



## SSC Guidance

### OIA requests for draft reports, correspondence and advice

Effective September 2014

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#### Introduction

This guidance is intended to assist officials processing requests for, or where the scope of the request includes, draft reports, documents or correspondence under the Official Information Act 1982 (OIA). SSC has identified the need for such guidance due to differing views on how the OIA should be applied to drafts, particularly between officials and ministers. It is important that people processing such requests have a clear understanding of their legal obligations under the OIA.

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#### Summary

Draft documents are official information and are subject to the OIA like any other document or information held by an agency. Regardless of whether the relevant drafts are of correspondence between officials, or between officials and Ministers, the same tests apply. Despite referring primarily to correspondence between officials and Ministers, this guidance applies equally to correspondence between public servants.

The decision to withhold draft documents should be made on a case-by-case basis. There are often good reasons under the OIA to refuse requests for draft documents. Some reasons that officials may consider are whether or not:

- withholding the draft(s) is necessary to protect information that is subject to an obligation of confidence to a third party, and releasing the information would be likely to prejudice the supply of similar information, or information from the same source
- withholding the draft(s) is necessary to maintain the constitutional conventions<sup>1</sup> which protect the confidentiality of advice tendered by Ministers and officials
- withholding the draft(s) is necessary to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between Ministers and officials
- the information requested is or will soon be publicly available.

Officials must also consider whether or not there is a public interest in disclosing the draft which outweighs any interest in withholding it, unless they are relying on one of the conclusive reasons for withholding official information (section 6 of OIA).

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<sup>1</sup> A constitutional convention is a commonly-understood custom or practice which is not enforced or recognised by the courts, but reflects constitutional or political ethics.

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**Draft documents as official information**

Draft documents are official information and may be subject to requests under the OIA. A document cannot be withheld simply because it is in draft form, as draft documents are not exempt from the OIA. Because draft documents are official information, and are subject to the OIA like any other information held by an agency, a ground that applies to a final document may also apply to the drafts of that document.

Information contained in a draft document is still official information even if the information is not, or is no longer, correct. In such a case it may be useful to include a cover note providing the relevant context or a correction.

As with all OIA requests, a request for draft documents must be considered in accordance with the purposes of the OIA and the principle that the information shall be made available unless there is good reason for withholding it.

The context in which the draft was produced should also be taken into account when considering whether or not one of the withholding grounds applies. For example a withholding ground that was considered to apply may no longer apply once the decision to which the document relates has been made.

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**Whether the scope of the request includes draft documents**

Draft documents may fall within the scope of a request.

A request does not have to refer to drafts specifically for draft documents to fall within its scope. Many requests can be reasonably assumed to relate only to the final form of a document (e.g. “*The report provided to the Minister on...*”). Others will clearly cover drafts (e.g. “*all preparatory material produced by the agency in relation to the briefing dated [x]*”). This is ultimately a matter of judgement based on the wording of the request.

If it appears that the wording of the request does encompass draft documents, it can be helpful to ask the requestor if draft documents can be excluded from the request. In many cases the requester may not be interested in drafts.

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**Fundamental questions to ask when the scope of the request includes draft documents**

- 1 Would the disclosure of draft documents prejudice an interest protected under the OIA – i.e. any of the withholding grounds in the OIA? Any of the withholding grounds in the OIA may apply to draft documents. Some of the more commonly-applied grounds are discussed below in relation to drafts. You should also refer to the guidance on the Ombudsmen’s website on how to apply these withholding grounds (and others) generally. See – [Official information - legislation guides](#).
  - 2 Is there a countervailing public interest in the disclosure of those drafts that outweighs the grounds for withholding them?
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**Section  
9(2)(ba)(i):  
information that  
is subject to an  
obligation of  
confidence**

Withholding the draft(s) may be necessary to protect information that is subject to an obligation of confidence, where making that information available would be likely to:

- prejudice the supply of similar information, or
- prejudice the supply of information from the same source.

The disclosure of certain draft documents may have a detrimental impact on effective government or administration if it is likely to result in similar drafts containing confidential information not being produced in the future and it is in the public interest for these drafts to continue to be produced.

Agencies should take into account that the Ombudsmen have rejected arguments that Ministers owe officials an obligation of confidence. However, section 9(2)(ba)(i) may apply where an obligation of confidence is owed to a third party.

For example, early drafts of reports may contain details that are later removed in the final version, such as personal details or unconfirmed confidential information. This ground may be applied to protect this information in the drafts because it is subject to an obligation of confidence.

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**Section  
9(2)(f)(iv):  
confidentiality  
of advice  
tendered by  
Ministers and  
officials**

Withholding the draft(s) may be necessary to maintain the constitutional conventions which protect the confidentiality of advice tendered by Ministers and officials.

This ground may be applied where there is concern that the release of the draft advice would interfere with the ability of a decision-maker to consider the advice tendered. While there is no general right to “undisturbed consideration” of advice, Ministers and officials must be able to properly consider advice that has been tendered. Premature disclosure of advice to Ministers might impact on the timeframes within which Ministers can or must act, may impact on the availability of options, or on Ministers’ ability to seek further advice or to consult on proposals.

It is relevant whether the decision-maker has an expectation that advice has been tendered for consideration will remain confidential for a certain period of time or not. Therefore, it may be necessary to consult with the decision-maker in relation to any concerns they may have regarding the release of draft advice.

It should be noted that this ground is not commonly applied to draft documents as it applies to advice that has been ‘tendered’. However, this ground may apply to information that has not been ‘tendered’ in circumstances where there is a direct connection between a draft and the consideration of advice yet to be tendered. An example is where internal discussion papers have been circulated within an agency prior to the planned tendering of formal advice to a Minister. The agency may be concerned that releasing these papers will undermine the ability of the Minister to consider the advice that will be tendered in an effective and orderly manner. If such information is released the Minister may be asked to publicly comment on issues on which he or she has not yet been properly briefed. Decision-makers are only accountable for the advice they act upon and must be free to determine how a final decision is reached.

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Draft answers to Parliamentary questions are usually withheld under this ground because it is considered that Ministers would be less likely to seek the advice of their departments in the future if draft answers were released. This unwillingness to seek advice would diminish the quality of information provided to the House.

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**Section  
9(2)(g)(i):  
free and frank  
expression of  
opinions**

Withholding the draft(s) may be necessary to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between Ministers and officials. This is a commonly applied provision when considering whether to release reports, correspondence, and advice.

The disclosure of certain draft documents may undermine the quality of reports, correspondence, or advice being generated, by inhibiting the future free and frank expression of opinions in generating reports, correspondence or advice.

Free and frank expression of opinion is important for robust decisions and an efficient decision-making process. In some cases disclosing draft documents may inhibit the free and frank expression of opinions during the decision-making process. This is likely to result in a less thorough and more defensive process, which may ultimately lead to weaker decisions being made.

Additionally, certain views may not be adequately developed, articulated, or recorded if there is a risk that these may be made public. Therefore the views expressed in the final report, correspondence, or advice are likely to not be as well-tested.

The *Ombudsmen's Official Information Opinion – Request for Draft Document on Starting Price Adjustment Input Methodology* (25 July 2013) stated that a draft document may be withheld if it is in a state where officials are still refining it by freely and frankly expressing their opinions to each other on a draft. It is in the public interest that such refinement takes place and the exchange of opinion can be expected to lead to better decisions in the final document.

An agency is unlikely to be able to justify withholding a draft under this ground if the draft document in question does not require much refinement and accurately reflects the positions of the agency. It has been argued that releasing a draft would not inhibit the future free and frank expression of opinions if the draft in question is well-developed, or close to its final form. However, a well-developed briefing may still contain free and frank advice to Ministers and therefore this ground may apply to protect the expression of those views.

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**Section 18(d):  
the information  
requested is or  
will soon be  
publicly  
available**

Draft documents may be refused if the information contained in the drafts is or will soon be publicly available. Certain draft documents will contain information that is reflected in the contents of the final report, correspondence, or advice. The request, or the part of the request that relates to that/those draft(s), may be refused if this information is, or is soon to be, available to the public. This ground is more likely to apply to drafts that are well-developed, or close to final form.

However, a request specifically for draft documents cannot be refused because the final document will be made available. This is because the draft document itself is unlikely to be made publicly available. As discussed above, less developed drafts may be able to be withheld on other grounds.

Also, care must be taken not to misuse section 18(d) by withholding drafts documents where there is an intention to release the final, but no certainty or imminence as to when that will happen. Draft documents cannot be withheld in reliance of this section unless there is some certainty and imminence as to the date of publication of the final document. Certainty about release dates may not always be the case with ministerial/executive government decision-making processes.

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**Countervailing  
public interest**

Information must be made available unless there is good reason for withholding. If one of the grounds for withholding under section 9 of the OIA is considered to apply, agencies must then consider whether or not the need to withhold is outweighed by the public interest considerations in favour of disclosure.

Often the public interest in disclosure may be met (or be able to be met) by disclosure of the final document. If the document has been finalised, agencies may consider releasing it, even if it is not captured by the request. If the document is yet to be finalised, it may help to advise the requester of the expected timeframe within which finalisation will happen. The requester may also be advised of any intention to publish the document. If there is no intention to publish the document, agencies could consider offering to make the document available to the requester once it is finalised, without the need for the requester to make a fresh request.

There may still be public interest in release of a draft document, notwithstanding the availability of the final version. Often this will arise where the draft document contains substantive information that the final does not, and release of this information would promote transparency, accountability or public participation by revealing:

- the full range of matters considered
  - the reasons for changes in position, or
  - some impropriety in process or practice.
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## References

[Official Information Act 1982](#)

[Official information - legislation guides](#)

Ombudsmen's Quarterly Review (OQR):

- [Volume 7 Issue 4 – December 2001](#)
- [Volume 8 Issue 3 – September 2002](#)

Ombudsman's Official Information Opinion:

- [Request for Lists of Titles and Dates of Reports and Briefings Received by the Minister from Specified Government Agencies \(17 February 2012\)](#)
- [Request for Draft Document on Starting Price Adjustment Input Methodology \(25 July 2013\)](#)

Ombudsman's Official Information Practice Guidelines – Other reasons for refusing Official information:

- [Part 2C: Confidentiality](#)
  - [Part 2C: Constitutional Conventions](#)
  - [Part 2C: Free and Frank Expressions of Opinion](#)
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