

3. RIGHT OF ACCESS BY PERSONS TO REASONS FOR DECISIONS AFFECTING THAT PERSON

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Corresponding provision in LGOIMA

Section 23 OIA = section 22 LGOIMA

Appendix

1. Role of an Ombudsman in investigating and reviewing decisions on requests made under section 23

Section 23¹

Section 23 effectively provides a code, within the overall framework of the OIA, for disclosure of information in respect of decisions or recommendations about individuals. It enables persons listed in section 23(2)² to request, from an agency *as of right*, a written statement containing certain information about a decision or recommendation made by that agency in respect of that person in his, her or its personal capacity. Section 23 states-

*"Subject to section 6(a) to (d), section 7, section 9(2)(b), and section 10 of this Act and to subsections (2), (4), and (5) of this section, **where a Department or Minister of the Crown or organisation makes, on or after the 1st day of July 1983, a decision or recommendation in respect of any person, being a decision or recommendation in respect of that person in his or its personal capacity, that person has the right to and shall, on request made within a reasonable time of the making of the decision or recommendation, be given a written statement of -***

- (a) The **findings on material issues of fact; and***
- (b) Subject to subsection (2A) of this section, **a reference to the information on which the findings were based; and***
- (c) The **reasons for the decision or recommendation.**"*

[Emphasis added]

Section 22 of the LGOIMA relates to decisions or recommendations made on, or after, 1 March 1988, but is otherwise identical in its effect.

Requests for a written statement of reasons are often made by persons who feel aggrieved and concerned at a decision or recommendation that affects them personally. Section 23 provides them with a right to information about that decision. It ensures that decision-makers avoid arbitrary procedures and make decisions or recommendations that are fair and reasonable. The right to request a written statement of reasons enhances both the quality of the decision-making process and promotes the accountability of decision-makers for their decisions. Furthermore, where a person is given a full statement of the reasons for a decision which has affected them personally, he or she is more likely to understand and accept that decision even if it is perceived to have an adverse effect. In some cases it may also help the person concerned to take steps to improve their performance in areas of perceived weakness.

Access to a written statement of reasons for a decision also promotes natural justice. Without knowing the reasons for a decision or recommendation, a person is less able to determine whether or not there are grounds to challenge the decision.

¹ Section 22 LGOIMA

² Section 22(2) LGOIMA

Types of decisions or recommendations to which section 23 applies

Agencies make many decisions or recommendations that affect people in their personal capacity in a wide variety of contexts. For example:

- ❖ **Employment** – an agency may make decisions or recommendations that relate to
 - (i) an individual's application for appointment or promotion to a particular position,
 - (ii) an individual's continuance in employment,
 - (iii) an individual's remuneration or other terms and conditions of employment.
- ❖ **Commercial activities** – an agency may make decisions or recommendations that relate to the awarding of tender contracts.
- ❖ **Education** – an agency may make decisions or recommendations on applications for scholarships or higher degrees.
- ❖ **Social Welfare** – an agency may make decisions or recommendations on applications for income support.

This list is not exhaustive. There may be other decisions or recommendations made by agencies which are covered by the requirements of section 23.

Requirements of section 23

1. A specific request must be made

Strictly speaking, the right to a statement of reasons under section 23 requires that a specific request be made by the person affected by the decision. A request for a statement of reasons will usually take one of three forms:

- (i) It may specifically refer to section 23;
- (ii) It may be more general, asking for more information about why a decision or recommendation was made; or
- (iii) It may seek particular details about the decision or recommendation.

In all cases, there must be a desire by the requester to obtain more information about the basis for the decision or recommendation. Often the latter two forms of request can be dealt with more effectively by providing a section 23 statement of reasons. Once a person is given a full statement of the actual reasons for a decision or recommendation that affects them, they are usually more likely to accept the particular decision or recommendation despite any adverse effect it may be perceived as having.

When an agency receives a request from a person for further information about a decision or recommendation made in respect of that person, the agency may consider it appropriate to either:

- ❖ approach the requester and remind them of their right under section 23 to request such a statement; or
- ❖ provide the information that would ordinarily be contained in such a statement.

2. The request can only be made by certain persons

If the request for a statement of reasons is made under the OIA, section 23(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;
- ❖ 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 for a statement of reasons is made under the LGOIMA, the standard definition of “*person*” contained in section 2 of that Act applies.

3. The decision or recommendation must affect the person in his, her or its personal capacity

Section 23 provides that a person may request a written statement of reasons from an agency in circumstances where the agency has made a decision or recommendation “*in respect of that person in his or its personal capacity*”. The term “*in respect of that person in his or its personal capacity*” means that the requester must have an interest in the decision or recommendation at issue which is different, in kind or degree, from that of the general public.

Establishing a personal interest in the decision or recommendation is important as it determines whether the request will be treated as a request for a statement of reasons under section 23 or a request for official information under Part II of the Act.

The grounds to withhold information under section 23 of the Act are specifically defined and limited compared to the grounds to withhold information requested under Part II of the Act. If an agency fails to recognise that a request falls within the scope of section 23 and, by error, processes it pursuant to the more general provisions in Part II, a requester may be deprived of information to which he, she or it is entitled.

A person seeking official information is not required to justify his or her reasons for the request. However, it is in a requester’s best interests to confirm to the agency his or her personal interest in the decision or recommendation upon which further information is being sought. Without evidence that the requester has a personal interest in the decision or recommendation, an agency may proceed to deal with a request pursuant to Part II.

4. The request for the statement must be made within a reasonable time of the making of the decision or recommendation

Section 23 specifically states that any request for a written statement must be made within a reasonable time of the decision or recommendation having been made. By limiting the right to be given a statement, pursuant to section 23, to requests made within a reasonable time, it is clear that this right is a transient one. If a person wishes to exercise his, her or its right, this must be done expeditiously. The reason for the time requirement is logical. The more time which has passed since the decision or recommendation at issue, the harder it will be for a decision-maker to accurately record in writing (in the format prescribed by section 23) the reasons for the decision or recommendation. The purpose of section 23 is undermined if, because of the passage of time, a decision-maker can no longer recall, with certainty, details of the decision-making process.

What constitutes “*a reasonable time*” depends on the circumstances of the particular case. However, it is an objective rather than subjective standard which must be met.

Ignorance by a requester of the availability of section 23 is not a matter that affects the assessment of whether a request was made “*within a reasonable time.*” It is not the reason for the delay but the degree of the delay that is at issue.

5. The written statement must include three elements

Section 23 specifically states that the written statement must detail:

- (a) The findings on material issues of fact;
- (b) A reference to the information on which the findings were based; and,
- (c) The reasons for the decision or recommendation.

This means the statement must be comprehensive in detailing the decision-making process at issue.

Further, it implicitly recognises that the reasons for a recommendation or decision may not be fully recorded prior to a section 23 request being received.

Limits on information to be provided in a section 23 written statement

Section 23(2A)³ of the Act places certain limits on the information that needs to be provided in the statement of reasons. In particular, Section 23(2A) provides that “[*a reference to the information on which any findings were based*]” need not be given in a written statement in certain limited circumstances, as set out in section 23(2A)(a) – (d).

Section 23(2A) **only** provides that “*reference[s] to the information on which the findings on material issues of fact were based*” need not be included in written statements in certain limited circumstances. It does not provide grounds to withhold the actual “*findings*” made by a public sector agency itself “*on material issues of fact*”, nor the actual reasons for the decision or recommendation.

³ Section 22(1A) LGOIMA

Section 23(2A)(a)

Section 23(2A)(a)⁴ provides that a reference to the information on which any findings were based need not be included in a written statement of reasons if:

- "(a) *The disclosure of the information or of information identifying the person who supplied it, being evaluative material, would breach an express or implied promise -*
 - (i) *Which was made to the person who supplied the information; and*
 - (ii) *Which was to the effect that the information or the identity of the person who supplied it or both would be held in confidence".*

The term "*evaluative material*" is defined in section 23(2B) of the Act to mean:

"...evaluative or opinion material compiled solely –

- (a) *For the purpose of determining the suitability, eligibility, or qualifications of the person to whom the material relates –*
 - (i) *For employment or for appointment to office; or*
 - (ii) *For promotion in employment or office or for continuation in employment or office; or*
 - (iii) *For removal from employment or office; or*
 - (iv) *For the awarding of contracts, awards, scholarships, honours, or other benefits; or*
- (b) *For the purpose of determining whether any contract, award, scholarship, honour, or benefit should be continued, modified, or cancelled; or*
- (c) *For the purpose of deciding whether to insure any person or property or to continue or renew the insurance of any person or property."*

Under section 23 a person is entitled to request a written statement which should include ***the decision-maker's "findings on material issues of fact"***. If the decision-maker's findings are based on evaluative material, that evaluative material might be protected under section 23(2A)(a). In such circumstances, a decision-maker's findings should be included in the written statement as the findings are those of the *decision-maker*. However, section 23(2A)(a) may apply to the evaluative material supplied in confidence to the decision-maker. In other words, when considering a request for a statement of reasons under section 23, the decision-maker must distinguish between:

- (a) his or her actual decision and the reasons for that decision which are covered by section 23; and,

⁴ Section 22(1A)(a) LGOIMA

- (b) the evaluative material used in reaching the decision, which may be subject to section 23(2A)(a).

For example, evaluative material received from a previous employer may state that a person had been suspected of theft of petty cash, but had resigned and the matter had not been pursued. The decision-maker may decide on the basis of that material that the applicant is not trustworthy or may not be trustworthy. Such a decision is a finding on a material issue of fact which should be included in a section 23 statement of reasons, even if a reference to the evaluative material on which the findings were based may be protected under section 23(2A)(a).

Section 23(2A)(b)

Section 23(2A)(b)⁵ provides that a reference to the information on which any findings were based need not be included in the written statement if:

“(b) After consultation undertaken (where practicable)... with a natural person’s medical practitioner, [the agency] is satisfied that –

(i) The information relates to that person; and

(ii) The disclosure of that information (being information that relates to the physical and mental health of the person making the request under this section) would be likely to prejudice the physical or mental health of that person....”

Section 23(2A)(c)⁶

This section provides that a reference to the information on which any findings were based need not be included in the statement if, in the case of a natural person under the age of 16, the disclosure of that information would be contrary to that person’s interests.

Section 23(2A)(d)⁷

This section provides that a reference to the information on which any findings were based need not be included in the statement if the disclosure of that information (being information in respect of a person who has been convicted of an offence or is or has been detained in custody) would be likely to prejudice the safe custody or the rehabilitation of that person.

Refusal to provide a written Statement of Reasons

As section 23 provides relevant persons with a “*right*” to a written statement of reasons, the ability to refuse such a request is very limited. Only the following exceptions apply:

1. The person does not meet the New Zealand citizenship, residency or place of business test under section 23(2) of the Act (this applies to requests made under the OIA only); or

⁵ Section 22(1A)(b) LGOIMA

⁶ Section 22(1A)(c) LGOIMA

⁷ Section 22(1A)(d) LGOIMA

2. The contents of the statement of reasons cannot be provided without prejudice to one or more of the interests protected by sections 6(a) to (d), 7, 9(2)(b) or 10⁸ of the OIA, namely-
- ❖ prejudice to the security or defence of New Zealand or the international relations of the Government of New Zealand⁹ (applies to section 23 requests under the OIA only); or
 - ❖ prejudice to the entrusting of information to the Government of New Zealand on a basis of confidence by either the government or another country or any international organisation¹⁰ (applies to section 23 requests under the OIA only); or
 - ❖ prejudice to the maintenance of the law;¹¹ or
 - ❖ endangering the safety of any person;¹² or
 - ❖ prejudice to the need to protect a trade secret or the commercial position of the supplier or the subject of the information;¹³ or
 - ❖ prejudice to the interest in neither confirming nor denying the existence or non-existence of the information;¹⁴ or
- 3 Disclosing the statement of reasons would allow the requester to obtain a written statement of advice given to the Sovereign or her representative¹⁵ (applies to section 23 requests under the OIA only), or
- 4 The decision or recommendation was made by the Public Trustee or the Maori Trustee in his capacity as a trustee under the Trustee Act 1956 or in any other fiduciary capacity¹⁶ (applies to section 23 requests under the OIA only).

Section 52¹⁷ of the OIA also provides several exceptions to these provisions:

1. Nothing in the Act authorises or permits the disclosure of information if disclosure would constitute contempt of court or of the House of Representatives;¹⁸ and
2. Nothing in the Act derogates from:
 - ❖ any provision in any other enactment authorising or requiring official information to be made available; or
 - ❖ 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.¹⁹

⁸ Section 23(1) OIA, section 22(1) LGOIMA

⁹ Section 6(a) OIA

¹⁰ Section 6(b) OIA

¹¹ Section 6(c) OIA, section 6(a) LGOIMA

¹² Section 6(d) OIA, section 6(b) LGOIMA

¹³ Section 9(2)(b) OIA, section 7(2)(b) LGOIMA

¹⁴ Section 10 OIA, section 8 LGOIMA

¹⁵ Section 23(4) OIA

¹⁶ Section 23(5) OIA

¹⁷ Section 44 LGOIMA

¹⁸ Section 52(1) OIA, section 44(1) LGOIMA

By limiting the scope for refusing a statement of reasons under section 23, Parliament has recognised that there is a public interest in such statements of reasons generally being available on request.

¹⁹ Section 52(3) OIA, section 44(2) LGOIMA

Appendix One

Role of an Ombudsman in Investigating and Reviewing Decisions on Requests made Under Section 23 (OIA) and Section 22 (LGOIMA)

When an Ombudsman is asked to investigate and review a statement of reasons, it is usually because the requester does not believe that the statement provided is correct. This may be because the statement does not meet the requirements of section 23 or because the requester believes that the reasons given do not reflect the facts or that relevant factors which should have been taken into account were overlooked by the decision-maker.

In the course of an investigation and review of a statement of reasons, the Ombudsman seeks to establish the factors which the decision-maker took into account in reaching the decision or recommendation at issue. Having done that, the Ombudsman forms a view as to whether the statement of reasons provides an accurate reflection of the factors taken into account in reaching the decision and the findings made in respect of them. The Ombudsman does not assess the merits of the decision or recommendation itself.

If the Ombudsman is satisfied that the statement is an accurate reflection of the factors taken into account, that is the end of the matter in terms of the OIA. If the requester feels that the decision itself was unreasonable, he, she or it must pursue some alternative remedy such as exercising some right of appeal or requesting an investigation under the OA into the reasonableness and fairness of the decision.

Note

The provisions of section 23(2A)(a) of the OIA are mirrored in section 29(1)(b) of the Privacy Act and, although the OIA does not require an Ombudsman to consult with the Privacy Commissioner when considering the application of section 23(2A)(a), an Ombudsman may, in a particular case, decide to seek the Privacy Commissioner's comments.

Summary Sheet Section 23 OIA and Section 22 LGOIMA

Reason for Decisions or Recommendations

Always proceed on the basis that the relevant person has a *right* to the information contained in the written statement.

1. Identify the particular decision or recommendation about which information is being sought.
2. Establish whether the person making the request falls within the definition of “person” set out in section 23(2) of the OIA.²⁰
3. Establish whether the decision or recommendation was made in respect of the requester’s “personal capacity”.
4. Consider whether the request has been made within a reasonable time of the making of the decision or recommendation.
5. Consider whether section 23(2A) provides grounds for not including “a reference to the information on which any findings were based” in the written statement of reasons. For example, would disclosure of the information at issue, being evaluative material, breach an express or implied promise made to the supplier to keep either the information or identity of the supplier confidential.

If so, the Act provides that those references to the information on which any findings were based need not be included in the written statement.

6. Consider whether release of the information contained in the statement would either:
 - ❖ prejudice one or more of the interests protected by sections 6(a) to (d), 7, 9(2)(b) or 10; or,
 - ❖ breach the requirements of sections 23(4) or (5) or 52 of the OIA or section 44 of the LGOIMA.

If so, do not include that particular information in the written statement.

If not, prepare a detailed written statement for release which contains:

- ❖ *the findings of material issues of fact;*
- ❖ *the reference to information on which the findings were based; and*
- ❖ *the reasons for the decision or recommendation.*

²⁰ Section 2 LGOIMA