

## **2. RIGHT OF ACCESS TO INTERNAL RULES AFFECTING DECISIONS**

### **In This Guideline**

- ❖ What Does Section 22 Provide?
- ❖ The Requirements of Section 22
- ❖ Grounds for Refusing Requests under Section 22
- ❖ Limited Release of Information
- ❖ Summary Sheet

### **Corresponding provision in LGOIMA**

Section 22 OIA = section 21 LGOIMA

## What does Section 22<sup>1</sup> Provide?

Section 22 effectively provides a code, within the overall framework of the official information legislation, for disclosure of any documents (including manuals) which contain internal rules or guidelines for decision making. It enables persons listed in section 22(2) to request, as of right, any document, held by an agency, which contains policies or guidelines for making decisions or recommendations in respect of any person or body of persons in his, her or its personal capacity.

Section 22(1) states:

*"(1) Subject to section 6(a) to (d), section 7, section 9(2)(a), (b), (ba), (i), and (j), and section 10 of this Act and to subsections (2) and (6) of this section, **every person has a right to and shall, on request made under this section, be given access to any document (including a manual) which is held by a Department or Minister of the Crown or organisation and which contains policies, principles, rules or guidelines in accordance with which decisions or recommendations are made in respect of any person or body of persons in his or its personal capacity.**" (emphasis added)*

## The Requirements of Section 22

### 1. A specific request for the information must be made

Strictly speaking, the right of access to internal rules affecting decisions requires that a specific request for that information be made. In some cases, a requester may make specific reference to section 22. In other cases, it may be apparent from the wording of the request that the requester is seeking a document that falls within the scope of section 22.

Section 12(2) of the OIA<sup>2</sup> provides that the official information requested shall be specified with due particularity in the request.<sup>3</sup> However, a request cannot be refused simply because an agency considers it to be so vague that it is not reasonably possible to determine what information is being requested. 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 which is in accordance with section 12.<sup>4</sup>

### 2. A request can only be made by certain persons

If the request is made under the OIA, section 22(2) states that the person making the request must be either:

- ❖ A New Zealand citizen;
- ❖ A permanent resident of New Zealand;
- ❖ A person who is in New Zealand;

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<sup>1</sup> Section 21 LGOIMA

<sup>2</sup> Section 10(2) LGOIMA

<sup>3</sup> Section 22(3) of the OIA states that sections 12(2) and (3), 13 to 15A and 19 shall apply, with the necessary modifications, to a request made under section 22(1).

<sup>4</sup> Section 13 OIA, Section 11 LGOIMA

- ❖ A body corporate which is incorporated in New Zealand; or
- ❖ A body corporate which is incorporated outside New Zealand but which has a place of business in New Zealand.

If the request is made under the LGOIMA, then the standard definition of “*person*” in section 2 of that Act applies.

### 3. Decisions affecting persons in their personal capacity

The right of access under section 22 only relates to those policies, procedures, rules or guidelines followed by an agency when making decisions or recommendations that affect any person or body of persons in his, her or its personal capacity.

There is no requirement in section 22 that the requester be personally affected by the decision made by an agency before requesting access to the agency's internal rules or policies.

### **Grounds for Refusing Requests under Section 22**

As section 22 provides relevant persons with a right to internal rules affecting decisions, the ability to refuse such a request is very limited. Only the following exceptions apply:

- (i) The person does not meet the New Zealand citizenship, residency or place of business test under section 22(2). This applies to requests made under the OIA only.
- (ii) The information cannot be provided without prejudice to one or more of the interests protected by sections 6(a) to (d), section 7, section 9(2)(a), (b), (ba), (i), and (j) of the Act.<sup>5</sup> These withholding grounds are discussed in more detail below.
- (iii) The information at issue relates to the making of decisions or recommendations by the Public Trustee or the Maori Trustee in his or her capacity as a trustee within the meaning of the Trustee Act 1956 or in any other fiduciary capacity.<sup>6</sup> This applies to requests made under section 22 of the OIA only.

Section 52<sup>7</sup> of the OIA also creates several exceptions. It provides that:

- (i) Nothing in the Act authorises or permits the disclosure of information if disclosure would constitute contempt of Court or of the House of Representatives.<sup>8</sup>
- (ii) Nothing in the Act derogates from:
  - ❖ any provision in any other enactment authorising or requiring official information to be made available; or,

<sup>5</sup> Sections 6, 7(2)(a), (b), (c), (h) and (i) LGOIMA

<sup>6</sup> Section 22(6) OIA

<sup>7</sup> Section 44 LGOIMA

<sup>8</sup> Section 52(i) OIA, section 44(1) LGOIMA

- ❖ any provision in any other Act or regulation which imposes a prohibition or restriction in relation to the availability of official information or regulates the manner in which official information may be obtained or made available.<sup>9</sup>

### Sections 6(a) to (d) and section 7<sup>10</sup>

Sections 6(a) to (d) provide good reason for withholding 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<sup>11</sup> (this exception only applies to requests made under section 22 of the OIA not requests made under section 21 of the LGOIMA);
- ❖ Prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by either the government of another country or any international organisation<sup>12</sup> (this exception only applies to requests made under section 22 of the OIA);
- ❖ Prejudice the maintenance of the law;<sup>13</sup>
- ❖ Endanger the safety of any person.<sup>14</sup>

Section 7 provides good reason for withholding official information related to the Cook Islands, Tokelau or Niue or the Ross Dependency in certain circumstances. This exception only applies to requests made under section 22 of the OIA.

### Sections 9(2)(a), (b), (ba), (i) and (j)<sup>15</sup>

Sections 9(2)(a), (b), (ba), (i), and (j) apply if, and only if, the withholding of information is necessary to:

- ❖ Protect the privacy of natural persons, including deceased natural persons;<sup>16</sup>
- ❖ Protect information where the making available of that information would be likely to disclose a trade secret or unreasonably prejudice the commercial position of the person who supplied the information or who is the subject of the information;<sup>17</sup>
- ❖ Protect information which is subject to an obligation of confidence or information which any person could be compelled to provide under the authority of an enactment, where the making available of that 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; or,
  - ♦ would be likely otherwise to damage the public interest;<sup>18</sup>

<sup>9</sup> Section 52(3) OIA, section 44(2) LGOIMA

<sup>10</sup> Section 6 LGOIMA

<sup>11</sup> Section 6(a) OIA

<sup>12</sup> Section 6(b) OIA

<sup>13</sup> Section 6(c) OIA, Section 6(a) LGOIMA

<sup>14</sup> Section 6(d) OIA, Section 6(b) LGOIMA

<sup>15</sup> Section 7(2)(a), (b), (c), (h) and (i) LGOIMA

<sup>16</sup> Section 9(2)(a), Section 7(2)(a) LGOIMA

<sup>17</sup> Section 9(2)(b), Section 7(2)(b) LGOIMA

<sup>18</sup> Section 9(2)(ba) OIA, Section 7(2)(c) LGOIMA

- ❖ Enable an agency holding the information to carry out, without prejudice or disadvantage, commercial activities;<sup>19</sup>
- ❖ Enable an agency holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial or industrial negotiations)<sup>20</sup>

These sections must be read subject to section 9(1) of the Act. Section 9(1) provides that good reason for withholding information under section 9(2) exists, unless, in the circumstances of the case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.

Accordingly, before it can be established that "*good reason*" for withholding information under sections 9(2)(a), (b), (ba), (i) or (j) exists, an agency must be satisfied that:

- (i) it is necessary to withhold the information in order to protect the interest identified by those sections; and
- (ii) the interest in withholding the information is not outweighed by other considerations which render it desirable, in the public interest, for the information to be released.

Guidance as to the application of these sections is provided in Part B of these Guidelines.

### **Limited Release of Information**

Where there is good reason to withhold some of the information contained in a document, the agency shall, unless it is impracticable to do so, either:

- (i) Make a copy of the document available to the requester with such deletions or alterations as are necessary; or
- (ii) Provide another document stating the substance and effect of the document except as it relates to the information that has been withheld.

Where information is withheld from a document, an agency must give the reasons for withholding that information.

However, if the agency is satisfied that the interests protected by the withholding grounds are likely to be prejudiced by the disclosure of the existence or non-existence of the information then the agency can give notice to the requester that it neither confirms nor denies the existence of the information.<sup>21</sup>

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<sup>19</sup> Section 9(2)(i) OIA, Section 7(2)(h) LGOIMA

<sup>20</sup> Section 9(2)(j) OIA, Section 7(2)(i) LGOIMA

<sup>21</sup> Section 10 OIA, Section 8 LGOIMA

## **Summary Sheet Section 22 OIA and Section 21 LGOIMA**

### **Right of Access to Internal Rules and Policies**

Always proceed on the basis that the requester has a right of access to any document (including a manual) containing policies, principles, rules or guidelines in accordance with which decisions or recommendations made in respect of any person or body of persons in their personal capacity.

In considering a request made under section 22 of the OIA (or section 21 of the LGOIMA), an agency will need to take the following steps:

1. Identify the particular decision or recommendation about which the internal rules or policies are being requested.
2. Establish whether the decision or recommendation was one made in respect of any person or body of persons in their personal capacity.
3. Establish whether the requester falls within the definition of "person" in section 12(2) of the OIA or section 2 of the LGOIMA.
4. Establish whether the limited exceptions set out in section 22(6) of the OIA and section 44 of the LGOIMA apply.
5. Consider whether there is good reason for withholding some of the information contained in the document to avoid prejudice to one or more of the interests protected by sections 6(a) to (d), 7, 9(2)(a), (b), (ba), (i) or (j) of the OIA or sections 6, 7(2)(a), (b), (c) (h) or (i) of the LGOIMA.
6. If there is good reason to withhold some of the information, then the agency must, unless it is impracticable to do so, either:
  - ❖ Make a copy of the document available with such deletions or alterations as are necessary, or
  - ❖ Provide another document stating the substance and effect of the document requested except as it relates to the information withheld.
7. Where information is withheld from a document then, subject to section 10 of the OIA or section 8 of the LGOIMA (which allows for an agency to issue a notice neither confirming nor denying the existence of information) the agency must give reasons for withholding the information.