On 1 October 2012 the Minister for Arts, Culture and Heritage wrote and advised:

> *"I reiterate the comments I have made in past correspondence about your analysis of the application of section 9(2)(b)(ii) of the Official Information Act 1982 to a number of documents that remain in dispute. Ministers of the Crown who frequently engage in commercial negotiations, and I think a Minister's considered opinion that the release of certain documents could cause damage should be given greater consideration [sic]. I remain unconvinced of your reasoning you employ in arguing for the release of these documents. Further, the clear feedback Ministers have received from the commercial entities with whom we negotiate suggests your decision could greatly impede our ability to conduct full free and frank negotiations in the future."*

The Minister asked for a meeting before I finalised my opinion.

On 17 October 2012 I wrote to the Minister, the Minister for Economic Development and the Minister for Arts, Culture and Heritage outlining my provisional view on the two additional papers.

A meeting with Ministers was arranged for 5 December 2012 and the complainants were advised of this.

On 5 December 2012, I was advised by an official from the Office of the Minister for Arts, Culture and Heritage that due to the late calling of a Cabinet Committee meeting, the Minister and the Minister for Arts, Culture and Heritage were unable to meet with me. I was further told that the Ministers had discussed my provisional opinion and now had no further comments to make before it was finalised.

Analysis and findings

Sections 6(a) and 6(b)(i)

These provisions provide conclusive reasons for withholding official information if the making available of that information would be likely to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand (section 6(a)), or to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the Government of any other country or any agency of such a Government (section 6(b)(i)).

Information at issue

Section 6(b)(i) was relied upon to make some deletions to a 2010 report from the Minister for Arts, Culture and Heritage to the Cabinet Domestic Policy Committee – titled *"Film Production Agreement between the Government of New Zealand and the Government of the People's Republic of China"*.

Application of section 6

It seems to me that both sections 6(a) and 6(b)(i) are of relevance to the information at issue. Having seen the information concerned I am satisfied that the withholding of it is necessary to avoid prejudice to the international relations of the Government of New Zealand and so as not to prejudice the entrusting of information from other countries on a basis of confidence.

Section 9(2)(a)

Section 9(2)(a) applies if the withholding of the information is necessary to protect the privacy of natural persons.

Information at issue

- Information deleted from a letter sent by the Minister for Arts, Culture and Heritage to the Minister – 2008. (This information is technically outside the scope of both of these requests because it predates November 2009 or is not relevant subject matter.)
- Deletion of business email addresses.
- Communications between the film industry third parties and Ministers in relation to the production of *The Hobbit* – 2010.
- Deletion of the identity of members of the public who wrote to Ministers in relation to the production of *The Hobbit* – 2010.

Application of section 9(2)(a)

The Minister for Arts, Culture and Heritage referred to this section as a possible reason for withholding some communications between the film industry third parties and Ministers. As required by the OIA, I have consulted with the Privacy Commissioner on its applicability. She has commented:

> *"I am inclined to deal with all the documents as a group rather than individually. I do so because the topics within the documents are not specifically personal to anyone in particular. The context is the various discussions and opinions about the actions of union interest groups within the film industry here and in Australia. Arguments have been raised around whether or not film workers are employees or independent contractors and the desire or not for collective bargaining. Those matters on their own do not produce a context which would require protection on privacy grounds.*
>
> *I assume that the primary personal interest in the documents is who wrote or produced them and not the interests conveyed. In that case the privacy interest would be those of all the named parties that have contributed to the debate in the various documents.*
>
> *Privacy v Public interest*

> *The group of people relevant to these documents were all involved in the government's investigation into the challenges about labour practice within the film industry. This was a highly publicised matter in late 2010 with a great deal of the debate being aired on the mainstream news. The events included meetings with representatives of Warner Brothers Pictures who came to New Zealand and with the Prime Minister and others. The Unions, including CTU, were highly visible and ready to debate the issues in the public domain.*
>
> *The outcome was an amendment to the Employment Relations Act excluding a certain class of film industry workers from the definition of employees and passed by parliament under urgency.*
>
> *I acknowledge that there will be many circumstances where submissions to Parliament by business interest will require confidentiality around some content. However, I consider that anyone who petitions the government for a law change does so in the knowledge that there is a general expectation of openness and transparency and that confidentiality around submissions will be unlikely.*
>
> *On this occasion the key private protagonists were all identified in public debate. Many of their broad positions were articulated publicly. Similarly the fact that the government was involved was no secret and again the representatives identified.*
>
> *In all the circumstances the privacy interests of any of the individuals involved do not appear to be significant given the context and the public nature of the issues. I consider their privacy interest to be low."*

In agreement with the Privacy Commissioner, I do not consider that section 9(2)(a) justifies deletion of the identities of the film industry third parties who communicated with Ministers in relation to the production of *The Hobbit*.

There are some private email addresses (business email addresses are generally publicly available) included in the information at issue and a candidate for the film industry review is identified. I have accepted that this information can be withheld under section 9(2)(a).

The identities of members of the public who communicated with Ministers have also been redacted. Ms Kelly advised me that in respect of those emails she could *"accept that those of general support or criticism from the general public do not need to be identified but those from parties to this dispute should not have been withheld"*.

As I have indicated above I have considered communications from film industry third parties (as identified by Ms Kelly) separately from communications from other members of the public. In any case a consideration of a breach of other correspondents' privacy sufficient to involve section 9(2)(a) would require an assessment of the particulars of each case. Given Ms Kelly's advice, I have not undertaken such an assessment and have accepted that section 9(2)(a) justifies the redactions of these other persons' identities.

Section 9(2)(b)(ii)

Section 9(2)(b)(ii) applies if 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.

Information can be withheld under this provision if:

- a prejudice can be identified that would be likely to result to a third party's commercial position if the requested information were to be made available; and
- the predicted prejudice is likely to occur and such prejudice would be unreasonable.

Information at issue

- Reports and information deleted from Ministry of Economic Development reports to the Minister - Film Studio Infrastructure -2009/2010. (Some of this information is technically outside the scope of both of these requests because it predates November 2009 or is not relevant subject matter.)
- Reports and information deleted from Ministry of Economic Development reports to the Minister – Applications for Large Budget Screen Production Grant – 2010.
- Information deleted from a Ministry of Economic Development report to the Minister – Film Industry Meeting on Actors' Equity and Immigration Issues –2010.
- Communications between the film industry third parties and Ministers in relation to the production of *The Hobbit*- 2010.
- Information deleted from a Ministry of Economic Development report to the Minister – Asia Pacific Producers Network Conference – 2010.
- Information deleted from an email from a Ministerial adviser to Ministers and others in relation to the production of *The Hobbit* – 2010.

Application of section 9(2)(b)(ii)

In my view section 9(2)(b)(ii) applies to some of the information at issue. This section is relevant to documents relating to the Government's assessment of, and assistance for, screen infrastructure in New Zealand and some briefings relating to specific applications for the Large Budget Screen Production Grant. Several of the papers describe potential studio development proposals or disclose production costs and budgets. Some financial information relating to a request for sponsorship was also deleted from the Asia Pacific Producers Network Conference report. I accept that this is all information which, if it had been disclosed at the time of the request, would have been likely to prejudice the commercial positions of the companies involved.

This provision was also relied upon to withhold advice which had been supplied by the film industry third parties to Ministers during the industrial dispute which preceded the filming of The Hobbit.

New Line Productions ('New Line') stated:

> *"Motion picture studios hold such delicate production information and negotiations, as well as budget and cost data, in the strictest of confidence as their trade secrets. When it comes to The Hobbit, two of the most expensive movies that will ever be made, this is especially true. Disclosing our negotiations and innermost thinking, including certain strategic decisions, legal and personal opinions, offers from third party governments and other private information, could damage business relationships we have with others (including those third party governments that offered us special incentives), as well as impair our ability to effectively negotiate with certain third parties in the future, including the relevant unions."*

Wingnut was similarly concerned:

> *"In short, the disclosure of the Wingnut information to a wider audience would unreasonably prejudice Wingnut's commercial position when dealing with both the local and international film community."*

However, the information which had been supplied to Ministers is not information which in my view was likely unreasonably to prejudice the commercial position of the person who supplied or who was the subject of the information. I accept that some of the information at issue may not be helpful to business relationships. But in this case I cannot accept the existence of a serious risk of unreasonable prejudice to a third party's commercial position.

Indeed information of a similar nature was already in the public domain at the date of the request or was released by the Minister to the requesters in December 2010.

On 22 October 2010, New Line issued the following press release about its position:

> *"Recent reports that the boycott of the Hobbit was lifted by unions a number of days ago and that Warner Bros asked to delay this announcement are false. It was not until last night that we received confirmation of the retractions from SAG, NZ Equity, AFTRA through press reports. We are still awaiting retractions from the other guilds. While we have been attempting to receive an unconditional retraction of the improper Do Not Work Orders for almost a month, NZ Equity/MEAA continued to demand, as a condition of the retractions, that we participate in union negotiations with the independent contractor performers, which negotiations are illegal in the opinion of the NZ Attorney-General. We have refused to do so, and will continue to refuse to do so. The actions of these unions have caused us substantial damage and disruption and forced us to consider other filming locations for the first time. Alternative locations are still being considered."*

The Minister also released the following information to the requesters in response to the official information requests:

> *"What Warners requires for The Hobbit is the certainty of a stable employment environment, and the ability to conduct its business in such a way that it feels its $500m investment is as secure as possible.*
>
> *Unfortunately Warners have now become very concerned about the grey areas in our employment law. This situation hasn't been helped by the fact that they spent a lot of money fighting (unsuccessfully) the Bryson case in our courts, so they have seen these vague laws in action....*
>
> *They are just looking for reasonable security, and unless its provided, its likely they will choose to base the movie somewhere else. ..."* [Sir Peter Jackson's email to the Minister's Office 18 October 2010]

In my view the advice supplied by the film industry third parties to Ministers during the industrial dispute takes public knowledge of the commercial concerns no further than this public information.

Section 9(2)(ba)(i)

Section 9(2)(ba)(i) applies if the withholding of the information is necessary to protect information which is subject to an obligation of confidence where the making available of the information 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.

Information at issue

This interest has been relied on in connection with communications from the film industry third parties to Ministers in relation to the production of *The Hobbit* - 2010

Application of section 9(2)(ba)(i)

The third parties in this case have referred to the *"highly confidential"* nature of the information which was supplied to the Government.

Wingnut stated:

> *"Wingnut continues to assert strongly that it urgently supplied this highly candid commercial/industrial information on the clear understanding that it was to be kept totally confidential as between Wingnut and Government Ministers.*
>
> *Ministers were, in October 2010, contemplating national policy issues at the highest level and under great urgency given the production of the Hobbit Movies in NZ was at serious risk. The information supplied was not subjected to any analysis by Wingnut at the time as to its confidentiality, as that was considered to be inherent in the candid and sensitive nature of the information."*

The issue of confidence attaching to documents supplied to Ministers has been considered in a 2010 Court of Appeal judgment. In that case, *Jeffries v Attorney General*,[1] the court had to consider whether a letter received by the then Minister of Finance was subject to section 9(2)(ba) of the OIA.

The Overseas Investment Office had received a request for the letter to the Minister and indicated its intention to release the letter under the OIA. The author of the letter challenged this decision, arguing that it was subject to an obligation of confidence that ought to be respected. He was unsuccessful in both the High Court and the Court of Appeal. In the latter, Chambers J stated at [44]:

> *"I appreciate that Mr Jeffries purported to make his letter to Dr Cullen (copied to the State Services Commissioner and the Solicitor-General) 'private and confidential' and also purported to bind 'the recipients of this letter' to not releasing the letter to 'the Powells' current solicitors, Kensington Swan" without his consent. Dr Cullen, however, never indicated he was prepared to accept the letter on that basis. If Mr Jeffries had wanted to gain such protection, he should first have ascertained whether Dr Cullen was prepared to accept the information he wished to convey on such a confidential basis. For obvious reasons, citizens cannot write to Ministers of the Crown and hope to avoid the release of their letters to enquirers simply by marking the letters 'private and confidential'. The information contained in Mr Jeffries's letter was not, therefore, 'subject to an obligation of confidence' on either Dr Cullen's part or on the part of the other recipients."*

The communications in this case were not marked confidential though, as the Court of Appeal made clear, even that in itself is not sufficient to invoke section 9(2)(ba).

There is no indication that the third parties here ascertained whether Ministers were prepared to accept the information they wished to convey on a confidential basis. As far as I can see, their claim of an obligation of confidence has been constructed after the event in response to the official information requests. I do not consider that section 9(2)(ba)(i) provides a tenable basis for withholding these communications.

However, I would go further and say that I doubt whether communications of the nature involved in this case attract an 'obligation of confidence' whatever the parties making them may have claimed at the time (here they made no claim at the time). As I remarked above, they are submissions on a matter of public interest designed to persuade Ministers to adopt a particular policy stance. They are not intrinsically confidential communications on personal matters, indeed much less so than in the *Jeffries* case itself. I do not consider that section 9(2)(ba) was ever intended to permit Ministers or departments to erect a barrier to the disclosure of general policy submissions made to them by third parties on the ground that an obligation of confidence thereby arises that is owed to those submitters. I do accept that obligations of confidence can arise from the provision of sensitive or personal information of a factual nature that might not otherwise be provided if it was known that it would be released.

[1] [2010] NZCA 38.

In such cases, provided it was clear that the information was being provided on this basis, section 9(2)(ba) might be engaged. But that is not the case here. These are submissions on a contentious policy matter designed to persuade the Government to the view of the submitters. They do not have the quality of confidential communications.

I do not consider that section 9(2)(ba) applies to the bulk of this information.

However (adverting to a point discussed further below regarding section 9(2)(g)(i)), I do accept that emails which SPADA attached to a communication with the Minister in October 2010 and which contained information which had been passed to SPADA *"in confidence"* are subject to an obligation of confidence in the hands of the Minister. It would appear that, in this particular instance, the relevant third parties did not know or could not reasonably be expected to have known that their discussions would be transmitted to the Minister in the wholesale way that occurred. In this case, it seems to me that the disclosure of this information would be likely to prejudice the supply of similar information or information from the same source and that it is in the public interest that such information should continue to be supplied.

Some redactions to an email between film industry third parties dated 29 September 2010 also fall into this category.

In my view section 9(2)(ba)(i) applies to these particular communications.

Section 9(2)(f)(iv)

Section 9(2)(f)(iv) applies if the withholding of the information is necessary to maintain the constitutional convention which protects the confidentiality of advice tendered by Ministers of the Crown and officials.

Information at issue

- Reports and information deleted from Ministry of Economic Development reports to the Minister – Screen Infrastructure/studio development proposals – 2009/2010. (Some of this information is technically outside the scope of both of these requests because it predates November 2009 or is not relevant subject matter.)
- Information deleted from a Treasury report to Minister of Finance and Associate Ministers – Government assistance for the film industry - 11 February 2010.

Application of section 9(2)(f)(iv)

At the time of the request this advice was under consideration by Ministers. I consider that withholding was necessary to protect the ability of government to receive and deliberate upon advice in an effective and orderly manner. Section 9(2)(f)(iv) thus justified withholding this advice.