

Requests for reasons for a decision or recommendation

A guide to section 23 of the OIA and section 22 of the LGOIMA

This is a guide to requests made under [section 23](#) of the Official Information Act (OIA) and [section 22](#) of the Local Government Official Information and Meetings Act (LGOIMA).

*For the sake of simplicity and given that section 23 of the OIA and section 22 of the LGOIMA are virtually identical, these requests are referred to in short in this guide as ‘**section 23 requests**’. Any reference to section 23 should therefore be read also as a reference to section 22 of the LGOIMA.*

Section 23 applies to requests for a particular type of information—the reasons for a decision which affects the requester personally. Such requests need to be considered within the special code that this section creates.

Section 23 is similar to reasons provisions in found in Australian legislation. Guidance published by the Australian Administrative Review Council has been helpful in preparing this guide.

This guide is published under the authority of the [Ombudsmen Rules 1989](#).

Contents

What is a section 23 request?	3
Why have a right of access to reasons for decisions?	3
Who can make a section 23 request?	4
Under the OIA	5
Under the LGOIMA	5
How to make or recognise a section 23 request	5
What is a ‘ <i>decision or recommendation</i> ’?	6
What does ‘ <i>in respect of</i> ’ the requester mean?	7
What does in the requester’s ‘ <i>personal capacity</i> ’ mean?	7
What is a ‘ <i>reasonable time</i> ’?	7
Processing requirements	8
How to answer a section 23 request	9
What are ‘ <i>the findings on material issues of fact</i> ’?	9
What is ‘ <i>a reference to the information on which the findings were based</i> ’?	10
What are ‘ <i>the reasons for the decision or recommendation</i> ’?	10
Format, style and length	11
Format	11
Style	12
Length	12
What if the decision or recommendation was wrong?	12
Reasons for refusing section 23 requests	14
Applicable withholding grounds	14
Exceptions to the duty to refer to the information on which findings were based	16
Evaluative material	16
Prejudice to the physical or mental health of a natural person	19
Contrary to the interests of persons under 16	19
Prejudice to the safe custody or rehabilitation of an offender or detainee	19
What if a requester is unhappy with the decision made on their section 23 request?	19
Further guidance	20
Appendix 1. Example statements of reasons	21
Example 1	21
Example 2	22

What is a section 23 request?

A [section 23](#) request is one for a statement of the reasons why an agency made a decision or recommendation in respect of the requester. This section is found in [Part 3](#) of the legislation. Ordinary requests for official information are considered under [Part 2](#).

Section 23 provides a **right of access** to a statement of reasons on request made within ‘a reasonable time’ of the decision or recommendation.

Section 23 requests are different from ordinary official information requests because the section doesn’t just enable access to information that is already **held**. It imposes a duty on agencies to **create** a statement of the reasons why a decision was made.

Why have a right of access to reasons for decisions?

Section 23 allows people to better understand why agencies have taken the decisions that affect them personally. This can help them to accept the decisions, or know whether to challenge them. Having to provide reasons can also help to improve the decision making process by encouraging decision makers to reflect more carefully on their task, and be more diligent in their decision making. The availability of reasons can also assist agencies to identify relevant principles from previous decisions, and create standards to inform future decisions.

The courts have recognised the following six-point rationale for providing reasons for decisions:¹

1. *The discipline on the decision maker itself: it is commonplace that preliminary views can be changed when the process of thinking through the reasons and writing them down is undertaken.*
2. *Assurance to those affected that their evidence and arguments have been assessed in accordance with the law, a matter relating to the next two points.*
3. *Assistance to those affected in deciding whether to challenge the decision, for instance by appeal, review or other complaint mechanism—since the statement of reasons may satisfy them that they have no real prospect of a successful challenge.*
4. *If a review is mounted, assistance to the parties, counsel and deciders engaged in the review.*
5. *The establishment, where appropriate, of a body of precedent or at least of guidance, governing or affecting the exercise of the particular power.*

¹ *Singh v Chief Executive Officer, Department of Labour* [1999] NZAR 258 at 262–263.

6. Assurance to the wider public of the legitimacy, openness and accessibility of the exercise of the power—an aspect of accountability.

Being able to provide reasons for decisions is **part of good decision making** generally (see our guide to [Good decision making](#)). It's good administrative practice to adequately record and document decisions at the time they are made. This makes it easier to provide a statement of reasons if one is later requested.

Related provisions

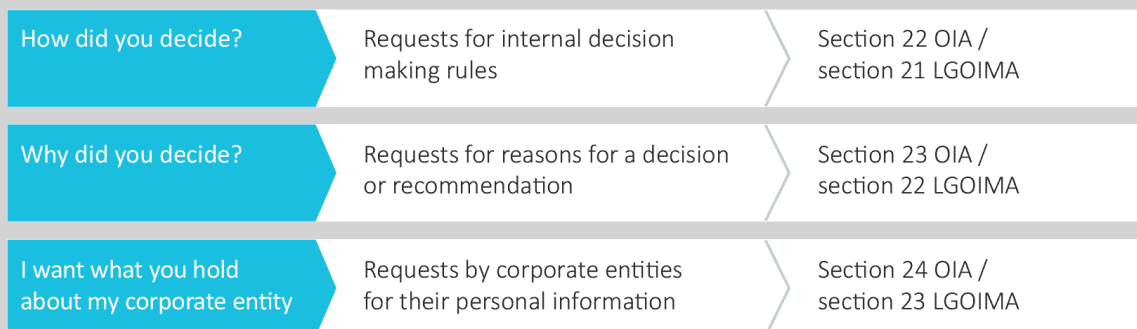
Section 23 complements other provisions in the legislation that enable:

- people and corporate entities to request the **internal rules** that agencies use to make decisions about them;² and
- corporate entities to request **personal information** about themselves.³

These provisions also deal with special types of information to which people have a right of access.

Like section 23, these provisions are about ensuring transparent and accountable decision making.

Here's a diagram to help you figure out which rules apply to which requests.



Who can make a section 23 request?

The eligibility requirements are different under the OIA and LGOIMA.

² See s 22 OIA and s 21 LGOIMA. For more information see [Requests for internal decision making rules](#).

³ See s 24 OIA and s 23 LGOIMA. Note, individual natural persons can request access to personal information about themselves under the Privacy Act. For more information see [Requests by corporate entities for their personal information](#).

Under the OIA

Requests for statements of reasons can **only** be made by:⁴

- New Zealand citizens or permanent residents;
- people in New Zealand; or
- corporate entities (that is, companies or incorporated societies) which are either incorporated in New Zealand or have a place of business here.

Under the LGOIMA

Requests for statements of reasons can be made by **any person** (individual or corporate entity), whether in New Zealand or not.⁵

How to make or recognise a section 23 request

There is no special way to make a section 23 request. Requests can be made orally, or in writing.

It is a good idea for requesters to refer to section 23 (or section 22 of the LGOIMA) when they make their request, so there can be no doubt that they are seeking a written statement of reasons. However, there is no requirement to do so. Agencies ought to be aware of their obligation to supply reasons when requested. They do not need to be referred to section 23. Nor should a person be denied their right to access reasons because they didn't know of it, or only knew of it vaguely, and so made the request without referring to section 23 explicitly.

Having said that, it must be **more than just a request for information relating to the decision or recommendation**, which would need to be considered under Part 2 of the OIA or LGOIMA or the Privacy Act 1993. It must be reasonably clear from the terms of the request that what the requester is seeking are the **reasons why** a decision or recommendation has been made in respect of them.

Section 23 will apply when:

- an agency has made [a 'decision or recommendation'](#);
- ['in respect of'](#) the requester;
- in their ['personal capacity'](#); and
- the requester asks the agency why that decision was made, within a ['reasonable time'](#).

⁴ See s 23(2) OIA.

⁵ See s 22(1) LGOIMA.

If it is unclear whether the requester is seeking a written statement of reasons, the agency should consider consulting them in order to clarify the request. This is in accordance with the agency's duty to provide reasonable assistance to the requester to make their request.⁶

Example scenarios in which a person might make a section 23 request include:

- a requester wants to know why an agency rejected their application for appointment or promotion;
- a requester wants to know why an agency decided not to renew their contract;
- a requester wants to know why an agency declined their application for a permit, grant or benefit.

Requesters may seek a statement of reasons under urgency, provided they give reasons.⁷

What is a 'decision or recommendation'?

The OIA and LGOIMA do not define the types of decisions or recommendations that give rise to a right to request reasons. Any decision or recommendation made in respect of the requester and affecting them personally will give rise to such a right.

The plain meaning of '*decision*' is a conclusion or resolution reached after consideration, and the plain meaning of '*recommendation*' is a suggestion or proposal to a decision maker as to a preferred conclusion or resolution.⁸

It follows that the issue requiring determination must have been **considered** by the decision-maker or the person making the recommendation, and a conclusion or resolution reached or proposed. The section 23 right does not arise in respect of issues that have not been actively considered. Nor does it arise in respect of the administrative steps taken toward reaching a decision or recommendation (for instance, where a decision maker seeks extra information in order to inform their decision).

Case study 386217 (2014)—What is a 'decision'?

A requester sought the reasons for ignoring his telephone messages, and (allegedly) not meeting New Zealand Bill of Rights Act obligations toward him. He complained to the Ombudsman when they were not provided. While he was perfectly entitled to ask for the reasons, it was not clear that this was a situation in which the requester could exercise

⁶ The duty to provide reasonable assistance in s 13 of the OIA (s 11 of the LGOIMA) is incorporated by s 23(3) of the OIA (s 22(2) of the LGOIMA).

⁷ The ability to seek urgency in s 12(3) of the OIA (s 10(3) of the LGOIMA) is incorporated by s 23(3) of the OIA (s 22(2) of the LGOIMA). For more information about responding to urgent requests, see [The OIA for Ministers and agencies](#) and [The LGOIMA for local government agencies](#).

⁸ Based on definitions in the Oxford Dictionary, retrieved on 21 January 2016 from www.oxforddictionaries.com.

his rights under section 23 of the OIA. It was not apparent that these issues had been actively considered and decided upon by the agency. The Ombudsman declined to investigate the complaint.

What does *'in respect of'* the requester mean?

'In respect of' means the decision or recommendation must be made **with reference to the requester** and not some other person or class of persons more generally. There may be situations when a requester is particularly keen to know why a decision was taken in respect of another person. For instance, a victim of crime is often interested in knowing the reasons why the enforcing authority decided not to prosecute a suspected offender. They may reasonably feel this decision impacts on them in a very significant way. However, the decision whether or not to prosecute is a decision made *'in respect of'* the alleged offender, not the victim. In this case, the victim's right to access information about the decision whether or not to prosecute can only be governed by Part 2 of the OIA or LGOIMA (and possibly the Privacy Act), not section 23.

What does in the requester's *'personal capacity'* mean?

'In their personal capacity' means the decision or recommendation must directly affect the rights and interests of the requester. The interests must be more than those of a general member of the public. As the committee that recommended the enactment of the OIA noted, section 23 *'does not apply in respect of decisions on policies or public issues'* more generally.⁹

What is a *'reasonable time'*?

As noted above, requests must be made within a *'reasonable time'*. What constitutes a *'reasonable time'* will depend on the circumstances.

The right to request a statement of reasons does not last forever. Requesters must exercise that right expeditiously. The reason for the time limitation is logical. The more time has passed since the decision or recommendation, the harder it will be for the decision maker to accurately recall and create a statement of reasons for the decision.

However, section 23 rights and the duty to provide reasons for decisions are important. Agencies shouldn't invoke the time limitation to avoid compliance with section 23 without good reason. Agencies should consider the following.

- What is the length of the delay? Is the delay so significant as to suggest the request was not made within a reasonable time?
- What are the reasons for the delay? Are they plausible and/or reasonable?

⁹ Committee on Official Information, *Towards Open Government: Supplementary Report* (1981) vol 2 at 77.

- Would the delay in any way prejudice the agency if it was required to respond, for example, because the person who made the decision has left?

If an agency is considering refusing a section 23 request on the grounds that it has not been made within a *'reasonable time'*, it is good practice to consider giving the requester an opportunity to comment before confirming any decision to that effect. The agency could also consider providing access to any information that is still held about the decision or recommendation, or facilitating a request for that information under Part 2 of the OIA or LGOIMA, or the Privacy Act.

Processing requirements

The processing requirements for section 23 requests are largely the same as they are for ordinary official information requests under Part 2 of the OIA or LGOIMA.

Agencies are still required to:¹⁰

- provide reasonable assistance to a requester to make a request for reasons;
- transfer a request if the decision or recommendation was made by another agency;
- make and communicate the decision on a request for reasons as soon as reasonably practicable and no later than 20 working days after the day it was received;
- notify any extension of this maximum time period within 20 working days;
- provide reasons for refusing a request, and tell the requester of their right to complain to the Ombudsman.

Agencies are also permitted to charge for the supply of reasons under section 23.¹¹ However, if an agency is following good administrative practice and adequately recording and documenting the decision making process at the time a decision is made, it should not be unduly onerous to provide a statement of reasons on request (see our guide to [Good decision making](#)). In addition, agencies must consider any factors that warrant waiver or remission of the charge in the public interest. Section 23 recognises that there is a strong public interest in people being able to access the reasons for a decision which affects them personally. These considerations may make it unreasonable to attempt to fully recover the cost of supplying a requester with a statement of reasons.

For more information about the requirements for processing official information requests see [The OIA for Ministers and agencies](#) and [The LGOIMA for local government agencies](#).

¹⁰ Section 23(3) of the OIA provides that ss 12(3) (urgency), 13 (reasonable assistance), 14 (transfers), 15 (decisions), 15A (extensions), and 19 (reason for refusal to be given) still apply. Section 22(2) of the LGOIMA provides that ss 10(3) (urgency), 11 (reasonable assistance), 12 (transfers), 13 (decisions), 14 (extensions), and 18 (reason for refusal to be given) still apply.

¹¹ Section 15(1A) of the OIA applies by virtue of s 23(3), and s 13(1A) of the LGOIMA applies by virtue of s 22(2).

How to answer a section 23 request

There is no set template or blueprint for answering a section 23 request.

A section 23 statement must be **written**, and include:

- the [findings on material issues of fact](#);
- a reference to the [information on which the findings were based](#) (with limited exceptions—see [Exceptions to the duty to refer to the information on which findings were based](#)); and
- the [reasons for the decision or recommendation](#).

These things don't necessarily have to be stated separately, though this can help to demonstrate that section 23 has been fully met in all respects. Collectively they must **enable the requester to understand why the decision or recommendation was taken**. As the Court of Appeal has said, *'the reasons must be proper, adequate ones dealing with the point in contention'*.¹² If the reader is likely to be left guessing as to why the decision maker reached their decision, the statement of reasons may not be good enough.

A possible format for a section 23 statement is found below (see [Format](#)), and example statements are included as an [appendix](#) to this guide.

What are *'the findings on material issues of fact'*?

An agency must state its findings on all material issues of fact. A material fact is one that is central to the decision—that can affect its outcome. Consequently, the findings on material facts are those that support the decision, based on the consideration of all relevant evidence. If a fact is relied upon it must be set out. If a matter is considered then the findings of fact in relation to it must be set out.

The significance of the fact might be indicated by the legislation or policy governing the decision, for example *'X is to be considered'*. Alternatively, it may be inferred from the subject matter or scope of the legislation or policy.

Sometimes a fact is established directly by the evidence—for example, a person's age or nationality. Sometimes a material fact will be inferred from other facts—for example, a finding that a person was living in a relationship in the nature of a marriage or civil union may be inferred from things such as their living arrangements or personal relationships. When a finding of fact is inferred, the statement of reasons should set out the primary facts and the process of inference to show how the decision was reached.

¹² *Singh v Chief Executive Officer, Department of Labour* [1999] NZAR 258 at 262–263.

Findings of fact can be distinguished from subjective judgments or opinions. Where a subjective judgment or opinion is based on facts, those underlying facts should be set out, as well as the judgment or opinion on which they were based.

If an agency does not set out its findings on a fact, the inference is that fact was immaterial to the decision making process.

What is ‘a reference to the information on which the findings were based’?

An agency must refer to the information on which the findings of fact are based. It is just a **reference** to the information that is required, not an actual copy of the information. However, the information must be described in a way that makes it readily identifiable—for instance, ‘*the medical report from Dr X dated Y*’.

An agency could still choose to provide a copy of the information on which the findings were based, if the requester does not already have it, on the basis that it would open to the requester to seek it under Part 2 of the OIA or LGOIMA or the Privacy Act in any case.

It is not sufficient simply to list all the documents that were before the decision maker. The requirement is to identify the information **on which the findings were based**—that is, the information that was considered relevant, credible and significant in relation to each material finding of fact. The point of this requirement is to demonstrate that each finding of fact is rationally based on evidence. If the evidence was conflicting, the statement should say which evidence was preferred and why.

In certain circumstances, agencies are exempt from the duty to give a reference to the information on which the findings were based (see [Exceptions to the duty to refer to the information on which findings were based](#)).

What are ‘the reasons for the decision or recommendation’?

An agency must provide the reasons for the decision or recommendation. This means the actual and real reasons. Preparing a statement of reasons is not an opportunity to rewrite history with the benefit of hindsight.

Every decision or recommendation should be capable of a logical explanation. A section 23 statement must contain all steps of reasoning, linking the facts to the decision or recommendation, so that the requester can understand how it was reached.

A section 23 statement must go further than stating conclusions—an agency must give the real reasons for those conclusions. Agencies should include any relevant background or context to the decision making process, including legislation, policies or procedures, so that the requester can fully understand the reasons and not have to guess at gaps.

Adopting reports and recommendations

Many decisions will be made by adopting the recommendations of others. Such recommendations will often be in the form of a report. Simply saying ‘*my decision was based on X report*’ or providing a copy of X report is not sufficient.

In all cases, the three required components of a section 23 statement must be supplied—ie, the findings on material issues of fact, a reference to the information on which the findings were based, and the reasons for the decision.

To the extent that these requirements are **fully** met by the report, agencies may choose to provide a copy of it, along with an explanation that the rationale for the decision contained in the report has been adopted by the decision maker. If the report does not fully encapsulate the decision maker’s reasoning process (for example, because the decision maker took into account additional information, or disagreed with any part of the report), further explanation will need to be provided.

Often reports that form the basis of decisions will be legally privileged (that is, they are prepared by a lawyer for the purpose of advising their client). Legal professional privilege is not a permissible reason for refusing a section 23 request. While the report **itself** may justifiably be withheld in order to maintain legal professional privilege,¹³ the advice in the report, insofar as it contains findings and reasons that have been adopted by the decision maker, will still need to be supplied.

Format, style and length

A statement of reasons must be provided in ‘*written*’ form. The format, style and length of a section 23 statement will depend on the nature of the decision or recommendation and the intended recipient.

Agencies should remember that the reasons are those of the **decision maker**, so although someone else may prepare a draft statement, the draft should not be adopted uncritically by the decision maker.

Format

In addition to the specific requirements discussed above, a good section 23 statement will include a clear and comprehensive explanation of:

- the issue to be resolved or answered by the decision;
- the decision or recommendation that has been made;

¹³ See s 9(2)(h) OIA and s 7(2)(g) LGOIMA.

- the date of the decision or recommendation (and the date it takes effect if this is different);
- the name and position of the decision maker, as well as their legal authority to make the decision;
- a reference to any relevant legislative, policy or procedural requirements for the decision or recommendation and how these were met;
- a reference to the evidence considered and the key facts taken into account;
- an explanation of why the decision was made; and
- details of any rights of review or appeal from the decision, including time limits.

Style

Section 23 statements should be written in a style that is understandable to the requester. Agencies should:

- use plain English;
- keep sentences short and to the point;
- avoid generalities and vague terms;
- avoid technical terms and abbreviations that are difficult to understand;
- do more than just quote the relevant legal standards and cases—explain the law and how it has been applied;
- develop a logical structure and use headings to guide the way; and
- try to accommodate any special language or other needs of the requester.

Length

The length of a section 23 statement will depend on the nature, importance and complexity of the decision. For a simple decision a page or two might suffice; whereas a decision with complex facts or multiple considerations might need to be longer. See [case study 178097](#) below.

What if the decision or recommendation was wrong?

Preparing a statement of reasons will often prompt a decision maker to review the decision and information on which it was based. If in doing so it appears the decision or recommendation may have been wrong, or a different one may have been preferred, an agency should consider whether it can lawfully withdraw the original decision and make a new one. If changing the decision is possible and would satisfy the requester, it would be a waste of time to prepare a statement of reasons in respect of a decision that, on further reflection, is indefensible or undesirable.

Case study 173933 (2006)—An inadequate statement of reasons

This case study relates to a complaint by one person who had applied unsuccessfully for two nursing positions (the applicant). The applicant requested the DHB's reasons for both decisions not to appoint her.

The **first** statement of reasons explained that the interview panel:

- considered the candidates' CVs and answers to questions; and
- selected a preferred candidate who ranked higher than the applicant in terms of being able to meet the requirements and competencies of the position.

The Ombudsman noted that certain information about the decision could be **inferred** from the supporting material supplied to the applicant, for example, the notes of the interview panel. However, this was not good enough.

Section 23 requires the agency to incorporate a certain level of detail and specificity in the statement of reasons itself. What had been supplied fell well short of meeting the agency's obligations in this respect.

The DHB had not explained the specific competencies for which the applicant was ranked lower than the preferred candidate, or the basis for how those rankings were determined. The Ombudsman required a further statement to be supplied providing this information.

The statement of reasons that was supplied following the Ombudsman's investigation is included in the [appendix](#) to this guide, as an example of a section 23 statement that was considered to be adequate.

The **second** statement of reasons is discussed in relation to evaluative material below (see [case study 173933](#)).

Case study 178097 (2010)—How much detail does a section 23 statement require?

A requester sought the reasons why they were not reappointed as a specialist assessor under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. This decision was made by the Director-General of Health on the recommendation of a review panel established by the Ministry of Health (the Ministry).

In response, the Ministry explained that the requester was found not suitable for reappointment based on an assessment of his exemplar reports. The reasons for this were that some reports demonstrated a poor understanding of the role; some risk assessments were inadequate for purpose; some psychometrics were inaccurate; and some language was confusing and deterministic.

The requester complained that the Ministry should have to specify which reports

demonstrated a poor understanding of the role; which risk assessments were inadequate for purpose; which psychometrics were inaccurate; and which language was confusing and deterministic. The Ombudsman did not agree that the Ministry's section 23 statement was inadequate for this reason.

The extent of detail required to be provided in response to a section 23 request will depend on the circumstances of the particular case. In general, a statutory requirement to state reasons must explain why the decision was reached. Significant detail may be required where a decision or recommendation requires the application of law and / or policy to the particular facts of a case, and the consideration of submissions and evidence provided by concerned parties.

In this case, the decision regarding the requester's suitability for appointment was based solely on an assessment of his exemplar reports. Section 23 required the Ministry to explain the conclusion it reached on the requester's suitability based on its consideration of the reports. It was not obliged to justify, or further substantiate, that conclusion by reference to a detailed analysis of the reports.

A requester may still have questions about a decision after they receive the agency's statement of reasons, but that does not mean the statement of reasons is inadequate. An agency is unlikely to be able to anticipate precisely what information a requester will desire in order to explain its decision to that person's satisfaction. Nor does section 23 oblige it to do this. Further information can be sought, provided it is held, under Part 2 of the OIA or LGOIMA, or the Privacy Act.

This case is discussed further in relation to evaluative material below (see [case study 178097](#)).

Reasons for refusing section 23 requests

Because there is a **right** of access to a section 23 statement, the reasons for refusing such requests are more limited. Some of the withholding grounds in Part 2 of the OIA and LGOIMA are applicable. In addition, there are certain circumstances in which agencies are exempt from the duty to give a reference to the information on which the findings were based.

Applicable withholding grounds

Section 23 is subject to the following withholding grounds found in Part 2 of the legislation:¹⁴

- security, defence and international relations (**OIA only**);¹⁵

¹⁴ See s 23(1) OIA and s 22(1) LGOIMA.

¹⁵ See s 6(a) OIA.

- confidential information provided by another country or international organisation (**OIA only**);¹⁶
- maintenance of the law;¹⁷
- personal safety;¹⁸ and
- disclosure of a trade secret / unreasonable prejudice to the commercial position of a third party (subject to the public interest test).¹⁹

This means an agency can refuse a request for a statement of reasons, or refuse to supply some of the information that would be included in a statement of reasons, where there is ‘*good reason*’ under these withholding grounds to do so.

The right of access to a statement of reasons in section 23 is also subject to section 10 of the OIA (section 8 of the LGOIMA).²⁰ This means an agency may refuse to **confirm or deny** the existence or non-existence of information if that would be likely to prejudice the interests protected by the withholding grounds in sections 6, 7 or 9(2)(b) of the OIA (sections 6 or 7(2)(b) of the LGOIMA).

For further guidance on the withholding grounds see our [official information legislation guides](#).

Withholding grounds that cannot apply

It’s important to note that some of the common Part 2 withholding grounds, for example, free and frank opinions²¹ and legal professional privilege,²² do **not** provide a justifiable reason for refusing a section 23 request. Agencies should not expect to be able to withhold any information that would form part of a section 23 statement on these grounds. Where, for instance, legal advice has been adopted and relied on in reaching a decision that affects the requester personally, information about the reasons for doing so will still need to be supplied (see [Adopting reports and recommendations](#)).

¹⁶ See s 6(b) OIA.

¹⁷ See s 6(c) OIA and s 6(a) LGOIMA.

¹⁸ See s 6(d) OIA and s 6(b) LGOIMA.

¹⁹ See s 9(2)(b) OIA and s 7(2)(b) LGOIMA.

²⁰ See s 23(1) OIA and s 22(1) LGOIMA.

²¹ See s 9(2)(g)(i) OIA and s 7(2)(f)(i) LGOIMA.

²² See s 9(2)(h) OIA and s 7(2)(g) LGOIMA.

Case study W43130 (2000)—‘We’ve been through this already’

A requester sought the reasons why the Department of Conservation (the Department) decided not to grant his application to be an honorary representative. The Department maintained it had given its reasons previously, in writing and verbally, on many occasions. The Ombudsman considered the relevant correspondence, and agreed it did include some commentary on the reasons for the decision to decline the application. However, that information was not sufficient to meet the requirements of section 23. When a section 23 request is made, the requester has a statutory right to be provided with the information irrespective of previous correspondence, or the agency’s view that the requester is already aware of the reasoning that led to the decision.

Exceptions to the duty to refer to the information on which findings were based

There are certain circumstances in which agencies are exempt from the duty to give a reference to the information on which the findings were based.

These exceptions **do not** exempt agencies from the duty to comply with section 23 in all other respects. Agencies must still provide the findings on material issues of fact and the reasons for the decision or recommendation, even if they cannot provide a reference to the information on which the findings were based (see [case study 173933](#) below).

Evaluative material

A reference to the information on which the findings were based does not have to be given if it would involve disclosure of ‘*evaluative material*’ (or information that would identify the supplier of that material), in breach of an express or implied promise made to the supplier that this information would be held in confidence.²³

In simple terms, evaluative material is information concerning what the supplier thinks about the requester—their judgment or opinion as to whether the requester is eligible or qualified to receive an award of some sort.

Agencies need to be able to get this information in order to make good decisions about employment and the awarding of contracts and other benefits. They may be unable to get such information if they cannot give and honour a promise of confidentiality to the person who supplies it.

It is important to remember that we are talking about release of a **reference** to the information on which any findings of fact were based, not release of the information itself. Agencies must therefore be satisfied that simply referring to the information on which the findings of fact

²³ See s 23(2A)(a) OIA and s 22(1A)(a) LGOIMA.

were based would in itself breach a promise of confidentiality to the supplier of the information.

There are two issues to consider.

Is the information evaluative material, or information that would identify the supplier of that material?

'*Evaluative material*' means evaluative or opinion material compiled solely for the purpose of:²⁴

- determining the suitability, eligibility or qualifications of the requester for employment, promotion or removal from office, or the awarding of contracts, awards or other benefits;
- determining whether any contract, award or benefit should be continued, modified or cancelled; or
- deciding whether to insure any person or property or to continue or renew the insurance of any person or property.

Would release breach an express or implied promise that was made to the supplier that the material and/or their identity would be held in confidence?

A promise must have been made to the supplier prior to or at the time the material was supplied that it and/or the identity of the supplier would be kept confidential. It must be evident that the supplier relied on this promise of confidentiality. These things are easier to establish when the promise of confidentiality was expressly recorded. However, they may also be implied from the circumstances where it is clear that the supplier must have expected confidentiality, and would not otherwise have been induced to supply the information.

Case study 173933 (2006)—Evaluative material exemption does not apply to findings of fact and reasons

This case study relates to a complaint by one person who had applied unsuccessfully for two nursing positions (the applicant). The applicant requested the DHB's reasons for both decisions not to appoint her.

The first statement of reasons is discussed above (see [case study 173933](#)). The second statement of reasons explained that the interview panel:

- took into account the candidates' CVs and answers to questions, and information supplied by the applicant's referees; and
- decided that the applicant did not meet the competencies outlined in the job description.

²⁴ See s 23(2B) OIA and s 22(1B) LGOIMA.

The agency did not want to specify which competencies were not met out of concern that this would identify the referees.

The Ombudsman accepted that the identities of the referees and the material they supplied were protected by the evaluative material exemption. However, specifying which competencies were not met comprised part of the findings on material issues of fact and the reasons for the decision. That information is not subject to the evaluative material exemption, and still needs to be supplied regardless of whether a referee could be identified as a result. The obligation to honour promises of confidentiality to referees does not override the obligation of public sector bodies to provide adequate explanations for their decisions to the affected parties.

The statement of reasons that was supplied following the Ombudsman's investigation is included in the [appendix](#) to this guide, as an example of a section 23 statement that adequately documented findings and reasons, while protecting the evaluative material on which those findings were based.

Case study 178097 (2010)—Evaluative material must be 'supplied' by someone else

A requester sought the reasons why they were not reappointed as a specialist assessor under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. This decision was made by the Director-General of Health on the recommendation of a review panel established by the Ministry of Health (the Ministry). Other aspects of this case are discussed above (see [case study 178097](#)).

The Ombudsman rejected the Ministry's argument that it was justified in not providing further detail of the panel's assessment because this constituted evaluative material.

Section 23(2A) of the OIA only protects evaluative material that has been 'supplied' to an agency subject to a promise of confidentiality. To 'supply' in its ordinary meaning means to 'make (something needed) available to someone' (Oxford Dictionary). In this context, it means one person (or entity) making information available to another person. It therefore assumes the provision of information by a party other than the agency itself. The rationale behind this is that other parties are under no obligation to supply evaluative material to an agency and, in many cases, they would refuse to do so unless they were promised confidentiality. So, for instance, section 23(2A) is often used to protect information supplied by external referees.

This case was different. The panel was established by the Ministry for the express purpose of assisting the Director-General to make his decision through the provision of information and advice. Members of the panel were remunerated for their time and effort. Information held by the panel was deemed to be held by the Ministry (section 2(2) of the OIA), and the panel itself was deemed to be part of the Ministry (section 2(3) of the OIA). In these circumstances, information about the panel's deliberations could not

be regarded as having been *'supplied'* to the Ministry for the purpose of section 23(2A) of the OIA.

Prejudice to the physical or mental health of a natural person

A reference to the information on which the findings were based does not have to be given if:²⁵

- the agency has consulted the requester's medical practitioner; and
- is satisfied that disclosure of information which relates to the requester's physical or mental health would be likely to prejudice their physical or mental health.

This only applies in the case of requesters who are natural persons.

Contrary to the interests of persons under 16

A reference to the information on which the findings were based does not have to be given if, in the case of a requester who is a natural person under 16, disclosure of that information would be contrary to their interests.²⁶

Prejudice to the safe custody or rehabilitation of an offender or detainee

A reference to the information on which the findings were based does not have to be given if:²⁷

- that information is in respect of a person who has been convicted of an offence or detained in custody; and
- disclosure would be likely to prejudice their safe custody or rehabilitation.

What if a requester is unhappy with the decision made on their section 23 request?

As with any other request for official information, if a requester is unhappy with the decision on their section 23 request, they can complain to the Ombudsman.

However, section 23 investigations are slightly different in that they are required to be undertaken by the Ombudsman under the Ombudsmen Act 1975, rather than the OIA or LGOIMA.²⁸ This means any recommendations by the Ombudsman will not be binding.²⁹

²⁵ See s 23(2A)(b) OIA and s 22(1A)(b) LGOIMA.

²⁶ See s 23(2A)(c) OIA and s 22(1A)(c) LGOIMA.

²⁷ See s 23(2A)(d) OIA and s 22(1A)(d) LGOIMA.

In addition to complaining to the Ombudsman, a dissatisfied requester has a concurrent right of appeal to the courts. This is also distinct from ordinary OIA and LGOIMA complaints relating to Part 2 decisions, which must be determined by the Ombudsman in the first instance.³⁰

Further guidance

[The OIA for Ministers and agencies](#) and [The LGOIMA for local government agencies](#) provide more information about processing OIA and LGOIMA requests.

Further guidance on the reasons for refusal is available [here](#).

Our website contains searchable case notes, opinions and other material, relating to past cases considered by the Ombudsmen: www.ombudsman.parliament.nz.

You can also contact our staff with any queries about section 23 requests by email info@ombudsman.parliament.nz or freephone 0800 802 602. Do so as early as possible to ensure we can answer your queries without delaying the response to a request for official information.

²⁸ See s 35(1) OIA and s 38(1) LGOIMA. Note the exception of decisions to issue s 10 notices (s 8 LGOIMA). Such decisions are investigated under the OIA or LGOIMA. See ss 35(1)(b) and 28(1)(d) of the OIA and ss 38(1) and 27(1)(d) of the LGOIMA.

²⁹ Recommendations under the Ombudsmen Act are not binding. In contrast, a public duty to comply with an Ombudsman's recommendation under the OIA or LGOIMA comes into effect 21 working days after it is made, unless vetoed by the Cabinet (under the OIA) or the local authority (under the LGOIMA); see s 32 OIA and LGOIMA.

³⁰ See s 34 OIA and s 37 LGOIMA.

Appendix 1. Example statements of reasons

Example 1

This is an example of an adequate section 23 statement that was provided following an Ombudsman's investigation (see [case study 173933](#) above).

On completion of the interview process the panel discussed the respective applicants' responses to questions asked. The applicants' responses, their CVs, and the interview notes assisted the panel to rank the applicants' in order of preference. The highest ranked candidate was selected.

Unfortunately, you were not the highest ranked applicant. The panel considered that you had not met some of the essential competencies for the position. In particular, evidence of attainment of listed generic competencies was required. Relevantly, those competencies included:

Cultural safety: Practises nursing in a manner which the client determines as being culturally safe.

To meet this requirement the applicant must:

- *recognise the Tangata Whenua of New Zealand (Maori) and the Treaty of Waitangi;*
- *consistently apply the principles of cultural safety in own nursing practice, implement cultural safety policies, and assist colleagues with these.*

And

Professional Judgement: Makes professional judgements that will enhance nursing practice.

To meet this requirement the applicant must demonstrate, among other things:

- *consistently takes responsibility for own actions and outcomes of nursing care planned and delegated, ensuring that their own practice is safe and effective.*

Following your interview the panel assessed all evidence, both verbal and documented, and determined that you had not fully met these competencies. The panel noted, in relation to cultural safety, that your manner was 'abrasive'. The interview notes also show some concern about your professional judgement in your response to the hypothetical scenario: 'All Drs responsibility — no mention of talking to the patient first'.

Further essential competencies for the position included:

- *Excellent interpersonal skills; and*
- *Professional demeanour.*

The panel commented that it had concerns about your 'manner of communication with colleagues & patients'.

The preferred candidate fully met all of the essential competencies and presented no concerns to the interview panel.

Example 2

This is an example of a section 23 statement that was provided following an Ombudsman's investigation. This statement adequately documented findings and reasons, while protecting the evaluative material on which those findings were based (see [case study 173933](#) above).

At the conclusion of the interview the panel discussed your responses to questions in conjunction with how they met the requirements and competencies of the job description.

The essential competencies required for this position, as outlined in the job description, included, among others:

- *excellent interpersonal and communication skills;*
- *ability to work in a team situation and support colleagues.*

Each applicant was discussed in comparison with the other. The discussions also focussed on the information contained in your CV. At the conclusion of this process your referees were contacted. Those enquiries into your work history returned some unsatisfactory results relevant to the essential competencies set out above. In particular there was concern regarding interpersonal skills and the manner of your relationships with other staff members.

Assessing all of this information the panel concluded that you did not fully meet some of the essential competencies outlined in the job description. For that reason your application was not successful.