

## Publicly available information

A guide to section 18(d) of the OIA and section 17(d) of the LGOIMA

*Under section 18(d) of the OIA,<sup>1</sup> agencies may refuse a request if the information is or will soon be publicly available.*

*This reflects the fact that people shouldn't need to resort to the OIA to access information that is already publicly available. It also enables agencies to refuse requests where there is a clear plan to publish the information, provided it is published soon.*

*Resort to section 18(d) should not undermine the purposes of the OIA, one of which is to increase the availability of official information. The discretion to refuse a request on this basis should be exercised reasonably, and with regard to the particular circumstances of each case.*

*This guide explains how section 18(d) applies. It includes a step-by-step work sheet, template letters, and case studies of actual complaints considered by the Ombudsman.*

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<sup>1</sup> References to section 18(d) of the OIA should also be taken as references to section 17(d) of the LGOIMA, as the wording of these provisions is identical.

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## What the Acts say

The starting point for considering any request for official information is the **principle of availability**. That is, information must be made available on request unless there is a good reason for withholding it.<sup>2</sup>

The reasons for refusal fall into three broad categories: conclusive reasons,<sup>3</sup> good reasons,<sup>4</sup> and administrative reasons.<sup>5</sup> Among the administrative reasons, section 18(d) of the OIA provides that a request may be refused if *'the information requested is or will soon be publicly available'*.

## When section 18(d) applies

Section 18(d) applies in two situations:

1. Where the requested information is already publicly available
2. Where the requested information will be publicly available soon.

## The requested information

It must be the *'information requested'* that is or will soon be publicly available.

Agencies must identify the **specific** information requested, and be satisfied that this information is or will soon be publicly available. If there is any lack of clarity about what has been requested, the agency should consult the requester.

If only some of the information requested is or will soon be publicly available, then a partial refusal may be justified. However, a decision on the remaining information that is not publicly available, or is not intended to be made publicly available, must be made.

Agencies cannot rely on section 18(d) if the publicly available information is different to what has been requested, even if it is related; or if it is in a different format. For example:

- In case [345580](#), the Ombudsman found that correspondence which summarised a court judgment was not publicly available just because the court judgment was.
- In case [A12938](#), the Ombudsman found that video footage of a meeting was not publicly available just because the minutes of that meeting were.

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<sup>2</sup> See s 5 OIA and LGOIMA.

<sup>3</sup> See ss 6 and 7 OIA and s 6 LGOIMA. *'Conclusive'* reasons are not subject to a *'public interest test'*, meaning that if they apply, there is no need to consider any countervailing public interest in release.

<sup>4</sup> See s 9 OIA and s 7 LGOIMA. *'Good'* reasons are subject to a *'public interest test'*, meaning that if they apply, agencies must consider the countervailing public interest in release.

<sup>5</sup> See s 18 OIA and s 17 LGOIMA.

- In cases [W37113](#) and [175682](#), requests for information in electronic form could not be refused because hard copies were publicly available.
- In case [413631](#), a request for a copy of the Teachers Register in CSV format could not be refused because the register was publicly available online.

## Public availability

Publicly available means available to the general public. Subject to the provisos discussed immediately below (see [Reasonableness of reliance on section 18\(d\)](#)), information will be publicly available if:

- it is freely available on a website;
- it is available for purchase (see cases [177600](#) and [305527](#));
- it is available in a public library; or
- it is available for public inspection, for example, in open access records held by Archives New Zealand (see case [343431](#)).<sup>6</sup>

## Reasonableness of reliance on section 18(d)

Resort to section 18(d) should not undermine the purposes of the OIA, one of which is to increase the availability of official information. Section 18(d) gives agencies a **discretion** to refuse a request for information that is or will soon be publicly available. Like any discretion, it must be exercised **reasonably**. This means that agencies should take into account all the relevant circumstances of the request.

Relevant circumstances when considering whether to refuse a request because the information **is publicly available** include:

- Whether the information is reasonably accessible to the requester. It may not be reasonable to rely on section 18(d) if the requester cannot access the information, for example, because they don't have internet access (see case [444073](#)), or because distance or disability prevents them from exercising a right of inspection, or because the price of access is patently excessive.
- Whether it would be administratively burdensome for the agency to supply the publicly available information to the requester. This was a relevant consideration in case [444073](#), where the Ombudsman found that the information at issue was not excessive in volume, and it would have imposed little additional administrative burden on the agency to supply it to the requester. Remember, an agency is able to charge reasonable

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<sup>6</sup> Note, restricted access records held by Archives New Zealand are not '*publicly available*' for the purpose of section 18(d). If an agency receives an OIA request for restricted access records, it must make a decision on that request in accordance with the OIA—see [s 44\(8\) Public Records Act 2005](#). The agency will need to recall the records from Archives New Zealand in order to make the decision.

reproduction costs associated with supplying publicly available information (see our [Charging](#) guide).

Relevant circumstances when considering whether to refuse a request because the information will **soon be publicly available** include:

- Whether, on an objective assessment, the requester needs the information before the planned publication date. Where there is a legitimate reason for urgency—for example, because the requester needs the information to be able to participate in a policy or decision making process on an informed basis—it may be unreasonable to delay release until the planned publication date.
- Whether there is any reason why the information cannot be made available sooner. If there is no reason why it can't be made available sooner, agencies should consider doing so. If there is still further work to be done to prepare for publication, such as quality-assurance, consultation and approval processes, delayed release is more likely to be reasonable, provided the delay is not undue—see cases [466794](#) and [467630](#).

If a complaint is made to the Ombudsman, they may conclude that although the information is or will soon be publicly available, it was nevertheless unreasonable for the agency to refuse the request on this basis.<sup>7</sup> Case [444073](#) is an example of where this happened.

## Information that is publicly available

Section 18(d) recognises that where the requested information is already publicly available, requesters should generally be able to get it themselves, without recourse to the OIA. This should be clear on the facts of the case. When refusing a request on this basis, the agency must, as a matter of good practice, tell the requester where and how the information can be obtained (see case [377705](#)). You can use our template [refusal letter](#) as a starting point.

## Information that will be publicly available soon

Section 18(d) also recognises that agencies may have a plan in place to publish information that is the subject of an OIA request. It enables agencies to refuse such requests, provided the publication is 'soon'.

The Committee that recommended the enactment of the OIA gave, as examples of when this situation might arise, a speech not yet delivered, or a press release not yet made.<sup>8</sup> However, it can arise in any situation where there is a planned publication process, including where

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<sup>7</sup> Under section 30(1) of the OIA, an Ombudsman may form an opinion that the request should not have been refused (section 30(1)(a)), or that the decision complained of was wrong or unreasonable in Ombudsmen Act terms (section 30(1)(b)).

<sup>8</sup> Committee on Official Information. *Towards Open Government: Supplementary Report*. (July 1981) at 73.

information is routinely published at regular intervals, as with annual or quarterly reports or minutes of scheduled meetings.

To justify refusal, the agency must be **reasonably certain** that the requested information will be published in the **near future**. Ombudsmen have accepted that release 8 and 14 working days from refusal is ‘soon’ (see [466794](#) and [467630](#)), as was 23 working days (see [397547](#)), 6 weeks (see [W42042](#)) and 8 weeks (see [377971](#)). By contrast, release more than 12 weeks after refusal was not ‘soon’ (see [443738](#), 12-16 weeks, [440225](#), 13 weeks, and [374966](#), 14-16 weeks). As a general rule of thumb, release more than 8 weeks after the refusal is unlikely to be considered ‘soon’.

Refusal is also more likely to be justified if there is a pre-existing decision to publish the information—meaning that there is an intention to publish **before the request is received**, and not just because it was received. While it is good practice for agencies to publish information released in response to an OIA request, this should not delay release of the information to the requester.

As a matter of good practice, agencies should provide the precise or approximate date by which the information will be published. A failure to do so may suggest that there is no reasonable certainty that the information will be published in the near future. However, there is no legal requirement under the OIA to provide the planned publication date, and a failure to do so will not mean that section 18(d) does not apply (see cases [466794](#) and [467630](#)).

Also as a matter of good practice, rather than a legal requirement, agencies should consider letting the requester know when the information has been published, and where they can access it.

You will find template letters, including a [refusal letter](#), and a letter advising that [information has been published](#) in Appendix 2.

## Unanticipated delays

As noted above, agencies should be reasonably certain that the information will be published soon.

It is important to consider what realistically needs to be done in order to meet the planned publication date. Not all of this will be within an agency’s direct control. However, an agency should consider any **reasonably foreseeable** reasons why the planned publication date might be delayed. In case [463213](#), this included the need to obtain ministerial input during an election period.

If publication is delayed beyond the date previously advised, it is good practice to contact the requester and explain the reason for the delay and the revised publication date. There is a template letter advising that [publication has been delayed](#) in Appendix 2.

## Requests for information about an incomplete process

Section 18(d) is more likely to apply to requests for information in final or near-final form. When OIA requests are received in the middle of an ongoing process, agencies should identify the specific [information requested](#). Does the requester want the final information, or the information that exists at the time? Consider the wording of the request, and if that is not clear, consult the requester.

If the requester wants the final information, but this is not yet held, it may be appropriate to refuse the request under section 18(g) of the OIA (section 17(g) of the LGOIMA).<sup>9</sup> In that case, agencies should explain the process that is underway, when it is expected to conclude, and when information about that process will be published.

If the requester wants the information currently in existence, consider whether there is any good reason under the OIA for that information to be withheld. Substantive withholding grounds, like sections 9(2)(ba) or 9(2)(g)(i) of the OIA, may be more relevant. Section 18(d) will only apply if the agency intends to publish the information in its current form in the near future.

### An alternative to section 18(d)

There is an alternative to refusing a request on the basis that the information will soon be publicly available. That is to make the decision to grant the request, and release the information later. The decision on a request must be conveyed as soon as reasonably practicable and within 20 working days (subject to extension).<sup>10</sup> The information must be released without '*undue delay*'.<sup>11</sup>

The notice of decision should indicate the timeframe within which the information will be released. It may also help to explain why the information cannot be released sooner.

If an Ombudsman was to receive a complaint about undue delay in release of official information, they would consider the work that still needs to be done to prepare for publication and whether the requester needs the information sooner (these are the same factors discussed under [Reasonableness of reliance on section 18\(d\)](#) above).

## Further information

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

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<sup>9</sup> Section 18(g) OIA / s 17(g) LGOIMA applies where the information is not held and there is no reasonable basis for believing it is held by, or more closely connected with the functions of, another agency.

<sup>10</sup> See s 15(1) OIA and s 13(1) LGOIMA.

<sup>11</sup> See s 28(5) OIA and s 27(5) LGOIMA.

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

You can also contact our staff with any queries about section 18(d) by email [info@ombudsman.parliament.nz](mailto: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.



## Appendix 1. Step-by-step work sheet

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| <p><b>1. Identify the information requested</b></p> <p>Relevant part of guide: <a href="#">The requested information</a></p>  | <ul style="list-style-type: none"> <li>• Read the request and consult the requester if necessary.</li> <li>• Note the form in which the information is sought. Just because information is publicly available in one form does not mean a request for that information in a different form can be refused.</li> </ul>   |
| <p><b>2. Is this specific information publicly available?</b></p> <p>Relevant part of guide: <a href="#">Public availability</a></p>  | <ul style="list-style-type: none"> <li>• Information will be publicly available if:             <ul style="list-style-type: none"> <li>- it is freely available on a website;</li> <li>- it is available for purchase;</li> <li>- it is available in a public library; or</li> <li>- it is available for public inspection.</li> </ul> </li> </ul>  |
| <p><b>3. Will this specific information be publicly available soon?</b></p> <p>Relevant part of guide: <a href="#">Information that will be publicly available soon</a></p> | <ul style="list-style-type: none"> <li>• You must be reasonably certain that the information will be published in the near future. If the planned publication date is more than 8 weeks after the refusal, this is unlikely to be considered ‘soon’.</li> </ul>   |
| <p><b>4. Is it reasonable to refuse the request?</b></p> <p>Relevant part of guide: <a href="#">Reasonableness of reliance on section 18(d)</a></p>                         | <ul style="list-style-type: none"> <li>• Consider whether there are any circumstances that would make it unreasonable to rely on section 18(d) to refuse the request.</li> <li>• If the information is publicly available, is it also reasonably accessible to the requester? Would it be administratively burdensome for the agency to have to supply it to the requester?</li> <li>• If the information will be publicly available soon, is there a legitimate reason why the requester needs it sooner? Is there any difficulty in releasing the information sooner, or is there still work that needs to be done to prepare for publication?</li> </ul> |
| <p><b>5. Refuse the request</b></p>   | <ul style="list-style-type: none"> <li>• If the information is publicly available, tell the requester where and how the information can be obtained—use our <a href="#">template letter</a>.</li> <li>• If the information will be publicly available soon, provide the precise or approximate date by which it will be published—use our <a href="#">template letter</a>.</li> </ul>   |

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|  | <ul style="list-style-type: none"><li>• Consider letting the requester know when the information has been published, and where they can access it—use our <a href="#">template letter</a>.</li><li>• If there is an <a href="#">unanticipated delay</a> in publication contact the requester and explain the reason for the delay and the revised publication date—use our <a href="#">template letter</a>.</li></ul> |
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## Appendix 2. Template letters

### 1. Refusal letter under section 18(d) OIA / 17(d) LGOIMA—Information publicly available

[Date]

[Name and address of requester]

Dear [name]

**Official information request for [brief detail of subject matter of request]**

I refer to your official information request dated [date] for [brief detail of the subject matter of the request].

This information is already publicly available at [provide directions on where and how to access the information].

As you are able to access this information yourself, I am refusing your request under section [18(d) of the OIA / 17(d) of the LGOIMA] (the information is publicly available).

You have the right to seek an investigation and review by the Ombudsman of this decision. Information about how to make a complaint is available at [www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz) or freephone 0800 802 602.

If you wish to discuss this decision with us, please feel free to contact [details of contact person].

Yours sincerely

[Name]

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## 2. Refusal letter under section 18(d) OIA / 17(d) LGOIMA—Information soon to be publicly available

[Date]

[Name and address of requester]

Dear [name]

### **Official information request for [brief detail of subject matter of request]**

I refer to your official information request dated [date] for [brief detail of the subject matter of the request].

We will be publishing this information soon [provide details of how and when this will be published].

We are therefore refusing your request under section [18(d) of the OIA / 17(d) of the LGOIMA] on the basis that the information will soon be publicly available. We will write to you again to let you know once the information is published.

You have the right to seek an investigation and review by the Ombudsman of this decision. Information about how to make a complaint is available at [www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz) or freephone 0800 802 602.

If you wish to discuss this decision with us, please feel free to contact [details of contact person].

Yours sincerely

[Name]

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### 3. Advice that information has been published

[Date]

[Name and address of requester]

Dear [name]

**Official information request for [brief detail of subject matter of request]**

I refer to your official information request for [brief detail of the subject matter of the request] that we refused because the information would be published soon.

This letter is to advise that the information you requested has now been published. [Provide directions on where and how to access the information].

I hope this information is helpful.

Yours sincerely

[Name]

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## 4. Advice that publication has been delayed

[Date]

[Name and address of requester]

Dear [name]

### **Official information request for [brief detail of subject matter of request]**

I refer to your official information request for [brief detail of the subject matter of the request] that we refused because the information would be published soon.

This letter is to advise that we have unfortunately not been able to publish the information within the anticipated timeframe. We are now expecting the information to be published by [date]. We apologise for the delay.

If you are dissatisfied with our handling of your official information request, you can complain to the Ombudsman. Information about how to make a complaint is available at [www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz) or freephone 0800 802 602.

Yours sincerely

[Name]

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## Appendix 3. Case studies

These case studies are published under the authority of the [Ombudsmen Rules 1989](#). They set out an Ombudsman's view on the facts of a particular case. They should not be taken as establishing any legal precedent that would bind an Ombudsman in future.

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| Information soon to be publicly available |      |   |
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## Information soon to be publicly available

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## Information publicly available

### Case 444073 (2017)—Request from a prisoner unable to access publicly available information

A prisoner sought information from the New Zealand Police. The Police refused to provide some of the information on the basis that it was publicly available on its website. The requester complained that, as a prisoner without access to the internet, the information could not be considered publicly available to him and, as such, the decision to refuse his request on this basis was unreasonable.

The Ombudsman’s role is to form an opinion on whether the request should have been refused. However, under section 30(1)(b) of the OIA, they can also form the opinion that the refusal was wrong or unreasonable.

The Chief Ombudsman found the information was clearly publicly available, and it was open to Police to refuse the request on this basis. However, the wording of section 18(d) is permissive. There is no obligation or duty under the OIA to refuse a request on this ground.

The Chief Ombudsman considered the context in which this request had been refused. In this case, the prisoner was not able to use the internet and therefore had no way to access the information he sought, notwithstanding its general availability to members of the wider public. The information at issue was not excessive in volume, and it would have imposed little additional administrative burden on Police to print and include it with the remainder of the material it supplied in response to the request.

The Chief Ombudsman formed the provisional opinion that although section 18(d) undoubtedly applied, the decision to refuse the request solely on that basis was nevertheless unreasonable under section 30(1)(b) of the OIA. The Police accepted the Chief Ombudsman’s provisional opinion and released the information that was initially refused. The Chief Ombudsman confirmed his provisional opinion as final. Read the full case note [here](#).

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### Case 343431 (2017)— Signed original deed of conveyance

A requester asked the Office of Treaty Settlements (OTS) for the signed original deed of conveyance relating to the sale of the Mohaka Block in 1851. OTS refused the request under section 18(d) of the OIA, and referred the complainant to Archives New Zealand.

The requester complained to the Ombudsman. The Chief Ombudsman formed the opinion that it was open to OTS to refuse the request on the basis that the deed was publicly available at Archives New Zealand.

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### Case 413631 (2017)—CSV copy of the Teachers Register

The Education Council refused a request for a full copy of the Teachers Register in CSV format on the basis that the information was publicly available, and the requester complained to the Ombudsman. The Ombudsman noted that the Teachers Register is available online, but the information in that register is not publicly available in CSV format. Section 18(d) did not provide a proper basis for refusing to supply the requested information in the format specified. The Ombudsman also formed the opinion that the online availability of the information in the register negated any need to withhold that same information in CSV format in order to protect the privacy of natural persons. The Education Council agreed to release the Teachers Register in CSV format and the complaint was resolved.

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### Case 377705 (2015)—Research relied on

A requester asked the Ministry of Business, Innovation and Employment (MBIE) for the research behind its published statement that *‘international research indicates that people are not able to perceive slopes of less than 1 percent’*. MBIE replied that the research was based on a number of publicly available articles and refused the request under section 18(d). The requester complained to the Ombudsman.

The Chief Ombudsman noted that MBIE had not told the requester where he could access the publicly available material. This was not in the spirit of the OIA. While section 18(d) does not explicitly put an onus on an agency to direct the requester to where they may seek the information, it is implicit that an agency should do so.

The Chief Ombudsman asked MBIE to reconsider its decision, and advise the requester what information it had relied on in making the published statement, and where that information could be accessed. She said that if MBIE could not identify the information, it might like to consider a more appropriate refusal ground:

*It seems axiomatic that a decision-maker should be able to precisely identify the information at issue before they could be justified in deciding that it is publicly available for the purposes of section 18(d).*

The complaint was resolved when MBIE reconsidered its decision and advised the requester where he might access the research relied upon.

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### Case 345580 (2015)—Correspondence about a court judgment

The Ombudsman investigated a decision by the Abortion Supervisory Committee to withhold a letter from the Deputy Solicitor-General regarding a High Court decision. He rejected the arguments in favour of withholding, partly on the basis that the letter amounted to a summary of the court's judgment, which was publicly available.

In response to the Ombudsman's provisional opinion, the Committee argued that, if it were to be found that the letter was nothing more than a summary of the publicly available judgment, it would have grounds to refuse the request under section 18(d) of the OIA, because the information was publicly available.

The Ombudsman also rejected this argument, stating:

*The plain fact is that the letter is not publicly available and the requester is seeking a copy of the letter only. The public availability of the judgment itself does not make the summary contained in the letter 'publicly available'. I do not consider that section 18(d) applies to the Deputy Solicitor-General's letter.*

Read the full opinion [here](#).

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### Case 305527 (2011)—Property valuation data available for purchase

A requester sought property valuation data from a council. The council informed the requester that the data could be purchased through a third party provider. The requester sought to obtain the data direct from the council for free, and complained to the Ombudsman.

The Ombudsman concluded that the information was publicly available, and the request could be refused under section 17(d) of the LGOIMA. The fact that it might be necessary to pay a commercial rate for information of commercial value did not make recourse to section 17(d) unreasonable.

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### Case 177600 (2008)—Vehicle registration information available for purchase

The New Zealand Transport Agency charged a requester for providing information about vehicle registrations. The information was available for purchase on the internet for a monthly fee of \$56.25. The requester complained to the Ombudsman.

The Ombudsman declined to investigate a complaint about the charge because the request could have been refused under section 18(d) of the OIA. That section enables a request to be refused if the information is publicly available. The Ombudsman said:

*If [an agency] properly refuses a request under [section 18(d)], the charging provisions in the [OIA] do not apply. A situation where [an agency] can clearly rely on section 18(d) is*

*where it publishes the information and advertises this as available for purchase at a set price by any person.*

The Ombudsman noted the following excerpt from the Law Commission's 1997 review of the OIA:<sup>12</sup>

*In some cases the ability to recover costs will arise through the commercial production and sale of the information (or the prospect of it) completely outside the ambit of the Act. In that event the request may be refused: s 18(d).*

He also noted this excerpt from Freedom of Information in New Zealand:<sup>13</sup>

*To what extent is material 'publicly available' if a Department or organisation charges for it? Clearly, books, maps, and other documents do not lose their availability simply because they are sold. Clearly too, the price at which they are sold may exceed the charges normally payable for retrieval and copying under Part II of the Act but by how much? An excessive price could make the material 'unavailable' for the purpose of section 18(d). Departments should not be able to resist claims for access to a single document by pointing to its publication in a tome costing hundreds of dollars...*

The Ombudsman agreed with this approach. He commented that it might be unreasonable to rely on section 18(d) where a price is patently excessive, but in this case the price reflected the actual cost of producing the information.

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### A12938 (2008)— Video footage of Hawkes Bay DHB meeting

TVNZ refused a request for video footage of a Hawkes Bay District Health Board meeting. It relied on section 18(d) of the OIA because minutes of the meeting were publicly available. The Ombudsman rejected this argument. While the minutes of the public portion of the meeting were publicly available, that is not what was requested. A minute is a document prepared after a meeting, recording—often in highly abbreviated form—decisions taken or discussions held at that meeting. The Ombudsman could not see a minute as in any way equivalent to a video recording of the meeting. The two are different pieces of information. Consequently, the Ombudsman did not consider that the information requested was publicly available.

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### Case 175682 (2007)—Electronic copy of proposed electorate boundaries

The Ministry of Justice refused to provide an electronic copy of proposed electorate boundaries. It relied, in part, on section 18(d) because the information was available in

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<sup>12</sup> Law Commission. *Review of the Official Information Act 1982* (NZLC R40, 1997) at 56.

<sup>13</sup> Eagles, I, Taggart, M, and Liddell, G. *Freedom of Information in New Zealand*. Oxford; Oxford University Press, 1992 at 244.

hard copy.

The Ombudsman formed the opinion that the fact that the information was available in hard copy did not mean that the request for an electronic copy could be refused on the basis that it was already publicly available.

The requester was entitled to seek information in a particular form. To claim that the information was available in a different form and for that reason could be refused under section 18(d) was to ignore section 16(2) of the OIA (which generally requires agencies to make information available in the way preferred by the requester).

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### Case W37113 (1998)—Information on computer disk

In response to a request from an Opposition Member of Parliament for information relating to the formula for the Special Education Grant, the Minister of Education made available relevant material, including a 43-page table of detailed data relating to schools. The requester then asked the Minister for a copy of the table on computer disk. This request was refused on the ground that it fell outside the scope of the OIA, and the requester complained to the Ombudsman. One of the issues considered by the Chief Ombudsman was whether section 18(d) of the OIA justified the Minister's refusal. However, while the Minister may have previously released the information at issue in hard copy form, the information was not publicly available in computer disk form. The Chief Ombudsman formed the opinion that section 18(d) could not apply. You can read the full case note on our website.<sup>14</sup>

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<sup>14</sup> Search for 'W37113' using our online library [Liberty](#).

## Information soon to be publicly available

### Case 463213 (2018)—Request for DHB financial reporting data

On 15 September 2017, the Ministry of Health received a media request for DHB financial reporting data. On the same day, it advised the requester that the data would be published after was reported to the Minister. It said the reports were published on 19 October the previous year, and a similar timeframe was expected this time. The requester complained to the Ombudsman.

The Ministry later clarified that its refusal was under section 18(d) of the OIA. The release was ultimately delayed until 22 December 2017 due to the change in government.

The Chief Ombudsman accepted that, at the time of the refusal, the Ministry expected to release the information roughly a month later, based on its release of similar information the previous year. A waiting period of a month to release this information appeared to be ‘soon’ in terms of 18(d).

However, the planned publication date was not sufficiently certain. As of 15 September 2017, the Ministry would have been aware that the election was looming, and that, due to the need for Ministerial input, this could impact on the Ministry’s ability to release the information at the time it anticipated. Coalition negotiations in an MMP electoral system are a reasonably foreseeable event, and the flow on effect should have been contemplated.

The Chief Ombudsman acknowledged that unforeseen circumstances can delay plans to make information publicly available, and in that event agencies should contact the requester and explain the reason for the delay and the revised publication date. In this case the requester was not advised that release of the information was delayed, and he was also not eventually told that the information had been made available in December. While this is not a legal requirement, it is a matter of good administrative practice.

The Chief Ombudsman formed the opinion that section 18(d) did not apply because the Ministry could not be reasonably certain the information would be released ‘soon’.

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### Cases 466794 and 467630 (2018)—Briefings to the Incoming Minister

Following the September 2017 election, requesters sought access to the Briefings to the Incoming Minister (BIMs) from the Privacy Commissioner and the Ministry of Transport. Both requests were refused on the basis that the information would soon be publicly available.

The requesters complained to the Ombudsman, saying there was no certainty that the information would be released, as the intended dates of release were not provided, and there did not appear to be any administrative difficulties in providing the information at that time.

The request to the Privacy Commissioner was made on 14 November 2017, and refused the same day. The Privacy Commissioner's BIM was published on 24 November 2017 (eight working days later).

The request to the Ministry was made on 30 October 2017 and refused on 17 November 2017. The Ministry's BIM was published on 7 December 2017 (14 working days later), as part of a coordinated release of a number of BIMs for public sector agencies and crown entities on the Beehive website.

The Chief Ombudsman formed the opinion that this was 'soon' in terms of section 18(d). He noted that, although it is good practice for an agency to provide a requester with a date of release of the information, this is not a requirement of the legislation. The absence of a confirmed date did not mean that section 18(d) did not apply, simply that other factors that point to the likelihood of impending publication must be assessed.

Despite not being able to provide a specific date of release at the time the requests were refused, it appeared that the agencies could be confident that the information would be released, and that this would occur imminently.

The delay, in the case of the Ministry of Transport, was occasioned by a desire to coordinate the publication of all briefings to incoming Ministers. This was not unreasonable, provided it did not unduly delay release of the briefings, which, in the Chief Ombudsman's opinion, it did not. A coordinated release may have been beneficial in allowing the public to see the full suite of advice received by the incoming Government, and to compare and contrast advice in related areas or by related agencies (such as the various transport agencies).

The delay would also have enabled incoming Ministers to familiarise themselves with the content of the briefings (which were written for them after all), before they were released to the public. It was entirely proper that the intended recipient of the briefing was first consulted before the final decision on release was made and implemented. Read the full case note [here](#).

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### Case 443738 (2017)—Quarterly Justice Sector report

On 25 November 2016, the Ministry of Justice received a request for the September 2016 Quarterly Justice Sector report. On 8 December 2016, it refused this request under section 18(d), advising that the report would be published in March 2017. The requester complained to the Ombudsman.

The Chief Ombudsman's staff explained that he was unlikely to accept that release 12-16 weeks after the refusal was 'soon'. The Ministry then advanced other substantive reasons for withholding the report but the Chief Ombudsman did not accept these either. After further consideration, the Ministry decided to release the report.

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### Case 440225 (2017)—Recidivism statistics

On 20 June 2016, a requester sought recidivism statistics related to the Department of Corrections' goal of reducing re-offending by 25 percent by 2017. On 22 July 2016, the Department supplied historical statistics, but refused 2016 statistics on the basis that they would soon be released by the State Services Commission as part of its reporting on the Better Public Services results and targets. On 20 October 2016, the requester complained to the Ombudsman, noting the information had still not been made publicly available. The information was published in early November 2016.

The Chief Ombudsman stated that in order for section 18(d) to apply:

- there must be a genuine intention to make the information public;
- the agency must be reasonably certain that publication will take place; and
- the intended publication must be at a point in time in the near future.

The word '*soon*' presupposes an element of certainty about when the information will become publicly available. It is insufficient that publication is simply anticipated. It is good practice to provide the requester with a specific date of release or to explain the perceived difficulty in meeting the request immediately.

In this case, the Department did not appear to have had any certainty about when the statistics would become publicly available. Publication was not within its control. The Department did not have reasonable grounds to believe that publication would be '*soon*'. In the finish it was 13 weeks before the information was published. This was not '*soon*'.

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### Case 377971 (2016)—Capping data

On 25 March 2014, the State Services Commission (SSC) received a request for its capping data (data on capping core government administration) as at 31 December 2013. On 31 March 2014, SSC refused the request under section 9(2)(f)(iv) of the OIA, but noted the next release of capping data would be in May 2014, following Cabinet consideration. The requester complained to the Ombudsman. The capping data was released as scheduled on 28 May 2014.

The Ombudsman did not consider that section 9(2)(f)(iv) applied (confidential advice to government). The information was statistical rather than advisory in nature, and was not related to any executive government decision making process. However, he did think it was reasonable for SSC to want to update Cabinet before the data was published. He accepted that section 18(d) would have provided a reason to refuse the request. SSC could be certain that publication would take place, and when it would take place. Release in May 2014, approximately eight weeks after the refusal, was '*soon*'.

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### Case 397547 (2015)—Holiday period excess speed infringement data

On 9 January 2015, a requester sought information about speeding infringements issued over the holiday period. On 27 January 2015, the New Zealand Police refused this request under section 18(d), explaining that:

*Police will be proactively releasing information about speed infringement notices issued during the Christmas/New Year period in late February 2015 as part of planned media activity for the completion of its summer road policing campaign.*

The requester complained to the Ombudsman. The Ombudsman made informal enquiries with the Police and was advised that information relating to January 2015 was not yet available because:

*there is a lag in reporting the data to allow Police to provide the most reliable and stable data as the infringements are received and processed by the Police Infringement Bureau.*

The Ombudsman wrote to the requester explaining that an investigation seemed unnecessary because it was apparent on the face of it that section 18(d) applied. The Police refused the request on 27 January 2015, and anticipated that the information would be released by the end of February 2015 (approximately 23 working days). Some of the information at issue was still being processed and reviewed. In these circumstances, the Ombudsman was satisfied that the information would soon be publicly available for the purpose of section 18(d).

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### Case 374966 (2014)—Restorative justice data

On 20 May 2013, the Ministry of Justice received a request for data on offenders who had attended restorative justice conferences and reoffended. On 19 June 2013, the Ministry responded that it would be undertaking a study on restorative justice later in the year, and the information would soon be publicly available.

The requester followed-up again on 12 December 2013 and 30 January 2014. On 10 February 2014, he was told his request was still being refused under section 18(d), and it would be some time before the information was released. He complained to the Ombudsman. The restorative justice study was publicly released on 3 April 2014.

The Ministry clarified that when it initially refused the request, it anticipated publication would occur by late September / early October 2013. It acknowledged that, given the predicted length of time, it should not have relied upon section 18(d).

The Ombudsman confirmed that reliance on section 18(d) was not appropriate in these circumstances. When the request was received, the information had not been extracted, and its release was not imminent. In fact, there was no certainty about when the information would become publicly available. Even if the information had been released at the time this was originally anticipated (14-16 weeks after the refusal), this would not

have been *'soon'*.

However, the Ombudsman formed the opinion that section 18(g) of the OIA applied (information not held). At the time the request was received, all the Ministry held was raw anonymised criminal records. To extract the requested information, the Ministry needed to write a computer programme that would identify offenders who had taken part in restorative justice and determine whether or not those participants had reoffended. This had not taken place when the request was made.

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### Case 320115 (2014)—Information about the Rugby World Cup

The Minister for the Rugby World Cup (RWC) refused to release information about the RWC on the basis that all the relevant documents would be publicly released when Auckland Council completed its review of the delivery of this event. The requester complained to the Ombudsman.

The Ombudsman noted that *'will soon be publicly available'* imports an element of assurance that the information will in fact be released in the near future. The Minister merely suggested that it was *'anticipated'* that all relevant documents would be released when the Auckland Council's review was complete. There was no certainty that the information would be released or when it would be released.

The Ombudsman stated that, unless there was, at the time of the decision, a genuine commitment by the agency holding the information to publish it at a reasonably certain point in the near future, then the conditions for invoking section 18(d) had not been met. The Ombudsman noted that it was not an issue of how reasonable the Minister's assumption was that such a decision would be taken. For reliance to be placed on section 18(d) some certainty must exist that the information will actually be published. This did not appear to have been the case when the Minister replied to the requesters in this case.

Furthermore, by the time the Ombudsman formed a view on the complaint, although the review by the Council had been completed, there had still been no release of relevant information. This confirmed the Ombudsman's view that it was not appropriate to rely on section 18(d) to refuse the request.

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### Case 353000 (2013)—Groups interested in setting up a charter school

The New Zealand Educational Institute complained when the Ministry of Education refused its request for the names of groups interested in setting up a charter school on multiple grounds.

The request of 20 February 2013 was refused on 14 March 2013. On 17 April 2013, the Ministry suggested that section 18(d) of the OIA might apply because it intended to

publish information about the selection of sponsors of partnership schools.

The Ombudsman explained that to substantiate a claim for withholding under section 18(d), the Ministry would need to be reasonably specific about its intentions.

The Ministry agreed to provide more detail about its publication intentions, and on 24 May 2013 advised the Ombudsman that it had always been its intention to release information once decisions had been taken.

The Ombudsman formed the provisional opinion that section 18(d) did not apply. On 18 June 2013, in response to the Chief Ombudsman, the Ministry advised that the passage of the Education Amendment Bill enabled it to be more definite about timeframes. The information would now be released on the Ministry's website on 31 July 2013.

The Ombudsman formed the final opinion that section 18(d) did not apply. He acknowledged the intention to publish further information, and that the intended publication was, by then, imminent. However, the relevant issue was whether section 18(d) provided a reasonable ground for refusing the request on 14 March 2013. The Ombudsman stated:

*On 14 March 2013, when the Ministry refused the request from NZEI, the 31 July 2013 date for publication was not in prospect, and there was no reasonably proximate date of proposed release. Section 18(d) should not be used to delay the release of information when publication is not imminent. To allow refusal in such cases would be to undermine the availability of official information to the public.*

Release some 19 weeks after the request was refused was not considered to be 'soon' in this case.

Read the full opinion [here](#).

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### Case 307769 (2012)—Operational protocols and governance arrangements for the retention of new born blood spot cards ('Guthrie' cards)

On 31 March 2011, a media requester asked the Ministry of Health a number of questions about the retention of Guthrie cards. The Ministry advised that it was 'developing the operational protocols and governance arrangements for the Guthrie cards'.

The requester then sought 'a copy of the most recent documents on this'. The Ministry replied, also on 31 March 2011, that 'the protocols will be reported back to the government by the end of April, and will be released in due course'.

The requester sought the OIA grounds for refusing her request. The Ministry responded that it would now treat her correspondence as an OIA request, and she would be advised of the Ministry's decision on that request in due course.

The requester complained to the Ombudsman about the Ministry's refusal. The Minister of Health subsequently confirmed the decision to withhold the requested information under sections 9(2)(ba)(i), 9(2)(f)(iv) and 9(2)(g)(i) of the OIA.

In addition to considering these substantive withholding grounds, the Ombudsman noted that the Ministry's response that *'the protocols ... will be released in due course'* appeared to be a refusal to supply the requested documents on the basis that they would soon be publicly available.

The requested documents comprised a draft policy framework that had been the subject of targeted public consultation, and submissions received in response to that draft policy framework. The Ombudsman noted that in the intervening period some final policy documents and a summary of the submissions had been published. However, this was not the information requested.

There never appeared to be any intention to publish the requested documents, and while they had since been disclosed to the requester, they had still not been made publicly available. The Ombudsman commented:

*'Will soon be publicly available' seems to me to import an element of assurance that the information requested will indeed be released in the near future. This implies that, at the time of the response, a decision has been made to make the information requested publicly available. This does not appear to have been the case. This is confirmed by the fact that in the intervening months the information requested has not become publicly available. I consider that section 18(d) was not an applicable reason to refuse the request.*

This case illustrates that it must be the actual information requested that is to be made publicly available, not other information, even if it is related, or the final version of the information.

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### Case 176212 (2007)—Report on de-merging traffic enforcement function from Police

The State Services Minister refused a request for a copy of a report on de-merging the traffic enforcement function from the New Zealand Police because it would soon be publicly available. The requester complained to the Ombudsman.

The Chief Ombudsman made informal enquiries with the Minister's office, and learned that the report was the subject of a draft Cabinet paper currently under consultation with a coalition party (New Zealand First), after which it would be submitted to Cabinet.

The Chief Ombudsman wrote to the Minister, explaining how section 18(d) applied, and observing that in this case *'it would appear that there is no certainty about when the information will become publicly available'*. He sought a copy of the report and an

explanation of the Minister's decision to refuse the request.

In reply, the Minister advised that the report was now able to be released. She explained that the report was part of the Confidence and Supply Agreement between Labour and New Zealand First, and because of this special relationship she was required to consult New Zealand First on its recommendations. At the time of the request, she was unable to provide any estimate as to when this consultation would be complete, or when the Cabinet paper would go to Cabinet for approval.

The complaint was resolved by release of the report, but the Chief Ombudsman wrote to the Minister noting that her concern about the release of this document related more to section 9(2)(f)(iv) of the OIA than it did to section 18(d). That section can provide temporary protection of confidential advice to Government if release would prejudice the ability of Coalition partners and support parties to conduct negotiations (see our guide [Confidential advice to Government](#)).

This case illustrates that section 18(d) cannot be relied upon where there is no certainty as to when the information will be released, and also that substantive reasons for withholding official information should be considered where appropriate.

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### Case W42042 (2000)—Unconfirmed local authority meeting minutes

A residents' association requested copies of unconfirmed minutes of a council's standing committees. The association wanted the information before the next meeting of the full council to enhance its ability to participate effectively in the council's actions and decisions. The request was refused under section 17(d) of the LGOIMA, and the association complained to the Ombudsman.

The Chief Ombudsman said that, in light of the principle of availability, section 17(d) should not be used if the purposes of the LGOIMA would be undermined. The central issue was whether the refusal had the effect of limiting the association's effective participation in actions and decisions of the council, as the association contended.

The council had a six week Committee/full Council meeting cycle. It seemed likely that a delay of six weeks in accessing the confirmed minutes would not usually prevent any concerns either being put to the following council meeting or preclude the council from addressing those concerns effectively.

LGOIMA (section 46A) permits members of the public to inspect, at least two working days before every meeting of a local authority, all agendas and associated reports relating to the meeting circulated to members. As the association had access to the same agenda papers as councillors (except for items where the public is excluded), it was not apparent that its opportunity to participate in the council's actions and decisions was detrimentally affected by the decision to decline the official information request.

The Chief Ombudsman concluded that it was open to the council to refuse the request

under section 17(d).

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