.7, which effectively excludes contracts on confidentiality preventing release of information.”

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at a potential disadvantage in its commercial activities, for the ‘neces-
sity’ test under s.9(2)(i) to be met in a particular case there had to be a
particular reason for nondisclosure of the unpublished material, which
related either to the content of the information or to the form in which
it was held.

This was a stated rejection of the no disclosure on principle argument. No unre-
asonableness is demonstrated by the decision the Ombudsman took on this point.”

THE WITHHOLDING PROVISIONS

5. Section 9(2)(b) [s.7(2)(b)]

5.1 This provision states:

“(2) ... this section applies if, and only if, the withholding of the information is
necessary to—

... 

(b) Protect information where the making available of the information—

(i) Would disclose a trade secret; or

(ii) Would be likely unreasonably to prejudice the commercial posi-
tion of the person who supplied or who is the subject of the infor-
mation.”

5.2 A general approach to the circumstances in which s.9(2)(b)(i) [s.7(2)(b)(i)] might
apply has not been developed. It has been raised in very few cases, and where it has
been raised, there have been difficulties in defining the term “a trade secret”. As s.
9(2)(b)(ii) [s.7(2)(b)(ii)] was found to protect the information at issue in those cases,
it was not necessary to form a final view on the definition of “a trade secret”.

5.3 Section 9(2)(b)(ii) [s.7(2)(b)(ii)] is one of the provisions relied on most often to
protect commercial interests. This section is aimed primarily at information held
by central and local government which is about the commercial interests of third
parties. (Section 9(2)(i) [s.7(2)(h)] deals with the commercial activities of the
holder of the information.) Before accepting that s.9(2)(b)(ii) [s.7(2)(b)(ii)] pro-
tects information in a particular case, the Ombudsman must be satisfied that:

(a) the information relates to the commercial position of the person who sup-
plied or who is the subject of the information; and

(b) disclosure would be likely unreasonably to prejudice that commercial position.

5.4 The Court of Appeal has interpreted the phrase “would be likely” to mean “a
serious or real and substantial risk to a protected interest, a risk that might well
eventuate” (Commissioner of Police v Ombudsman [1988] 1 NZLR 385.)
5.5 For example, on a general level the Ombudsmen have accepted that where disclosure of pricing information would be likely to reveal a tenderer's pricing/market strategy in a competitive market, then such information is protected by s.9(2)(b)(ii) [s.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 identities of successful and unsuccessful tenderers, the Ombudsman would have to be persuaded in a particular case that such information requires protection under the official information legislation. To date the Ombudsmen have very rarely been persuaded that such information is protected.

5.6 In respect of s.9(2)(b)(ii) [s.7(2)(b)(ii)] an issue which often arises is how one assesses the likelihood and nature of prejudice to a third party's commercial position. In the Ombudsman's view, a simple assertion by the holder of the information that such prejudice would be likely is insufficient. Each Ombudsman considers that direct consultation with the third party or parties either by the department or organisation or local authority or by the Ombudsman is necessary. Such consultation can be either by letter or orally.

5.7 Where consultation with a third party about its interests in the information is undertaken, it is not enough for the third party simply to object to disclosure. (See Wyatt.) The Ombudsman needs to know how the commercial position of the third party would be prejudiced and why that prejudice would be unreasonable.

6. Section 9(2)(ba) [s.7(2)(c)]

6.1 This section states:

"(2) ... this section applies if, and only if, the withholding of the information is necessary to—

(ba) Protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information—

(i) Would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or

(ii) Would be likely otherwise to damage the public interest."

6.2 Section 9(2)(ba) [s.7(2)(c)] involves the decision-maker, and the Ombudsman on review, in a two-stage test.

6.3 Stage One

The first stage involves determining whether the information is subject to an obligation of confidence or whether it is information which any person has been or could be compelled to provide under statutory authority.
6.4 **Information supplied subject to an obligation of confidence**

Where the decision-maker maintains that the information at issue should be withheld because it was supplied subject to an obligation of confidence, the first step in an Ombudsman’s investigation and review of that decision is to establish that the information at issue is subject to an obligation of confidence. In making the assessment, an Ombudsman has regard to the nature of the information and the full circumstances of its supply.

6.5 **Information supplied under statutory compulsion**

Where information is supplied under statutory compulsion, the authority under which the information was supplied must be established. If there is a statutory power to compel the supply of similar information from the same source, future supply can be assured. However, there are circumstances where, notwithstanding the power to compel the supply of information, a department or organisation has to rely on the supplier to provide the quality of information to enable it to discharge its functions. In particular cases, therefore, a department or organisation may only be able to ensure the future supply of information of the quality it requires if the information is supplied on the basis of an understanding that it will be held in confidence.

6.6 **Stage Two**

Where it is determined that the information at issue was either supplied subject to an obligation of confidence or under statutory compulsion, an assessment must then be made as to whether, in the circumstances of the particular case, disclosure of that information would be likely to either:

(a) prejudice the supply of similar information or information from the same source, and  
(b) it is in the public interest that such information should continue to be supplied; (s.9(2)(ba)(i) [s.7(2)(c)(i)]) or  
(c) otherwise damage the public interest (s.9(2)(ba)(ii) [s.7(2)(c)(ii)]).

6.7 An example of the situation in which the Ombudsman has accepted that s.9(2)(ba) [s.7(2)(c)] applies is where the holder of the information requires the information to discharge a statutory function. Even where the department or organisation concerned may have the statutory power to compel the provision of information, it may have to rely on the timely supply of reliable information in order for it to be able to discharge its statutory responsibility effectively. In this context, the information is supplied and accepted under an obligation of confidence in order to ensure that reliable information is supplied in a timely manner. Where the Ombudsman has been satisfied that disclosure of the information would be likely to prejudice the continued supply of such timely and reliable information and therefore the department’s or organisation’s ability to discharge its public function, it has been accepted that s.9(2)(ba)(i) [s.7(2)(c)(i)] applies.
6.8 Section 9(2)(ba)(ii) has been considered a relevant withholding provision, in some circumstances, in respect of information generated by the Audit Office or information generated within a department or organisation which discloses Audit Office information, on the basis that there is a strong public interest in ensuring that the integrity of the Audit Office’s statutory functions. While the Audit Office is not subject to the Official Information Act, reports of the Audit Office and/or the Controller and Auditor General, when in the hands of organisations subject to either that Act or the LGOIMA, become subject to those Acts. Audits are conducted in an environment where information exchanged between auditor and auditee is subject to an obligation of confidence and disclosure of that information would be likely to prejudice the integrity and effectiveness of the audit process. Clearly it is in the public interest to maintain the integrity and effectiveness of that process.

6.9 The interpretation of s.7(2)(b)(ii) and s.7(2)(c)(i) of the Local Government Official Information and Meetings Act were the subject of consideration by the High Court in *Hyatt* (see paras 4.1 and 4.2 above). The Court supported the approach which the Chief Ombudsman had taken, namely, that the Act did not protect commercial information supplied by a third party simply on the basis of an understanding of confidentiality, but that a realistic assessment needed to be made of the nature of the particular information and the likely consequences of its disclosure.

7. Section 9(2)(i) [s.7(2)(h)]

7.1 This section concerns the commercial activities of the holder of the information. It states:

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(2) ... this section applies if, and only if, the withholding of the information is necessary to—

(i) Enable a Minister of the Crown or any Department or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities.
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7.2 This section allows information to be withheld where necessary to enable the department, Minister, organisation or local authority to carry out, without prejudice or disadvantage, commercial activities. The approach involves:

(a) identifying the commercial activity in question;

(b) identifying the prejudice or disadvantage which might result to that activity if information were made available;

(c) establishing precisely how that prejudice or disadvantage would occur; and

(d) assessing whether disclosure of the information would be so likely to cause the *prejudice* or *disadvantage* predicted that it is *necessary* to withhold it.
7.3 In applying the abovementioned general tests in the tendering situation, a starting point is to establish:

(a) the particular market activity to which the information relates;
(b) the characteristics of that market activity, eg, the number of competitors and degree of competition;
(c) the criteria on which the tender contracts are awarded and how the information at issue relates to those criteria; and
(d) the degree to which the information could be said to reveal a tenderer’s marketing/pricing strategy which a competitor would be able to use to obtain a competitive advantage.

7.4 This information then assists the assessment of:

(1) the precise nature of the prejudice or disadvantage which the department, organisation or local authority predicts would result from disclosure; and

(2) the likelihood of such a prejudice or disadvantage occurring.

8. Section 9(2)(j) [s.7(2)(i)]

8.1 This section states:

"(2) ... this section applies if, and only if, the withholding of the information is necessary to—

(j) Enable a Minister of the Crown or any Department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations)."

8.2 Section 9(2)(j) [s.7(2)(i)] recognises that it is in the public interest for those subject to the Act to be able to carry on commercial or industrial negotiations without prejudice or disadvantage. It allows information to be withheld where necessary to protect that interest.

8.3 However, the section does not provide good reason to withhold all information relating to particular negotiations. It only protects information, disclosure of which would be so likely to prejudice or disadvantage the department, Minister, organisation or local authority in the negotiations that it is necessary to withhold that information. Whether such prejudice or disadvantage will occur will depend very much on the precise nature of the information and its relevance to the actual issues under negotiation or contemplated negotiation. Information relating to negotiating strategy might well be protected, but it is not sufficient simply to assert that release of the information would be unhelpful to the holder’s position.
9. **Section 9(2)(k) [s.7(2)(j)]**

9.1 In commenting on this provision in its Supplementary Report, the Danks Committee said:

"... Not all disclosure of use of official information for advantage or gain is objectionable; much information of this character is designed to assist individuals and businesses to their advantage. It seems impossible in a succinct statement to spell out precisely the circumstances in which the exception should apply: the word 'improper' in general appears adequate."

9.2 The application of s.9(2)(k) was discussed in the *TVNZ* case as follows (p.113 line 27):

"The Ombudsman dealt with s.9(2)(k) indicating that it was not an easy test to meet, the test being whether withholding is 'necessary to prevent the disclosure or use of official information for improper gain or improper advantage'. She referred to the difficulty that people seeking information did not have to specify or justify the purpose for which the information was sought. In this case the Ombudsman dealt with the argument that the background material was not relevant to the advancement of complaint under s.4 (l)(d) of the Broadcasting Act. That argument seems to me to have been correctly rejected. After reviewing Mr Thompson's argument on this point the Ombudsman said:

'Mr Thomson says he fails to see how the background material requested by the Institute can advance the issue under this provision (s.4(1)(d)). He states, with emphasis, that it is not the balance of the background material which is relevant; rather it is the balance of the programme as presented. If that is so, however, then there can be no advantage to the Institute in obtaining the information and s.9(2)(k) cannot apply. Conversely if background material is, after all, relevant, then it is hard to see how any advantage derived from obtaining information could be described as improper.'"

9.3 This section was accepted by the Ombudsman as applicable in a case where a requester sought a copy of the Seventh Form Calculus notes used by the Correspondence School. The Ombudsman concluded that given the statutory restrictions on enrolment at the school; the school's enrolment policy which stated, among other things, "The correspondence school is not an alternative school for those who have the option of attending a local secondary school, nor is it normally a source of alternative curriculum for those students enrolled at a secondary school"; and under s.7A(2) of the Education Amendment Act 1989 relating to fees, disclosure of the calculus notes would constitute an improper gain or advantage for the requester. This was on the grounds that the material had been compiled using the skill and judgment of the school staff and, because the requester was not enrolled at or receiving tuition from the school, provision of the information would give the requester an advantage or gain to which he was not entitled, and it would also circumvent the restrictions on enrolment and tuition.
9.4 Section 9(2)(k) was also accepted in a case where disclosure of the information at
issue would have enabled beneficiaries and recipients of the Rest Home Subsidy
to obtain a benefit to which they were not legally entitled. The Ombudsman formed
the view that if something was illegal, it was also improper.

10. Section 9(1) [s.7(1)]—Countervailing public interest

10.1 This section states:

“(1) Where this section applies, good reason for withholding official in-
formation exists, for the purpose of section 5 of this Act, unless, in
the circumstances of the particular case, the withholding of that
information is outweighed by other considerations which render it
desirable, in the public interest, to make that information available.”

10.2 Accordingly, even where one of the reasons for withholding information under
s.9(2) [s.7(2)] can be made out, the decision-maker, and the Ombudsman on re-
view, still needs to consider in each case whether there is any countervailing pub-
lic interest in disclosure. In balancing the competing interests for and against dis-
closure of information, the Ombudsman has regard to the purposes of the Act as
defined in s.4 and also the principle of availability enunciated in s.5. As observed
at page 190, line 55, in Wyatt:

“it is fundamental to the Act 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.”

10.3 In the tendering situation, for example, the public interest considerations which
the Ombudsmen have identified as favouring disclosure are:

(a) the public interest in public sector procedures for purchasing of goods and
services to be seen to be beyond reproach, and

(b) the public interest in the New Zealand public having access to information
on how government departments and organisations and local authorities
spend public funds.

10.4 These considerations flow naturally from the stated purposes of the official infor-
mation legislation in s.4 of the respective Acts, namely, “to promote the account-
ability of ... officials”.

10.5 There have, in the past, been incidents where public sector employees have been
charged and convicted of offences connected with the corruption of tendering
procedures. These incidents, though rare, serve to highlight the importance of
integrity in the tendering process so that such integrity is beyond doubt in the eyes
of the public (including unsuccessful and prospective tenderers).

11. Conclusion

11.1 The Official Information Act and the Local Government Official Information and
Meetings Act provide adequate protection for information which is held by Minsters
of the Crown, Departments, organisations and local authorities and disclosure of
which would prejudice or disadvantage unreasonably their commercial position
or activities or those of third parties about whom they hold information. Since 1
July 1983 when the Official Information Act came into force, no evidence has
been produced to an Ombudsman that information which has been disclosed ei­
ther under that Act or under the Local Government Official Information and
Meetings Act as a result of an investigation and review by an Ombudsman has
prejudiced any of the commercial interests which the Act seeks to protect. All the
legislation requires is that, when considering a request for commercial informa­
tion, the holder of the information must, in each case, identify the prejudice or
disadvantage, and show how that prejudice or disadvantage would occur, and
why that prejudice or disadvantage would be unreasonable. The holder must then
consider whether there are any countervailing public interest factors favouring
disclosure. Only then can a decision be made as to whether or not good reason
exists in terms of the legislation to withhold the information.

Wellington, September 1993

Other Practice Guidelines

Practice Guidelines No.1 (Revised edition No.2)—“Official Information Act 1982 and Local
Government Official Information & Meetings Act 1987—Application of Administrative Provi­
sions”—July 1994

Practice Guidelines No.2—“Current Approach of the Ombudsman to s.9(2)(f)(iv) and s.9(2)(g)(i)
of the Official Information Act 1982”—February 1993

Practice Guidelines No.4—“Local Government Official Information & Meetings Act 1987—
Requests for information on Local Authority Trading Enterprises”—April 1994

Practice Guidelines No.5—“General guidelines for Departments and organisations subject to the
Ombudsmen Act 1975, the Official Information Act 1982 and the Local Government Official In­
formation & Meetings Act 1987 on the role and investigation procedures of the Ombudsmen”—
July 1994

Practice Guidelines No.6—“Current approach of the Ombudsmen to the interface between sec­
tions 9(2)(a) and 27(1)(b) of the Official Information Act/sections 7(2)(a) and 26(1)(b) of the
Local Government Official Information and Meetings Act and the Privacy Act”—July 1994

Practice Guidelines No.7—“Current Approach of the Ombudsmen to requests for information
relating to the reasons for decisions or recommendations made by public sector agencies about a
requester which affect that person in his, her or its personal capacity. Section 23 of the Official
Information Act and section 22 of the Local Government Official Information and Meetings Act”—
July 1994