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Editorial:

OIA and LGOIMA - how to swim between the flags

Many of the complaints about the operation of the OIA and LGOIMA, both from requesters and agencies, result from a failure to make effective use of the mechanisms within the legislation that are intended to facilitate timely responses to requests.

Our experience, over the last decade in particular, is that requesters are concerned when:

- they hear nothing from agencies about whether their requests have been received and what is happening to them;
- they learn, after the event, that the way they have phrased their requests has raised issues which cause the process to take longer than necessary;
- they learn, after the event, that they have made incorrect assumptions about what information is actually held and how it is held which, if explained to them at the outset, would have enabled them to clarify their requests so that they could be processed more quickly;
- they learn, after the event, that while they thought their request was clear it has been interpreted in a completely different way from what they intended.

On the other hand, officials and staff of agencies subject to the OIA and LGOIMA are concerned when:

- requests are so broadly framed that the volume of information covered is large or it is difficult to identify what precisely has been requested;
- multiple similar requests on the same topic are received within a short time frame placing pressure on limited resources and existing priorities;
- requests on contentious or complex issues require consultation with other parties before a decision can be made;
- the agency's own administrative systems for internal review and sign-off limit the flexibility to deal with simple matters straight away;

- the way an agency holds particular information (e.g. paper or electronic, written or undocumented) creates administrative difficulties in determining what is held and is readily retrievable;
- there is misunderstanding or lack of clarity about the agency's obligations under the law in responding to OIA or LGOIMA requests.

In many cases we have found that these concerns can be resolved by sensibly applying the options that the OIA and LGOIMA provide. In some cases, agencies are not aware of the options. In other cases, agencies are aware of the options but don't know how to use them or why they should be used.

If agencies are overly risk-averse in managing OIA and LGOIMA requests, and lose sight of the process and mechanisms the legislation sets out, they can increase their likelihood of acting contrary to law or making simple matters more complicated than they need to be. Similarly, if requesters are cavalier or unreasonable in framing their requests, they risk complicating the process unnecessarily and obstructing their object of accessing particular information.

In this OQR, we summarise the key obligations under the OIA and LGOIMA. We also identify the issues that can arise and the options for managing them that the legislation and best practice provide.



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Core Timeframe Obligations

An agency's legal requirements for responding to requests for official information are to:

- make a decision and communicate it to requesters "*as soon as reasonably practicable*" and no later than 20 working days after the request is received (unless the time for responding is extended under the OIA or LGOIMA – see below for the rules on extensions);
- release any official information it has decided to release "*without undue delay*".

Agencies should note that:

- the distinction between the two time requirements above can be important especially when responding to large requests. Usually in practice, the decision and the information will be sent to the requester together. However, sometimes that may not be possible;
- when notifying requesters of the decision on their request, the phrase "*as soon as reasonably practicable*" sets out an agency's primary legal obligation. The reference to "*20 working days*" is not the de-facto goal but the absolute maximum (unless it is extended appropriately).

The OIA and LGOIMA set out the circumstances in which failure to meet the time requirements results in the request being deemed to have been refused. The requester can ask an Ombudsman to investigate and review the deemed refusal. If an Ombudsman receives complaints about a particular agency on a regular basis, a pattern of non-compliance with fundamental obligations of the OIA may suggest systemic failure of administrative processes.

Extending the maximum time limits

Extensions of the maximum time limits for transferring requests, making decisions on requests and communicating those decisions may be made – but only if certain criteria are met:

- the extension must be for "*a reasonable period of time having regard to the circumstances*";
- any extension decision must be communicated within 20 working days after the day on which the request was received;
- extensions can only be made 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 necessary to make a decision on the request are such that a proper response to the request cannot reasonably be made within the original time limit;
- a requester must be advised:
 - that the agency has decided to extend the time limit;
 - the specific period of the extension;
 - the reasons for the extension;
 - any other necessary information; and
 - that the requester has a right to complain to the Ombudsman about the extension decision.

NB "*A reasonable period of time*" is not defined in the legislation – what amounts to a reasonable period of time to make the decision on the requested official information will depend on the circumstances of the particular case.

Transfers - a mandatory requirement in certain circumstances

An agency that receives a request *must* transfer that request to another agency that is subject to the OIA or LGOIMA (including Ministers), if the information to which the request relates:

- is not held by the agency but is believed to be held by another agency; or
- is believed to be more closely connected with the functions of another agency.

In the absence of these circumstances, the agency that receives the request must make the decision on it. However, this does not prevent an agency consulting other interested parties before making the decision.

Rules for mandatory transfers

The following rules apply to transfers:

- transfers will only be valid for one of the two reasons listed above;
- transfers must be made "*promptly*" and, in any case, no later than 10 working days after the request is received (unless a valid extension is made); and
- the requester must be informed that the request has been transferred.

How to count time

"*Working Days*" means any day that *is* not a Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, Labour Day, Queen's birthday, Waitangi Day or a day between 25 December and 15 January inclusive.

A regional anniversary day *is* a working day for the purposes of the official information legislation.

"*Day 1*" is the first working day *after* the day on which the request is received, irrespective of whether the agency has recognised it as a request for official information.

Troubleshooter's guide to avoiding delays using the mechanisms in the OIA/LGOIMA

A number of reasons are commonly provided to the Ombudsmen to explain why there has been a delay in responding to a request. Many of these reasons could have been addressed by using mechanisms contained within the official information legislation.

We have listed some of the reasons that are frequently given and we have identified some of the mechanisms or techniques that may assist in managing these situations. ***In all cases, agencies are encouraged to refer to the OIA/LGOIMA and the Ombudsmen's Practice Guidelines to ensure the option they use is appropriate in their circumstances and is executed in accordance with the legislation.***

“Broad requests”

An agency's options include:

- identifying which aspect of the request is causing concern, then contacting the requester and explaining the problem to them (including how much information their request covers as currently phrased) and inviting them to clarify or refine their request (and suggest how);
- considering extending the time limit to give the agency more time to locate everything;
- considering whether charging for the supply of information would be reasonable and appropriate in the circumstances;
- considering releasing the information in an alternative form e.g. summary, viewing, oral briefing;
- considering whether, in the circumstances of the case, it would be reasonable for the agency to exercise its discretion to refuse the request on the basis that the official information cannot be made available without substantial collation or research.

“Multiple requests within a short timeframe”

An agency's options include:

- engaging more officials to assist;
- contacting the requester, explaining the problem and inviting the requester to prioritise the requests;
- considering extending the time limit on individual requests if needed, to give the agency more time to respond substantively;
- advising the requester of the decisions on the individual requests *“as soon as reasonably practicable”* after they have been made, and subsequently rolling-out information to be released *without undue delay*;
- considering releasing the information in an alternative form e.g. summary, viewing, oral briefing;
- considering also releasing the information on the agency's website (if the requests are for the same information from multiple parties). In this case the requesters must be advised of the release *at least* at the same time as it appears on the website;
- considering whether, in the circumstances of the case, the multiple requests can be treated as a single request for the purposes of deciding whether it is appropriate to refuse the request on the ground that making the information available would require substantial collation and research;

- considering whether it may be appropriate to refuse the requests on the ground that the *requests* (not the requester) are frivolous and/or vexatious.

“The information requested is difficult to identify/cannot be found”

An agency’s options include:

- reviewing the request carefully to identify what information is actually being sought;
- contacting the requester to explain the problem and to ask whether the request can be made more specific;
- if the information is in the form of discussions that were held but not recorded, finding officials who remember what was said and asking them to write it down;
- considering whether transferring part or all of the request to another agency who does hold the information is required;
- considering extending the time limit to give the agency more time to locate the information;
- considering whether refusal is appropriate on the ground that the document alleged to contain the requested information does not exist or cannot be found;
- considering whether refusal is appropriate on the basis that the agency does not hold the information being requested and has no grounds for believing that the request should be transferred to another agency;
- considering whether the agency is being asked to create information or express an opinion rather than supply information that it holds.

“We have to consult/get sign-off before the decision can be provided to the requester”

Agencies may have to engage in consultations before a decision can be made on official information requests. Consultations may be held with:

- external third parties who originally provided the requested information to the agency (as to whether they have any concerns with its disclosure, for example, in relation to privacy or understandings of confidentiality);
- any agencies who were involved in the creation of the information as part of a collaborative process (to seek their views before a decision is made on a request);
- an agency’s in-house policy or legal team, chief executive or Minister for their comments on the proposed response.

NB Any consultations must be *necessary* for an agency to make a proper decision on the request. If there are unnecessary consultations and sign-offs taking place, this could give rise to a complaint that an agency has developed a process which prevents a decision being made “*as soon as reasonably practicable*”.

To avoid breaching its legal timeframe obligations under the OIA/LGOIMA while such consultations are in train, an agency’s options include:

- extending the maximum time limit for responding to the request;
- considering whether it should transfer part or all of the request to another agency which is subject to the official information legislation on the basis that its functions are more closely connected with some or all of the requested information;

- considering speaking to the requester to explain the need to consult with third parties. Although not obliged to, the requester may be able to clarify why the information is being requested. This often helps to expedite the consultation process. Equally, the requester may be able to narrow or limit the request so that any consultation may no longer be necessary;
- considering whether the agency needs to consult with third parties in respect of all of the information requested or whether the requester can be advised of the decision on the request in respect of some of the information while consultations on the remaining information are under way.

Tips for Consulting Third Parties

An efficient and effective consultation should include:

- sufficient relevant background information about the request;
- the identity of the requester (unless there is specific good reason not to provide this);
 - good administrative practice is to advise the requester of the intended consultation first to check that there are no genuine concerns about disclosure of the requester's identity. If the requester wishes to retain anonymity, the agency should consider whether there is a reasonable basis for non disclosure given that the identity of the requester may often be a relevant factor for a third party in identifying any concerns with release of the information requested;
- a brief description of the information held by the agency which is captured by the request and on which it is seeking the third party's comments;
- advice about the agency's obligations under the OIA/LGOIMA for responding to the request for this information including that:
 - the agency must follow the principle of availability set out in the Act;
 - it is for the agency to assess whether there is "*good reason*" for withholding;
 - third parties can expect their concerns to be taken into account, but they cannot veto release;
 - lack of consent is not, in itself, a reason for refusal;
- a request for confirmation as to whether the third party has any concerns with release and if so, a detailed explanation of these and the basis for them;
- a due date for response to enable the agency to make a timely substantive decision on the request.

“We’re not ready to release the information yet”

This could cover a number of situations including:

- where the agency is intending to make the information publicly available shortly but is not quite ready to do so (for example, the information is being printed or is in the final stages of being approved and finalised for release). In this case, an agency has a discretion to refuse a request if *“the information requested is or will soon be publicly available”*. However, it would be helpful to explain to the requester:
 - where and how the information will be able to be obtained;
 - the specific date of public release; and
 - the perceived difficulty in meeting the request now.
- where the agency has a substantive concern about making the information available at that particular time. In this situation, the agency will need to decide whether the relevant Act provides good reason to withhold it. Unless there is good reason under the legislation to withhold the information, it should be disclosed to the requester without delay.

“The issue is complex and we’re not sure of the answer”

An agency should first consider whether it actually has all the information it needs to identify accurately any prejudice that could result from disclosure that is protected by a ground in the official information legislation. To assist in making its decision, an agency’s options include:

- consulting with relevant third parties for their views on disclosure (and extending the maximum time period for responding if necessary to allow this to take place);
- assessing whether some or all of the information requested is more closely connected with the functions of another agency subject to the official information legislation. If so, those particular parts of the request should be transferred to that other agency within the 10 working day time limit (unless appropriately extended);
- consulting the agency’s in-house policy or legal team, senior management, chief executive or Minister to ascertain whether they have any concerns about release of the information (and extending the maximum time period for responding if necessary to allow these consultations to take place);
- obtaining external legal advice where appropriate;
- checking the Ombudsmen website: (www.ombudsmen.parliament.nz). On the website you will find:
 - Practice Guidelines (which explain how the various sections of the official information legislation work); and
 - Case notes (which provide summaries of past cases and are searchable by subject or by reference to the relevant section in the legislation).
- calling the Office of the Ombudsmen. While the agency’s obligation is to make its own decision on a request, the Ombudsmen and their staff are able to provide guidance on the current operation and interpretation of the official information legislation and how the relevant Act has been applied in particular fact situations in the past.

Advising the Requester of the Agency's Decision

Releasing information not covered by the request

Sometimes a document that is being released in response to a request also includes other information that is not covered by the request. An agency's options include:

- releasing the document in its entirety; or
- deleting the information in the document not covered by the request and advising the requester accordingly in its covering letter.

Releasing information subject to conditions

Both the OIA and LGOIMA implicitly recognise that information that is otherwise protected under their withholding provisions may be released subject to certain conditions. Usually these conditions are associated with a legitimate need for the information not to be released publicly or used out of context and will, therefore, take the form of an agreement that the requester either keep the information received confidential or not use the information without reference to a contextual statement the agency may have provided.

NB If the requester considers a condition unreasonable, they can ask the Ombudsman to investigate and review its imposition.

Releasing information in an alternative format to that preferred by the requester

Where the information requested is comprised in a document, it can be made available in a number of ways which are set out in section 16 of the OIA and section 15 of LGOIMA. If an agency decides not to provide the information in the way preferred by the requester because it would:

- impair efficient administration;
- be contrary to a legal duty the agency has regarding the document at issue; or
- prejudice the interests protected either by certain provisions in the legislation.

Its letter to the requester must set out:

- the reason for not providing the information in the way preferred; and
- the grounds supporting that reason.

Releasing personal information to a body corporate

Personal information about individuals is covered by the Privacy Act. However, personal information about bodies corporate is covered by Part 4 of the OIA and Part IV of LGOIMA. Both the OIA and LGOIMA require that an agency adopt appropriate procedures to ensure that any personal information about a body corporate being released to it is received:

- only by that body corporate; or
- where the request is made by an agent of that body corporate, only by that agent who has either:
 - the written authority of the body corporate; or
 - is otherwise properly authorised by that body corporate to obtain the information.

An agency must also include in its response, advice that the person has a right to request the correction of the information at issue if it is believed to be inaccurate or incomplete and gives a misleading impression.

Withholding information (including deletions)

If an agency's decision is to withhold the requested information, it must advise the requester:

- what information is being withheld;
- the reasons for the refusal;
- if requested, the grounds for withholding the information relied on in the OIA or LGOIMA; and
- information about the right to seek an investigation and review of the refusal by way of complaint to an Ombudsman.

Making deletions

To delete information within a document before photocopying an agency has a number of options available:

- black the information out;
- white the information out;
- cut the information out; or
- delete electronically.

It is not recommended that a new document is created with the original information deleted or electronic spacing omitted as it is important that both the requester, and an Ombudsman on review, are able to assess the information that was deleted in its original context. The exception to this is if an agency has decided to release the information by way of summary.

Quick Guide for Requesters

- You do not need to use a particular form when requesting official information.
- You do not have to state that your request has been made “*under the Official Information Act*”.
- Your request does not have to be in writing:
 - if you do make it in writing, it would be useful to keep a copy and note the date it was sent,
 - if you make your request orally, it would be useful to make a note of what you have requested, when you requested it and who you made the request to.

Tips for phrasing requests

Sometimes, requests cover large amounts of information because the requester does not know exactly what type of information they are most interested in receiving or does not know how that information is held by the agency. Requests which are unclear or are too broad may result in unnecessary delays, charges, or even refusals.

- Be as clear and specific as possible about the information you are seeking:
 - if it is a particular document, name it;
 - if you are not sure of its name, describe it with reference to author, date, content and/or subject matter;
 - if it is information on a particular topic or subject, explain in detail the information you are seeking;
 - you do not have to say why you want the information or what you intend to do with it, but sometimes providing this information may be helpful to the agency in identifying all the relevant information they hold that you would like to receive;
 - if you don't want to receive certain types of information (for example, internal emails or draft versions of documents) make that clear in your request;
 - if you are seeking reasons why a decision or recommendation was made about you, say so. You may be entitled to a statement of reasons created by the agency rather than having to request information from it that it may not hold;
- Prioritise the order in which you wish your requests to be answered if you are making multiple requests;
- If you need the information urgently, give the reasons why and the timeframe within which you wish to receive it;
- Advise whether you have any concerns with your identity being disclosed to any third parties should the agency wish to consult them before making its decision on the request;
- Indicate if you are happy to provide the information in an alternative form e.g. oral briefing, viewing, summary;
- Provide your contact details and, if you are happy to discuss your request with the agency, invite them to do so.

NB If your requests are more in the form of questions about an issue the agency is dealing with, it may not be a request for information which is already held by the agency. In such cases, the request will not be considered under the Official Information Act but rather in accordance with the agency's policy on responding to general correspondence.