

# **PART A**

## **HOW THE OFFICIAL INFORMATION LEGISLATION WORKS**

# 1. PRINCIPLE AND PURPOSES OF THE LEGISLATION

## Principle of Availability

The principle of availability underpins the whole Official Information Act (OIA). It is set out in section 5 of the Act:<sup>1</sup>

***“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.**”*** (Emphasis added)

This principle should always be kept in mind when an agency is considering how best to respond to a request for official information.

## Purposes of the Act

The guiding principle is reflected in the purposes of the OIA. Section 4<sup>2</sup> of the OIA sets out the purposes that Parliament intended to be achieved in enacting the legislation. Section 4 states:

***“Purposes - The purposes of this Act are, consistently with the principle of the Executive Government’s responsibility to Parliament, -***

- (a) 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 to enhance respect for the law and to promote the good government of New Zealand:*
- (b) To provide for proper access by each person to official information relating to that person*
- (c) To protect official information to the extent consistent with the public interest and the preservation of personal privacy.”*

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<sup>1</sup> Section 5 LGOIMA

<sup>2</sup> Section 4 LGOIMA

With regard to personal information about natural persons, this purpose is now principally achieved under the Privacy Act.

The purposes recognise that implicit in the application of the OIA there will often be a tension between:

- ❖ considerations favouring disclosure of information; and
- ❖ considerations favouring withholding information.

Considerations favouring withholding are set out in sections 6, 7, 9 and 18 of the OIA.<sup>3</sup> These range from:

- ❖ reasons for refusal that relate to the administrative difficulty in complying with a request; to
- ❖ reasons for refusal based on the harm that may be caused by disclosure of the information at issue.

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<sup>3</sup> Sections 6, 7 and 17 LGOIMA

## 2. RESPONDING TO A REQUEST FOR OFFICIAL INFORMATION

When processing and responding to a request for official information, an agency needs to consider a number of different issues. A checklist of these is set out below, and a more substantive discussion of each issue is contained on the following pages.

- ❖ What specific information has been requested?
- ❖ Can the information be identified?
- ❖ Is the information “*held*”?
- ❖ Is the information held “*official information*”?
- ❖ Are there any administrative or procedural reasons for refusal?
- ❖ Is it possible to make a decision on the request within the time limits of the Act?
- ❖ Is there good reason to withhold some or all of the information?
- ❖ In what form should the information be released?

### What specific information has been requested?

The actual request should be considered carefully in order to identify the specific information that has been requested.

If a decision-maker begins to make assumptions about the information that is being sought, there is a risk that those assumptions will be wrong. Where it is evident that an assumption about the scope of the request is being made, it can often be helpful to contact the requester if that is reasonably practicable. Often a simple telephone conversation can resolve any ambiguity.

### Can the information be identified?

A request cannot be refused simply because the agency considers it to be so vague that it is not reasonably possible to determine what information is being requested.

Section 13<sup>1</sup> of the OIA provides that:

**“13. Assistance** – *It is the duty of every Department, Minister of the Crown, and organisation to give reasonable assistance to a person, who –*

- (a) Wishes to make a request in accordance with Section 12 of this Act; or*
- (b) In making a request under section 12 of this Act, has not made that request in accordance with that section; or*
- (c) Has not made his request to the appropriate Department or Minister of the Crown or organisation or local authority, -*

*to make a request in a manner that is in accordance with that section or to direct his request to the appropriate Department or Minister of the Crown or organisation or local authority.”*

If the information requested cannot be identified, there is a duty on the recipient of the request to give reasonable assistance to the requester to make the request in a manner that is in accordance with section 12<sup>2</sup> of the Act. Reasonable assistance requires more than telling the requester that the request is not specific. Having regard to the purposes of the Act and to the principle of availability of information, it is incumbent on the recipient of a request to take all reasonable steps to provide assistance. The aim of the assistance should be to enable the requester to refine the request so that it is specific enough to enable the information sought to be readily identified.

The fact that a request is for a large amount of information does not of itself mean that the request lacks due particularity. The term *“fishing expedition”* appears to have received general recognition in the vocabulary of those concerned with making decisions on requests for information. It should be clearly understood that this term is not recognised in the Act as a withholding reason. If the information requested meets the test of *due particularity* it cannot be refused simply on the basis that it is considered to be a *fishing expedition*. The request must be given proper consideration under the Act.

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<sup>1</sup> Section 11 LGOIMA

<sup>2</sup> Section 10 LGOIMA

If an agency is considering whether to refuse a request pursuant to section 18(f)<sup>3</sup> of the OIA (on the basis that the information requested cannot be made available without substantial collation or research – discussed further in Part B, chapter 2.4), recent amendments to the OIA make it clear that the agency must first consider whether:

- ❖ imposing a charge for the supply of the information at issue or extending the time frame for responding to the request would enable the request to be granted;<sup>4</sup> and
- ❖ consulting with the requester would assist the requester to make their request in a manner which would not involve substantial collation and research.<sup>5</sup>

These amendments to the OIA confirm the Ombudsmen's general approach to section 18(f), namely that it is a *"provision of last resort"* which should only be used if the other mechanisms in the OIA do not provide a reasonable basis for managing the administrative burden of processing the request.

### Is the information *"held"*?

The duty to provide assistance only applies to requests for information that is *"held"* for the purposes of the OIA. If the information requested is not held by the agency, the agency should consider whether to transfer the request or to refuse the request under sections 18(e) or (g) of the Act<sup>6</sup> [for a discussion of when these sections apply, see Part B chapter 2].

Section 14(b)<sup>7</sup> of the Act provides that where the information to which the request relates:

- "(i) Is not held by the Department or Minister of the Crown or organisation but is believed by the person dealing with the request to be held by another Department or Minister of the Crown or organisation, or by a local authority; or*
- (ii) Is believed by the person dealing with the request to be more closely connected with the functions of another Department or Minister of the Crown or organisation, or of a local authority..."*

then the agency should transfer the request *"promptly, and in any case not later than 10 working days after the day on which the request is received."*

Under section 15A<sup>8</sup>, the 10 working day time limit can be extended in certain limited circumstances where there is a large quantity of information or there is a need to consult other parties. However, any extension must be notified within the original 10 working day time limit.

It is at this initial stage (within 10 working days of receipt of a request unless extended pursuant to section 15A) that agencies should determine who is to accept responsibility for responding to the request – for example, whether it is more appropriate for the request to be answered by a Department (or Ministry, Crown entity or SOE) or the Minister. In the case of requests made to a Minister, often the information at issue is not physically held by the Minister at all but is held (and is often being worked on) by a Department or Ministry. Unless

<sup>3</sup> Section 17(f) LGOIMA

<sup>4</sup> Section 18A OIA, section 17A LGOIMA

<sup>5</sup> Section 18B OIA, section 18B LGOIMA

<sup>6</sup> Sections 17(e) or (g) LGOIMA

<sup>7</sup> Section 12(b) LGOIMA

<sup>8</sup> Section 14 LGOIMA

there are genuine policy concerns which require Ministerial input, many such requests could be transferred to the relevant Department or Ministry.

If an agency does decide to transfer the request, it should first ensure that it has identified any relevant information that it holds. It should identify that information when making the transfer, and explain whether:

- (a) it will retain responsibility for responding to the request with regard to that information; or
- (b) it is transferring responsibility for responding to the request with regard to that information.

It seems to be common practice for an agency to respond to a request so far as it relates to information that it has generated, and transfer the request to the extent that it relates to information generated by other agencies. To avoid unnecessary confusion, in these types of cases it is good practice to identify the information to which the transfer relates.

### **Is the information held “official information”?**

All information held by a Department, a Minister of the Crown in his or her official capacity, or an organisation subject to the OIA or Local Government Official Information and Meetings Act (LGOIMA) is official information. This includes information held by an independent contractor engaged by an agency, and information held by any advisory council or committee established for the purpose of assisting or advising a department, Minister or organisation.

The Ombudsmen consider that the definition of official information also includes knowledge of a particular fact or state of affairs held by officers in such organisations or Departments in their official capacity. The fact that such information has not yet been reduced to writing does not mean that it does not exist and is not “held” for the purposes of the Act.

As a consequence of the Privacy Act 1993 (PA), requests made by or on behalf of natural persons for personal information about themselves must be considered under the PA rather than the OIA. However, requests from bodies corporate for personal information about themselves still fall to be considered under the OIA. Similarly, all requests for information relating to natural persons other than the requester must be considered under the OIA.

### **Are there any administrative or procedural reasons for refusal?**

Administrative and procedural reasons for refusal are set out in section 18<sup>9</sup> of the OIA. This section provides that requests may be refused if:

- ❖ The making available of the requested information would:
  - ♦ be contrary to the provisions of a specified enactment; or
  - ♦ constitute contempt of Court or of the House of Representatives.
- ❖ The information is or will soon be publicly available.
- ❖ The document alleged to contain the information requested does not exist or cannot be found.

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<sup>9</sup> Section 17 LGOIMA

- ❖ The information requested cannot be made available without substantial collation or research.
- ❖ The information requested is not held and the request cannot be transferred to another organisation.
- ❖ The request is frivolous or vexatious or that the information requested is trivial.

For a more detailed discussion of the Ombudsmen's approach to these reasons, refer to chapter 2 of Part B of these guidelines.

### **Is it possible to make a decision on the request within the time limits of the Act?**

When a request is received for official information, that request must be considered and a decision made and conveyed to the requester **as soon as reasonably practicable**, and in any event no later than 20 working days after the date upon which the request is received.<sup>10</sup>

It is important to note that when the time limit was inserted into the Act in 1987 Parliament made it clear that 20 working days should not be treated as the normal period within which to respond to a request, but should be the absolute maximum. The Law Commission in its report, "*Review of the Official Information Act 1982*", reinforces this view:<sup>11</sup>

*"We consider that the basic obligation upon agencies should remain to deal with requests as soon as reasonably practicable. This requirement remains paramount notwithstanding the existence of a 20 working-day limit."*

### Extension

Section 15A<sup>12</sup> of the Act provides that the time limit (for transfer in section 14<sup>13</sup> and decision in section 15<sup>14</sup>) may be extended if:

- ❖ The request is for a large quantity of information or necessitates a search through a large quantity of information, and meeting the original time limit would unreasonably interfere with the operations of the agency; or
- ❖ Consultations which are necessary to make a decision on the request mean that a proper response to the request cannot reasonably be made within the original time limit.

Any extension of the time limit for response must be for a "*reasonable period of time having regard to the circumstances*".

If an agency intends to extend the time limit for response, it must notify the requester before the expiry of the original time limit of the intention to extend the time for reply, the period of the extension, the reason for the extension and the right to make a complaint to the Ombudsman about the extension.

The Act does not allow for further extensions to be notified if the original extension cannot be met. In this regard, agencies should bear in mind that the time limits expressed in the Act are

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<sup>10</sup> Section 15 OIA; section 13 LGOIMA

<sup>11</sup> (NZLC R40), paragraph 158; page 61

<sup>12</sup> Section 14 LGOIMA

<sup>13</sup> Section 12 LGOIMA

<sup>14</sup> Section 13 LGOIMA

maximums. Any extension of the maximum time limit for response should be realistic, given that multiple extensions are not permitted.

### Breach of time limits

If a decision is not made within 20 working days, or within the extended time frame, the request is deemed to have been refused and the requester has the right to ask an Ombudsman to investigate that deemed refusal.<sup>15</sup>

Similarly, if a decision is made and the requester is notified within the statutory time limit that the information will be made available, but there is then an unreasonable delay in actually supplying the information to the requester, the request is deemed to have been refused. The requester has the right to ask an Ombudsman to investigate that deemed refusal.<sup>16</sup> For example, if the requester is advised within the statutory time limit that the information will be made available upon payment of a charge, then once the charge has been paid, the information should be released as soon as reasonably practicable. There is not a further time frame of 20 working days from the time the requester pays the charge.

### **Is there good reason to withhold some or all of the information?**

Sections 6 and 9 of the OIA set out what is considered to be “*good reason*” under the Act to withhold information.<sup>17</sup> When considering whether one of those withholding grounds applies to the information requested, thought should be given to:

- ❖ whether there are grounds to believe that disclosure of the information would cause a harmful effect;
- ❖ whether that harmful effect would prejudice one of the conclusive interests protected by section 6; or
- ❖ whether that harmful effect would prejudice one of the interests protected by section 9(2) – if so, whether the interest in withholding the information is outweighed by any countervailing considerations which favour its release, in the public interest, in terms of section 9(1).

The approach of the Ombudsmen to a number of these withholding grounds is set out in Part B of these guidelines.

If an agency considers that there is good reason to refuse the request, it should advise the requester of:

- ❖ the decision to refuse the request;
- ❖ the reason for its decision to refuse the request;
- ❖ if possible, the grounds in support of that reason; and
- ❖ the right to complain to an Ombudsman about the decision to refuse the request.

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<sup>15</sup> Section 28(4) OIA; section 27(4) LGOIMA

<sup>16</sup> Section 28(5) OIA; section 27(5) LGOIMA

<sup>17</sup> Sections 6 and 7 LGOIMA

While it is not mandatory for an agency to provide grounds in support of the statutory reasons for refusal, a requester does have the right to ask for these.<sup>18</sup> Advising a requester of these grounds at the time of the refusal:

- ❖ enhances the decision-making process, by ensuring that the agency has satisfied itself that there is sufficient basis to support the decision to withhold; and
- ❖ allows the requester to form a better understanding of why the agency considered it necessary to withhold information - if the requester finds these reasons acceptable, there is less likely to be a complaint to an Ombudsman.

### **In what form should the information be released?**

Once it is decided that some or all of the information should be released, consideration should be given to the form in which the information should be released. However, subject to certain exceptions, information should be released to the requester in the way preferred by the requester. The exceptions are set out below.

There are a number of different ways an agency can make information available to satisfy a request made under the OIA:

- ❖ Release the information in its entirety;
- ❖ Release the information in its entirety subject to certain conditions, such as a restriction regarding its further disclosure or an agreement to pay a reasonable charge;
- ❖ Release of the information together with a contextual statement – this is useful if there is a concern that the information on its own might be misleading or incomplete;
- ❖ Partial disclosure of the information – for example:
  - ♦ release of a document with certain information deleted;
  - ♦ release of the information in the form of a worthwhile summary; or
  - ♦ release of an excerpt from a document;
- ❖ Making the information available by way of inspection or an oral briefing;
- ❖ Releasing other relevant information to satisfy any considerations favouring disclosure in the public interest – the public interest in disclosure may be satisfied by release of a statement confirming the status of the matter at issue, the procedures or the decision-making process, rather than release of the actual information itself.

Where the information requested is contained in a document, section 16(2)<sup>19</sup> requires that information shall be made available in the way preferred by the requester unless to do so would:

- ❖ Impair efficient administration;
- ❖ Be contrary to any legal duty in respect of the document; or

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<sup>18</sup> Section 19(a)(ii) OIA; section 18(a)(ii) LGOIMA

<sup>19</sup> Section 15(2) LGOIMA

- ❖ Prejudice the interests protected by sections 6, 7 or 9 of the Act and in the case of section 9 there is no countervailing public interest.

### **3. CHARGING FOR THE RELEASE OF OFFICIAL INFORMATION**

Once a decision has been made to release some or all of the information that has been requested, an agency may consider whether or not it is reasonable to fix a charge for the provision of that information. There is, however, no requirement that a charge be imposed.

This chapter addresses the following issues:

- ❖ the statutory basis for imposing a charge;
- ❖ what is a reasonable charge;
- ❖ what an agency should do when it intends to impose a charge.

## The statutory basis for imposing a charge

Section 15(1A) &(2) of the OIA provides:

- “(1A) Subject to section 24 of this Act, every Department or Minister of the Crown or organisation (including an organisation whose activities are funded in whole or in part by another person) may charge for the supply of official information under this Act.*
- (2) Any charge fixed shall be reasonable and regard may be had to the cost of the labour and materials involved in making the information available to and to any costs incurred pursuant to a request of the applicant to make the information available urgently.”*

Section 13(2) of the LGOIMA is the equivalent provision but is worded differently. It provides:

- “(2) Any charge for the supply of official information under this Act shall not exceed the prescribed amount.”*

“Prescribed amount” is defined in s.2(1) of LGOIMA as follows:

*“...in relation to any document or copy of any document provided pursuant to this Act, means the amount determined in accordance with regulations made under this Act”.*

No regulations have been made determining the “prescribed amount”. Subsection 3 of s.13 provides:

- “(3) Where no such amount is prescribed, any charge fixed shall be reasonable, and regard may be had to the cost of the labour and materials involved in making the information available and to any costs incurred pursuant to a request of the applicant to make the information available urgently.”*

## What is a reasonable charge?

The Ombudsmen have consistently taken the view that charges cannot be fixed for time spent or expenses (including legal expenses) incurred deciding on whether or not, or to what extent, information can be made available. An agency should not consider whether and how much to charge for the release of information until it has decided whether (and to what extent) information can be made available.

This approach is consistent with the principle of availability of official information contained in section 5 of the Act.

The Government Guidelines on Charging (which were last issued by the Ministry of Justice in March 2002) provide a basis for assessing whether a proposed charge is reasonable. These give some guidance on factors which may be relevant when assessing whether it is reasonable to charge for the supply of certain information. These factors include:

- ❖ Staff time used preparing information for release;

- ❖ Photocopying charges and other fixed costs incurred in preparing information for release;
- ❖ Whether payment of a charge might cause the requester financial hardship; and,
- ❖ Whether there is a public interest in the release of the requested information without a charge (and factors to take into account when considering this issue).

The Charging Guidelines are available on the Ministry's website, [www.justice.govt.nz](http://www.justice.govt.nz), under the heading 'Information and Publications', 'Online Reports and Reviews'.

At a general level, the Ombudsmen have taken the view that the standard charging regime set out in the government guidelines is reasonable. However, in a number of cases, the Ombudsmen have found that agencies, when fixing a charge, have only taken into account the time and the cost of materials in making information available and have failed to take into account other relevant factors, such as the inability of the requester to pay the charge or the public interest in the release of the information.

An agency, and an Ombudsman on review, must consider all the relevant factors when assessing whether a charge is "*reasonable*" in all the circumstances of the request.

### **What should an agency do when it intends to impose a charge?**

Where an agency decides that information requested can be made available, but that it will impose a charge (which has been assessed in accordance with the Government guidelines) the agency should formally advise the requester of:

- ❖ its decision whether or not to release the information; and
- ❖ the estimated amount (and basis for) any proposed charge; and
- ❖ the right to seek a review by an Ombudsman of the estimated charge.

Where the proposed charge is substantial, it is good administrative practice for an agency to give the requester an opportunity to refine the scope of the request and thereby reduce the charge to be imposed for the information released.

The requester should be advised of the agency's decision "*as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received by that [agency]*".<sup>1</sup>

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<sup>1</sup> Section 15(1) OIA; section 13(1) LGOIMA