BUDDLEFINDLAY

# Official Information Act update

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6 September 2017

In recent months there has been increased media commentary (and some criticism) about how agencies and Ministers deal with requests under the Official Information Act 1982 (OIA). The Ombudsmen have been focusing on clearing a significant backlog of complaints, and on providing proactive guidance to agencies to encourage compliance with the OIA. In this update we summarise some of the topics on which the Ombudsmen have recently provided guidance, and provide tips on key OIA requirements that create issues for agencies.

## Recognise when Part 4 of the OIA applies to a request

When an agency receives an OIA request, one of the first things it should consider is whether the request is required to be dealt with under Part 2 or Part 4 of the OIA (or, if an individual requests information about themselves, under the Privacy Act 1993). Most public sector agencies are familiar with Part 2 of the OIA. Part 2 includes sections 6 and 9, which set out conclusive and other reasons for withholding information, and section 18, which sets out administrative reasons for refusing requests.

However, those provisions do not apply to a request by an organisation (eg a company) for information about itself. Part 4 of the OIA applies to such requests. This means they can be refused only if one of the withholding grounds in section 27 of the OIA applies. Those withholding grounds are similar to the withholding grounds in the Privacy Act, and are much more limited than those set out in sections 6 and 9. It is a common mistake for an agency to withhold information for a reason not allowed under Part 4 as a result of failing to recognise that the request must be dealt with under that Part. The Ombudsman has published guidelines that provide further information on Part 4 requests.

## When you can treat a clarified or amended OIA request as a new request

Agencies often receive unclear requests for information, and seek to clarify the scope of such requests with the requester. The OIA was amended in 2015 to provide that, if an agency seeks an amendment to, or a clarification of, a request, and the request is amended or clarified by the requester, the amended/clarified request may be treated as a new request that replaces the original request. That means that the timeframe for responding to the request begins from the date of the new request, giving the agency more time to respond. However, this applies only if the agency seeks the amendment or clarification within seven working days of receiving the request. Agencies should make sure they factor the seven working day timeframe into their OIA processes.

## The Ombudsmen's approach to OIA delays

The Ombudsmen have formalised their approach to resolving complaints that allege that an agency has not responded to a request within 20 working days, as set out in new guidelines. If the Ombudsman receives a "delay" complaint, it will contact the agency to establish if there has in fact been a delay. If the agency then confirms, within five working days, that it has communicated a decision to the requester, the complaint will not be investigated further. Otherwise, the Ombudsman will commence a formal investigation. Once the Ombudsman has formed a provisional opinion on the complaint, the agency will have two weeks to comment. If the agency acknowledges the delay, and communicates its decision on the request to the requester within those two weeks, the Ombudsman will discontinue its investigation. However, if no decision is communicated to the requester within that two-week period, the Ombudsman will form a final opinion and consider making recommendations. This approach is intended to encourage quick action by agencies when delays have occurred, and focus Ombudsmen's resources on more complex complaints.

## Know what you can and can't charge for when you make information available

Agencies may, in some circumstances, charge requesters for making information available. In June this year, the Ombudsman released new guidelines to charging for official information. The guide provides that agencies can impose a reasonable charge to recover some of the costs of actually making the information available, if responding will significantly impact on the agency's ability to carry out its other operations, requires "substantial collation or research", or if the requester has previously made a large volume of time-consuming requests without good reason (eg they are a journalist and would be expected to make a lot of requests).

However, an agency may only charge for the supply of official information once a decision to release the information has

been made. So, while an agency can charge for labour (eg costs associated with search and retrieval, collation, research, and editing) and materials (eg photocopying costs), it can only do so for costs incurred once the agency has decided to release the information. An agency cannot charge for work done in deciding whether to grant a request (eg reading and reviewing the documents in order to make a decision, or seeking legal advice). The guide also states that agencies cannot charge for searching/retrieving information that is not easily available because of administrative inefficiencies or poor record-keeping, or for time spent briefing a Minister or formatting information in a way preferred by the agency but not requested by the requester.

## Know when you can rely on substantial collation and research

Section 18(f) of the OIA provides that a request may be refused if the information cannot be made available without substantial collation or research. The Ombudsman released guidelines in February this year on how to interpret and apply section 18(f). The guidance states that collation and research can involve identifying, searching, retrieving, extracting, and assembling information, and determining whether the agency holds information. Collation and research can also include reading, reviewing, and consulting on the information, but only to the extent necessary to find out what has been requested and to bring it together. However, time spent making a decision on the request, including consulting with affected parties, is not "collation and research".

The OIA imposes obligations on agencies considering refusing a request under section 18(f). It requires an agency to consider whether consulting with the requester (section 18B), or setting a charge or extending the timeframe for responding (section 18A) would assist the requester to make the request in a form that would not require substantial coalition or research. Any agency refusing a request under section 18(f) must consider the above options (and comply with its obligations under section 19 of the OIA, including by giving its reasons for refusing the request).

## Documents in draft are subject to the OIA

We are often asked by agencies whether they are required to release draft documents under the OIA. The definition of "official information" in the OIA is broad, in that it means any information held by an agency, including draft documents. Agencies are often concerned about releasing draft documents, particularly when they relate to decisions that have not yet been made or information that is not publicly known. In September 2014, the States Services Commission released guidelines on OIA requests for draft reports, correspondence, and advice.

The guidance explains that draft documents are official information and are subject to the OIA, but acknowledges that there are often reasons to withhold draft documents. For example, the scope of the request may not include a draft document, or one of the withholding grounds may apply. For example, the guidelines say it may be possible to withhold information under section 9(2)(f)(iv) to maintain the confidentiality of advice tendered by Ministers or officials, if there is a concern that releasing the information would interfere with Ministers' ability to properly consider advice or information. The guidelines also record that, while agencies can refuse a request for information contained in a draft document because it is, or will soon be, publicly available under section 18(d), there must be some certainty and imminence as to when the final document will be published.

## New guide and model protocol for dealing with OIA requests involving Ministers

The Ombudsman has recently released guidelines on dealing with OIA requests involving Ministers, and a model protocol on dealing with OIA requests involving Ministers. The OIA places separate decision-making responsibility on Ministers and the agencies they are accountable for. Agencies that receive OIA requests are responsible for deciding on a response, unless that responsibility is transferred to the Minister. However, Ministers can have legitimate interests in OIA requests received by agencies. The guide recognise three mechanisms for dealing with OIA requests involving Ministers:

- Transferring the request to the Minister under section 14 of the OIA
- Notifying a Minister of a decision the agency has made about a request, which may be particularly important if there may be public or political commentary on the information
- Consulting the Minister on the request.

The guide recognises that consultation is a discretion under the OIA that must be exercised reasonably, but would be appropriate if an agency needs the Minister's input in order to make a proper decision on a request. Agencies consulting a Minister must ensure they will be able to respond within 20 working days while still giving the Minister a reasonable period to provide input. Consultation is not a negotiation, but rather involves good faith and open-minded consideration of the Minister's input. Importantly, the final decision on a request must be made by the agency – not the Minister.

## Information must be collated and reviewed before you refuse to provide it

In 2015 the High Court confirmed that, if an agency receives an OIA request, it must collate and review the information requested before it can rely on a withholding ground to refuse to provide the information. Professor Kelsey requested a variety of information about the Trans-Pacific Partnership Agreement from the Minister of Trade in January 2015. The Minister refused her request on a number of grounds, including that releasing the information would prejudice

international relations and seriously damage the economy of New Zealand by prematurely disclosing economic or financial policies. The Minister stated that he did not review or assess individual documents because he understood the nature of the documents and believed they would be of utmost sensitivity and could be properly withheld.

After the then Chief Ombudsman endorsed the Minister's decision not to release most of the information requested, Professor Kelsey (and others) challenged the Minister's decision by judicial review. One ground of review was that the Minister erred in law by relying on the advice of officials to reject the request on a "blanket basis". The Court found in favour of Professor Kelsey, holding that the OIA requires Ministers to assess each piece of information requested that is held against the criteria in the OIA for withholding information before a request can be refused. The Court also held that the genuine administrative challenges associated with complying with the OIA do not entitle a Minister or agency to circumvent their duties under the OIA. The Court directed the Minister to reconsider his decision requiring that officials assess each piece of information requested by Professor Kelsey held by the Minister (and the Ministry of Foreign Affairs and Trade), against the criteria in the OIA for withholding information. Any agency responding to an OIA request will need to make sure it assesses information before relying on a withholding ground – even if the agency is sure that a withholding ground is likely to apply.

## Officials' names should be released

When releasing information under the OIA, agencies are often keen to withhold the names of staff members under section 9(2)(a) in order to protect their privacy. However, the Ombudsman has previously determined that the names of officials should, in principle, be made available when requested. In this case the Ombudsman acknowledged the Privacy Commissioner's view that more junior staff members "generally would be entitled to a degree of anonymity". However, the Ombudsman concluded that it was not necessary to withhold the identity of staff members to protect their privacy, and that there is a strong public interest in releasing information to ensure openness and transparency in decision-making.

While it may be appropriate to withhold some personal staff details such as personal cellphone numbers, agencies should take the view that staff names in emails, letters, and documents requested under the OIA will be released unless there is a strong privacy interest that outweighs the need to ensure transparency. If agencies are worried about harassment or threats to staff members, section 9(2)(g) allows information to be withheld to maintain the effective conduct of public affairs through the protection of officers and employees from improper pressure or harassment. However, this withholding ground is not often relied on as the Ombudsman has set a high threshold (there must be a reasonable likelihood of improper pressure or harassment so serious that it will place the effective conduct of public affairs at risk).


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