

## Frivolous, vexatious and trivial

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

*Under section 18(h) of the OIA<sup>1</sup> a request can be refused if it is frivolous or vexatious, or the information is trivial.*

*There is a high threshold for declaring a request frivolous or vexatious. Requesters should not be unfairly denied the opportunity to make genuine requests.*

*However, section 18(h) provides a necessary ability for agencies to refuse requests that would amount to an **abuse of the right** to access official information.*

*This guide sets out the factors that agencies should consider in deciding whether a request amounts to an abuse of the right to access official information.*

*It has advice for agencies on how to make the decision to refuse a request as frivolous or vexatious, and how to deal with challenging requesters.*

*It includes a step-by-step work sheet for dealing with potentially frivolous or vexatious requests, template letters and case studies.*

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<sup>1</sup> References to s 18(h) of the OIA should also be taken as references to s 17(h) 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(h) of the OIA provides that a request may be refused if the request is frivolous or vexatious, or the information requested is trivial.

## High threshold

The threshold for proper application of section 18(h) is high. The right to request information under the OIA and LGOIMA is a constitutionally important one.<sup>6</sup> Requesters should not be unfairly denied the opportunity to make genuine requests. While requests can sometimes be **annoying** and **inconvenient**, these factors on their own are not sufficient grounds for concluding they are frivolous or vexatious.

At the same time, section 18(h) recognises that there must be an ability to refuse requests that, in all the circumstances of the case, amount to an **abuse of the right** to access official information. Agencies need to be prepared to find that a request is frivolous or vexatious in legitimate circumstances, but at the same time, careful and considered about when and how they decide to do this.

## Related provisions

Because there is a high threshold for frivolous or vexatious requests, and because calling a request *'frivolous or vexatious'* can often complicate an already fraught relationship with the requester, agencies should keep in mind the following related provisions. If these provisions apply, section 18(h) should not be considered as an alternative option.

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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.

<sup>6</sup> The OIA has been described as *'a constitutional measure'* (*Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA) at 391), and *'an important component of New Zealand's constitutional matrix'* (*Kelsey v the Minister of Trade* [2015] NZHC 2497 at paragraph 19).

## Substantial collation or research

If an agency's only concern is the administrative burden that would be involved in responding to a request, it should consider the application of section 18(f) of the OIA.<sup>7</sup> Section 18(f) provides that a request can be refused if the information cannot be made available without substantial collation or research. Before refusing a request on this basis, agencies must consider alternative ways of addressing the administrative burden, including consultation with the requester, extension, charging, and meeting the request in another way. More information about section 18(f) and alternative ways of addressing the administrative burden involved in responding to a request is available in our guide [Substantial collation or research](#). More information about charging is available in our [Charging](#) guide.

## Information not held—no obligation to create it

The OIA and LGOIMA only apply to 'official information', which is defined as any information held by agencies and Ministers in their official capacity.<sup>8</sup> There is no obligation on an agency to create information in order to respond to a request. Requests of an argumentative or interrogatory nature that might be perceived as vexatious may, in effect, be asking the agency to create new information (for example, see case studies [343825](#), [327805](#) and [W31433](#)). If a requester is seeking explanations or opinions that would need to be created, it may be better to refuse the request under section 18(g) of the OIA on the basis that the requested information is not held. See our template letter [Information not held—no obligation to create it](#).

## Protection for staff

Where release of official information would infringe the privacy of agency staff members, or give rise to improper pressure or harassment that affects their ability to do their jobs, agencies may consider the following withholding grounds:

- Section 9(2)(a) of the OIA,<sup>9</sup> which provides good reason to withhold official information (subject to a countervailing public interest test) if it is necessary to protect the privacy of natural persons, including agency staff members.
- Section 9(2)(g)(ii) of the OIA,<sup>10</sup> which provides good reason to withhold official information (subject to a countervailing public interest test) if it is necessary to maintain the effective conduct of public affairs through the protection of staff members from improper pressure or harassment.

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<sup>7</sup> Section 17(f) LGOIMA.

<sup>8</sup> See s 2 OIA and s 2 LGOIMA.

<sup>9</sup> Section 7(2)(a) LGOIMA.

<sup>10</sup> Section 7(2)(f)(ii) LGOIMA.

See our Practice Guidelines for more information on section 9(2)(a) ([Privacy](#)) and section 9(2)(g)(ii) ([Improper pressure or harassment](#)).

## Frivolous or vexatious requests

Agencies are entitled to refuse requests that are *‘frivolous or vexatious’*. To be *‘frivolous or vexatious’*, it must be **plain and obvious to a reasonable person** that the request amounts to an **abuse of the right** to access official information.

In reaching this determination, agencies must consider the nature of the request in light of the surrounding circumstances. Some relevant factors are set out below.

It is important to remember that it is the **request not the requester** that must be vexatious. Just because someone has made a vexatious request before doesn't mean their next request will automatically be vexatious. Each request must be considered on its own merits.

### Relevant factors to consider

The following factors may be relevant in determining whether a request is frivolous or vexatious.

<b>The burden of the request</b>	<ul style="list-style-type: none"><li>• A request is more likely to be considered frivolous or vexatious if it would impose an excessive and unreasonable burden on the agency. Agencies should consider:<ul style="list-style-type: none"><li>- The complexity of the request</li><li>- The volume of information requested</li><li>- The time and resources required to process it</li><li>- The impact on the agency's other operations.</li></ul></li><li>• This factor on its own will not make a request frivolous or vexatious. As noted above, if the agency's only concern relates to the administrative burden of processing the request, it should consider the application of section 18(f),<sup>11</sup> and the other mechanisms available under the legislation for dealing with administratively challenging requests, including consulting with the requester (see <a href="#">Related provisions</a> above).</li><li>• Agencies must take their obligation to provide <b>reasonable assistance</b> to requesters seriously. It may not be reasonable to refuse a burdensome request as frivolous or vexatious if the</li></ul>
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<sup>11</sup> Section 17(f) LGOIMA.

	<p>agency has made no effort to help the requester refine it, or reduce its scope, or clarify the specific information being sought (see case <a href="#">362529</a>).</p>
<p>The purpose or value of the request</p>	<ul style="list-style-type: none"> <li>• A request is more likely to be considered frivolous or vexatious if it lacks any serious purpose or value. Agencies may consider any comments volunteered by the requester about the purpose of their request, and any wider value or public interest in making the requested information available.</li> <li>• This factor on its own will not make a request frivolous or vexatious. It must be remembered that there is an inherent value in the release of official information. As the High Court has recognised, requests <i>‘do not have to be accompanied by reasons why the information is required’</i>.<sup>12</sup> <p style="margin-left: 40px;"><i>There is no question of establishing a need for the information. <b>Information by its very nature needs to be available if the purposes of the Act are to be achieved</b></i> (emphasis added).</p> </li> <li>• Agencies must be cautious about jumping to conclusions that a request lacks serious purpose or value simply because it is not immediately self-evident to the agency.</li> <li>• Consideration should be given to talking to the requester (see case <a href="#">414468</a>). Most requesters are likely to have some serious purpose behind their request.</li> </ul>
<p>The intention behind the request</p>	<ul style="list-style-type: none"> <li>• If a requester has explicitly stated that their intention is to cause disruption, irritation or distress to an agency or its staff, then the request is likely to be considered frivolous or vexatious.</li> <li>• A request may also be considered frivolous or vexatious if the available evidence suggests that the requester doesn’t genuinely need or want the information, but is instead requesting that information as means of causing disruption, irritation or distress to an agency or its staff.</li> <li>• In contrast, if it is apparent that the requester genuinely needs or wants the information, the request is less likely to be considered frivolous or vexatious. The Ombudsman will make an assessment of the requester’s bona fides (their honesty and sincerity of intention) in seeking the information (see, for example, cases <a href="#">414468</a>, <a href="#">362529</a>, <a href="#">391655</a>, <a href="#">279056</a> and <a href="#">W36125</a>).</li> </ul>

<sup>12</sup> *Television New Zealand Ltd v Ombudsman* [1992] 1 NZLR 106 at 118.

<p>The effect of the request on staff</p>	<ul style="list-style-type: none"> <li>• A request is more likely to be frivolous or vexatious if it causes unreasonable harassment or distress to staff. This may be because: <ul style="list-style-type: none"> <li>- It is seeking personal information about staff</li> <li>- It includes derogatory or defamatory remarks about staff</li> <li>- The burden of dealing with the request will necessarily fall to particular staff.</li> </ul> </li> <li>• The harassment or distress to staff must be <b>unreasonable</b>. Agencies will have to deal with frustrated people from time to time, and they can expect to face a certain level of criticism. Employees of agencies should know they are working in an environment where the OIA (or LGOIMA) applies. This may mean that information about what they've done in an official capacity is sometimes disclosed. This might result in scrutiny that is uncomfortable or embarrassing to the employees concerned, but that doesn't necessarily make the request vexatious.</li> <li>• Note that if an agency's only concern relates to <i>'improper pressure or harassment'</i> of staff that prejudices the effective conduct of public affairs, it should consider the application of section 9(2)(g)(ii) of the OIA<sup>13</sup> (see <a href="#">Related provisions</a> above).</li> </ul>
<p>The language and tone of the request</p>	<ul style="list-style-type: none"> <li>• As noted above, agencies can expect to face criticism, and to deal with frustrated people. However, it is not reasonable to expect an agency to tolerate requests for official information that are aggressive, offensive or abusive. Examples of this might be where threats have been made against staff, or racist language is used.</li> <li>• Before refusing such a request, agencies should provide an opportunity for the requester to withdraw their abusive remarks and re-frame their request. If the requester declines to do so, it may be reasonable for the agency to refuse the request on the basis that it is frivolous or vexatious. See our <a href="#">template letter—aggressive or abusive language</a>. Case <a href="#">W36125</a> is an example of where this approach was followed.</li> </ul>
<p>The history and context of the request</p>	<ul style="list-style-type: none"> <li>• As noted above it is the <b>request not the requester</b> that must be frivolous or vexatious. However, agencies can take into account the history and context of the request, including previous requests for official information, in deciding whether it is frivolous or vexatious.</li> </ul>

<sup>13</sup> Section 7(2)(f)(ii) LGOIMA.

- Frivolous or vexatious requests will often arise in the context of a longstanding grievance or dispute. However, a request will not automatically be frivolous or vexatious just because it is made in the context of a dispute or forms part of a series of requests. There may be genuine reasons for this. For example, a series of requests may be necessary where previous disclosures were unclear or raised further questions the requester could not have foreseen. Similarly, in the context of a dispute, a request may be a reasonable way to obtain new information not otherwise available to the requester. Section 18(h) should not be used to avoid answering awkward questions that have not yet been resolved satisfactorily.
- While it is perfectly legitimate to pursue a grievance or dispute with an agency, including by requesting official information, the history and context to a particular request may suggest that the requester's approach to a grievance or dispute has gone beyond what is reasonable, and become **excessive and disproportionate**.
- In relation to the history and context of the request, agencies should consider:
  - The complexity and frequency of the requester's correspondence with the agency
  - Their conduct in pursuit of the grievance or dispute, and whether it has caused distress to staff or raised safety or security concerns
  - The steps taken by the agency or others to address the grievance or dispute, for example, whether it has been conclusively resolved by the agency or subject to some form of independent investigation
  - The information provided by the agency to try and address or explain the grievance or dispute
  - The time and resources that have been required to address the grievance or dispute
  - The impact this has had on staff and the agency's other operations.
- In relation to previous requests for official information, agencies should consider:
  - The number, complexity and frequency of previous related requests

	<ul style="list-style-type: none"> <li>- The extent of information supplied in response to those requests</li> <li>- The time and resources required to process those requests</li> <li>- The impact on staff and the agency's other operations.</li> </ul> <ul style="list-style-type: none"> <li>• A request is more likely to be considered frivolous or vexatious if it is set against a background of long and complex correspondence and requests, that have collectively taken a lot of time and resources to address, and had a significant impact on staff and the agency's other operations.</li> <li>• An agency should also consider its own conduct, and whether this may have contributed to the lengthy and protracted nature of the requester's correspondence and requests. If the requester's grievance or dispute is to some extent justified, and the requester needs the information to pursue that grievance or dispute, then the agency should be expected to absorb more of a burden or detrimental impact than might otherwise be the case (see case <a href="#">279056</a>). If the problems which an agency is facing in dealing with a request have, to some degree, resulted from deficiencies in its handling of the requester's previous requests and enquiries, then this will weaken the argument that the request is vexatious.</li> </ul>
Repeat requests	<ul style="list-style-type: none"> <li>• A repeat request for the same information that has been sought previously could potentially be regarded as frivolous or vexatious, in certain circumstances. However, that might not be the best way of dealing with it.</li> <li>• Agencies must be satisfied that the request is in fact for the <b>same</b> information sought previously. It's not enough that the requests being compared are about the same or similar subject. Nor is it enough that they are similarly worded. The terms of the requests must capture the same information. To the extent that <b>different</b> information is captured, the request cannot reasonably be regarded as 'repeat'.</li> <li>• If exactly the same information has been <b>supplied previously</b>, it may be preferable to explain this to the requester and confirm that no additional relevant information is held, in preference to refusing the request on the basis that it is frivolous or vexatious. Agencies should bear in mind that requesters may genuinely need a further copy of information supplied previously; for example, because the information has since been lost or destroyed.</li> <li>• If exactly the same information has been <b>refused previously</b>, agencies should consider whether circumstances have changed</li> </ul>

since the original refusal. That is most likely the basis on which the requester has decided to repeat their request. It may be preferable to make a fresh decision in light of current circumstances, even if that involves invoking the same refusal grounds as before, rather than refusing a request on the grounds that it is frivolous or vexatious.

## Making the decision

The decision to refuse a request as frivolous or vexatious will often be contentious. It may serve to escalate any pre-existing dispute with the requester, who is likely to complain to the Ombudsman. Such decisions should therefore be taken at an appropriately senior level, based on detailed evidence and sound reasoning. This evidence and reasoning should be properly documented.

If part of an agency's evidence and reasoning relates to the history and context of the request, including previous requests for official information, it is good practice to document this information in a log, which can be provided to the Ombudsman in the event of a complaint. There is a [sample evidence log](#) at appendix 3 of this guide.

It is a good idea to ask someone who is not familiar with the background to review the request and see whether they agree that it meets the high threshold for being frivolous or vexatious, and whether the agency has done everything it reasonably should to help and inform the requester.

At a minimum the agency's refusal letter must comply with section 19 of the OIA.<sup>14</sup> It must include the reason for refusal (section 18(h) of the OIA), and information about the requester's right to complain to the Ombudsman.

However, agencies can also demonstrate that they have taken a careful and considered approach to relying on section 18(h) by including details of the evidence and reasoning for concluding the request is frivolous or vexatious. Our [template refusal letter](#) provides a basis to start from.

## Dealing with challenging requesters

Section 18(h) is about the **request not the requester**, but the reality is the behaviour of some requesters can be challenging. Here are some tips for dealing with that:

- Try to identify and separate OIA or LGOIMA requests from general correspondence (including where OIA or LGOIMA requests are contained within general correspondence).

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<sup>14</sup> Section 18 LGOIMA.

Provide a reasonable response to the general correspondence. Provide a response to OIA or LGOIMA requests in accordance with the legislation.

- Where OIA or LGOIMA requests arise out of a more general grievance or dispute against the agency, consider whether the agency has done everything it reasonably can to address the root cause of that grievance or dispute, because the requests and correspondence will likely persist so long as that grievance or dispute remains substantively unaddressed.
- If the requester is seeking information that is not held but would need to be created, explain that the OIA (or LGOIMA) doesn't give a right of access to such information, but that the agency will nevertheless endeavour to provide a reasonable response.
- If the nature or volume of requests and correspondence from a particular requester is becoming problematic, establish an [evidence log](#), and use it to document interactions with the requester, the response that is required, and the amount of time taken. A log can help to inform decisions about whether a request should be regarded as frivolous or vexatious when seen in context. It can also assist if a complaint is made to the Ombudsman.
- Let the requester know in advance that the nature or volume of their requests and correspondence is becoming problematic. This will give them an opportunity to moderate their behaviour, and mean it won't come as a complete surprise if a future request is refused as frivolous or vexatious because they have refused to do so. Focus on the impact of the requests (based on the evidence gathered in your log), rather than the behaviour of the requester themselves. Calling a requester 'obsessive', 'unreasonable' or 'aggressive' may just make the relationship worse.
- Set clear ground rules that aggressive or abusive language won't be tolerated. If a request for official information contains aggressive or abusive language, give the requester an opportunity to reframe it. See our template letter [Aggressive or abusive language](#). If they decline to do so, consider whether to refuse the request on the basis that it is frivolous or vexatious.
- If appropriate, nominate one person within the agency to deal with the requester's correspondence and requests. Make sure other staff in the agency know to forward to that person any correspondence and requests received from the requester. This should enable the agency to develop an overview of the requester's conduct, and ensure consistent responses are provided.
- If the requester is pursuing a complaint against your agency, consider whether they are exhibiting '*unreasonable complainant conduct*'. For help in identifying '*unreasonable complainant conduct*' and strategies to deal with it read our guide to *Managing unreasonable complainant conduct* ([full](#) | [short](#)). Where limits have been placed on a requester due to their unreasonable complainant conduct, act consistently with these, unless to do so would breach the agency's legal obligations under the OIA or LGOIMA.

- If your agency is one that receives a high proportion of potentially frivolous or vexatious requests, consider publishing the criteria for determining that a request is frivolous or vexatious on your website. This should enable requesters to see that they are being treated consistently with others, rather than being targeted personally.

## Trivial information

Requests may also be refused if the information requested is *'trivial'*. In deciding whether requested information is trivial, agencies should consider the nature of the information and what is known about the purpose of the request. Remember, information that seems trivial to an agency, may be very important to a requester.

Agencies should consider consulting the requester, who may be able to clarify the terms of the request (so that truly trivial information is excluded), or their purpose in seeking the information. Such consultation is consistent with an agency's duty to provide reasonable assistance to requesters.<sup>15</sup>

The volume of information at issue may also be relevant. It is usually no problem to supply a small amount of information, even if it does seem trivial. It may be more difficult, and not ultimately worth the effort, if there is a significant amount of trivial information at issue. For example, see case [170889](#).

## Further information

Appendix 1 of this guide has a [step-by-step worksheet](#) for dealing with potentially frivolous or vexatious requests.

Appendix 2 has helpful [template letters](#).

Appendix 3 has a [sample evidence log](#) that agencies can use to record their dealings with challenging requesters.

Appendix 4 has [case studies](#) illustrating the application of section 18(h).

Other related guides include:

- [The OIA for Ministers and agencies](#) and [The LGOIMA for local government agencies](#).
- *Managing unreasonable complainant conduct* ([full](#) | [short](#))
- [Substantial collation or research—A guide to section 18\(f\) of the OIA and section 17\(f\) of the LGOIMA](#)
- [Charging —A guide to charging for official information under the OIA and LGOIMA](#)

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<sup>15</sup> See s 13 OIA and s 11 LGOIMA.

You can also contact our staff with any queries about the application of section 18(h) 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 your response to a request for official information.

## Appendix 1. Step-by-step work sheet for dealing with potentially frivolous or vexatious requests

<p><b>1. Are any other provisions relevant?</b></p> <p>Relevant part of guide: <a href="#">Related provisions</a></p>	<ul style="list-style-type: none"> <li>• Before deciding to refuse a request as frivolous or vexatious consider whether any other provisions are relevant, including: <ul style="list-style-type: none"> <li>- <a href="#">Substantial collation or research</a></li> <li>- <a href="#">Information not held</a></li> <li>- <a href="#">Protection for staff.</a></li> </ul> </li> </ul>
<p><b>2. Is the request frivolous or vexatious?</b></p> <p>Relevant part of guide: <a href="#">Frivolous or vexatious requests</a></p>	<ul style="list-style-type: none"> <li>• Consider the nature of the request in light of the surrounding circumstances, including: <ul style="list-style-type: none"> <li>- <a href="#">The burden of the request</a></li> <li>- <a href="#">The purpose or value of the request</a></li> <li>- <a href="#">The intention behind the request</a></li> <li>- <a href="#">The effect of the request on staff</a></li> <li>- <a href="#">The language or tone of the request</a></li> <li>- <a href="#">The history and context of the request</a></li> <li>- <a href="#">Whether the same information has been supplied previously and there is no good reason for it to be supplied again.</a></li> </ul> </li> <li>• Based on this and any other relevant considerations, would it be plain and obvious to a reasonable person that the request amounts to an abuse of the right to access official information?</li> </ul>
<p><b>3. Making the decision</b></p> <p>Relevant part of guide: <a href="#">Making the decision</a></p>	<ul style="list-style-type: none"> <li>• Ask someone else who isn't familiar with the background to consider whether the request meets the high threshold for being frivolous or vexatious.</li> <li>• Ensure an appropriately senior person makes the decision.</li> <li>• Document the evidence and reasoning for the decision.</li> <li>• Use our <a href="#">template refusal letter</a> as a starting point. Add details of the agency's evidence and reasoning to demonstrate that it has taken a carefully considered approach to refusing the request.</li> </ul>

## Appendix 2. Template letters

### 1. Refusal—Frivolous or vexatious request

[Date]

[Name and address of requester]

Dear [name]

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

I refer to your official information request dated [date] for [quote or set out detail of request].

We have decided to refuse your request under section [18(h) of the OIA/17(h) of the LGOIMA] because we think it is frivolous or vexatious.

We have not reached this decision lightly. [Detail the reasons why the request is considered to be frivolous or vexatious.]

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.

Yours sincerely

[Name]

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## 2. Information not held—no obligation to create it

[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].

The [OIA/LGOIMA] enables people to request official information from [Ministers and agencies/local government agencies], including [agency name]. However, the [OIA/LGOIMA] only applies to information that is already held by [agency name]. There is no obligation on [agency name] to create information in order to respond to a request.

The information you are seeking in this case is not held by [agency name] but would need to be created in order to respond to your request. [Explain the agency's reasons for believing the information would need to be created].

I am therefore refusing your request under section [18(g) of the OIA/17(g) of the LGOIMA], because [agency name] does not hold any official information.

I am, however, able to advise that [provide any information or explanation that is reasonable to provide in the circumstances].

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.

Yours sincerely

[Name]

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### 3. Aggressive or abusive language

[Date]

[Name and address of requester]

Dear [name]

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

I refer to your official information request dated [date] for [quote or set out detail of request].

[Agency name] responds to all official information requests made in good faith in accordance with the requirements of the [OIA/LGOIMA].

However, the language and tone of your request lead us to question whether your request has been made in good faith. [Describe the agency's concerns about the language and tone of the request].

Rather than refuse your request as frivolous or vexatious at this stage, we invite you to consider resubmitting it in more appropriate terms.

If you choose not to, we will consider whether it is necessary to refuse your request as frivolous or vexatious under section [18(h) of the OIA/17(h) of the LGOIMA].

We look forward to receiving your revised request.

Yours sincerely

[Name]

**Note:**

If you don't hear back from the requester you will still need to make a decision on the original request within the maximum statutory timeframe.

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## Appendix 3. Sample evidence log

Date of contact	Type of contact	Summary of contact	Response required	Person responsible	Time taken
16/05/2016	Letter	OIA request for qualifications and experience of decision maker  Link to <a href="#">full letter</a>	Information released	AB, Analyst  CD, Manager	3 hours

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## Appendix 4. 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.

Note, because there have been so few cases on frivolous or vexatious requests, we have included cases that the Ombudsman has declined to investigate on the basis that the complaint was frivolous or vexatious or not made in good faith (section 17(1)(d) of the Ombudsmen Act 1975), in order to further illustrate the Ombudsman’s approach.

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428929	2016	<a href="#">Movement log and Police file</a> <i>Vexatious complaint, Ombudsman refuses to investigate—requester not deprived of right to access official information because he had already received all relevant information—requester not deprived of access to justice because his underlying concerns had been conclusively resolved in a range of forums</i>
362529	2016	<a href="#">Information relating to proposed parking changes in a street</a> <i>Request not frivolous or vexatious—while the volume of correspondence and requests created challenges, the requester had a legitimate interest in obtaining information to help them understand the intended changes and make submissions on the proposal—no evidence the request was made for irrational, mischievous or malicious reasons—no evidence that the agency had helped the requester to refine the request, reduce the scope, or clarify the specific information sought</i>
327805	2016	<a href="#">Information about mental health</a> <i>Some information not held—explanation would need to be created—some information could not be provided without substantial collation or research</i>

391655	2015	<p><a href="#">Copy of LGOIMA request</a></p> <p><i>Request not frivolous or vexatious—information should be released—earlier decision to supply the (wrong) information undermined the later decision to declare the request vexatious—request arose out of genuine interest in the subject—while the requester had been critical of Council that did not mean the purpose of his request was to harass or annoy</i></p>
350799	2015	<p><a href="#">Correspondence regarding dog control officer’s actions</a></p> <p><i>Vexatious complaint, Ombudsman refuses to investigate—request related to dispute some 16 years prior that had already been the subject of court proceedings and inquiries by this Office—request was an attempt to re-litigate already long-concluded matters and an abuse of the right to access official information</i></p>
343825	2015	<p><a href="#">Evidentiary conclusions in respect of 15 issues or assertions and information about the religious affiliation or association of staff</a></p> <p><i>Information not held—evidentiary conclusions would need to be created—information about religious affiliation of association of staff would be held in a personal capacity, if at all</i></p>
388454	2014	<p><a href="#">Tangata whenua rights</a></p> <p><i>Information not held—explanation would need to be created</i></p>
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279056	2011	<p><a href="#">Audit report of approved organisation under the Animal Welfare act</a></p> <p><i>Request not frivolous or vexatious—information should be released—acrimonious history and prolonged legal dispute were relevant to decision whether or not request was vexatious—while future similar requests might be vexatious this one was not—the requester’s legitimate concerns about the effectiveness re oversight of approved organisations were the catalyst for the audit report, and she was initially promised a copy of it—requester was genuinely interested in and entitled to know the findings.</i></p>

170889	2010	<p><a href="#">Trivial information</a></p> <p><i>A proportion of the large volume of information at issue could fairly be characterised as 'trivial', bearing in mind the purpose of the request—this included auto replies, read receipts, undeliverable messages, emails arranging meetings and information about the proper processing of the requester's OIA and Privacy Act requests</i></p>
W37133	1997	<p><a href="#">Information in electronic form</a></p> <p><i>Repeat request for information in a different format not frivolous or vexatious—information should be released</i></p>
W36125	1996	<p><a href="#">Aggressive or abusive language</a></p> <p><i>Request not frivolous or vexatious—request was not intended to trouble or harass—requester genuinely wanted the information—requester was asked to resubmit his request without any derogatory and intemperate comments</i></p>
W31443	1994	<p><a href="#">Market information and explanations</a></p> <p><i>Request not frivolous or vexatious but refusal otherwise justified—release of market information would require substantial collation or research—explanations not held</i></p>

### Case 414468 (2017)—Internal and external correspondence relating to OIA requests

In September 2015, the Ministry of Justice refused to comply with a request for information that it said lacked due particularity. The requester (a parliamentary researcher) submitted a follow-up request for internal and external correspondence about the original request.

In April 2016, the Ministry refused another OIA request by that requester under section 18(d), on the grounds that the information would soon be publicly available. The requester again submitted a follow-up request for internal and external correspondence about the original request.

Both of the follow-up requests were themselves refused on the basis that they were frivolous or vexatious, or the requested information was trivial, and the requester complained to the Chief Ombudsman.

The requester noted that the Ministry had complied with previous similar requests; that it had not attempted to contact him before deciding his requests were vexatious; and that his purpose in making the follow-up requests was to understand how the original requests had been dealt with.

The Chief Ombudsman notified the complaint to the Ministry, which attempted to

resolve it by doing a number of things. First, it apologised for refusing the follow-up requests as vexatious if, in fact, the requester's intention had been to understand how his original requests were dealt with. It provided a further explanation of how both the original requests had been dealt with. It also offered to undertake an internal review in the event the requester was dissatisfied with the Ministry's reasons for refusing any future requests for official information. However, the Ministry still declined to provide the actual information sought by the requester. The Chief Ombudsman therefore proceeded with his investigation, seeking a report on the Ministry's reasons for refusal.

The Ministry maintained that the requests were frivolous or vexatious. Relevant factors in the Ministry's decision were that:

- The requester had a practice of making follow-up requests whenever the Ministry refused an OIA request or asked him to refine it. The Ministry provided a further two examples, including one (a request for the name, qualification and length of service of an official), which the Ministry construed as *'a thinly veiled attack on the person who made the decision to ask him to refine the request'*.
- The fact that the requester made the follow-up requests within 5 and 6 minutes of the Ministry's response to the original requests, indicating a lack of any real thought or consideration before making the requests.
- The fact that the Ministry had already taken care to explain the reasons for its decisions on both requests, and that the requested documents would add little, if any, further insight.

Noting the Ministry's apparent disbelief that the requester was in fact motivated by a desire to understand how his original requests were dealt with, the Chief Ombudsman arranged for his staff to meet with the requester. As a result of that meeting, he formed the provisional opinion that the follow-up requests had in fact been made in good faith.

The requester genuinely wanted to know how his requests had been handled. The purpose or value of such requests was evidenced by the fact that similar requests had been made by other parliamentary researchers. The speed with which the requests were submitted did not constitute sufficient evidence that the requester was abusing his right to request official information.

The Chief Ombudsman also did not consider that the information requested was trivial. It could certainly have assisted the requester to understand how his original requests had been handled, and in particular, why one of those requests caused confusion due to the lack of particularity. The Chief Ombudsman considered that the Ministry should have discussed the matter with the requester before resorting to outright refusal.

In response, the Ministry argued that the Ombudsman's focus on bad faith and abuse of rights was too narrow. In addition to the intent or motive of the requester, it was necessary to consider the objective value of the request, and its effect on the agency. While the Ministry accepted that it could be a legitimate for a requester to seek internal

communications about the processing of a previous OIA request, the conduct and context in this case led it to the view that these particular requests were frivolous or vexatious. These factors included:

- the speed with which the follow-up requests were submitted;
- the fact that the requester had now submitted a total of five such follow-up requests in a 14-month period (this type of request appeared to have developed into a *'reflexive habit'* on the part of the requester);
- the fact that reasons for the decisions had already been provided and release of the information at issue would not materially add to the requester's understanding of these;
- the fact that, in one of the previous instances, the requester appeared to be challenging the competence of the official who dealt with his request by seeking their name, qualifications and experience, creating further doubt as to the genuineness of the requests.

The Ministry also said that it did not typically have the advantage of meeting its requesters in person, and so needed to assess their requests based on the content and context of their written communications.

The Chief Ombudsman rejected this assertion, noting that the requester worked in central Wellington and invited contact in the event that the intent of his requests required clarification. In the Chief Ombudsman's opinion, it would have been simple and expedient to have met or at least talked with the requester before the Ministry changed its practice of providing this type of information. The Chief Ombudsman formed the final opinion that the requests in this case were not frivolous or vexatious, and the information was not trivial, and recommended disclosure of the information at issue.

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### Case 428929 (2016)—Movement log and Police file

A requester asked the Police for the *'movement log'* for a particular document, and a particular Police file.

In respect of the former request, the Police advised that there was no *'movement log'* for the document. As the requester had been advised before, because in Police's view no criminal offending had occurred, the document was not an exhibit requiring special recording procedures for the purposes of admissibility in a criminal case.

In respect of the latter request, the Police noted that the requester had already received a copy of the file. Because he *'had been provided with the information to which [he was] entitled in response to numerous and repeated requests over many years'*, the Police declined to provide a further copy. The requester complained to the Chief Ombudsman.

The Chief Ombudsman considered the complaint, the Police's decision, files relating to

the requester's previous complaints to the Ombudsman, and publicly available information concerning litigation to which the requester was a party. He noted, in particular, that the former Ombudsman had in 2012 conducted a page-by-page review of the information held by Police and concluded there was nothing to suggest the Police then held or had ever held any additional relevant information. The Chief Ombudsman concluded that investigating this complaint would be an abuse of process and an injudicious use of the Ombudsman's and the Police's limited resources.

The Chief Ombudsman noted that the Police refusal had not deprived the requester of his right to access official information. He had previously been provided with this information. Much of the information was originally sourced from him, so he was well aware of its contents. The only reason he no longer held some of the information was his decision to send it, unsolicited, to the Police. The former Ombudsman was satisfied in 2012 that the Police did not hold any additional relevant information, so this was not a case where further requests might have uncovered material to which the requester had not previously had access.

The Chief Ombudsman also noted that that the Police refusal had not deprived the requester of access to justice. His underlying concerns had been resolved conclusively in proceedings before the Health Practitioner's Disciplinary Tribunal, the Human Rights Review Tribunal, the District Court, the High Court, the Court of Appeal and the Supreme Court. The Chief Ombudsman declined to investigate the complaint on the basis that this would be an abuse of process, and the complaint was therefore frivolous or vexatious.

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### Case 362529 (2016)—Information relating to proposed parking changes in a street

A residents' group complained to the chief executive of a local authority about the public consultation process it was carrying out in relation to proposed parking changes in a particular street. In this context, it also made a request for official information about the proposed changes. The request was stated to be made with urgency, to enable the group to prepare its submissions on the proposal. At the same time the group noted that it was considering referring its wider concerns about the consultation process to the Ombudsman for consideration under the Ombudsmen Act. In the absence of a response from the local authority, it did in fact do so.

The Chief Ombudsman investigated the group's wider concerns, and formed the provisional opinion that the local authority should respond to its complaint about the consultation process, as well as its request for official information. The local authority accepted this suggestion, but decided to refuse the request for official information as vexatious. In so doing, it noted that the request had been made over a year earlier for the purpose of preparing a complaint to the Ombudsman. As that purpose had now been fulfilled, *'the request [was] no longer made in good faith and may be considered instead an abuse of official information rights'*.

The Chief Ombudsman noted that the purpose of the request was to enable the group to

prepare its submissions on the proposal, not to make a complaint to the Ombudsman. She was concerned that a request might be considered vexatious simply because a requester had complained to the Ombudsman, or indicated their intention to do so: *‘any requester has the right to make a complaint to the Ombudsman, and no negative repercussions should arise as a result of this’*.

The Chief Ombudsman acknowledged the volume of requests and correspondence from the group created challenges for staff in terms of the workload involved in considering and responding to them. However, it seemed the group was trying to obtain more information in order to understand the intended changes, and to inform its submissions on the proposal. The group was persistent in pursuing this information, and in raising its concerns about the consultation process. However, it did seem to have a legitimate interest in the information it was seeking. There was no evidence the requests were made for irrational, mischievous or malicious reasons.

In addition, while the local authority expressed concern about the breadth of the official information request there was no evidence that it had attempted to discuss the request with the group in order to refine it, reduce the scope, or clarify the specific information that was being sought.

The Chief Ombudsman formed the final opinion that the request should not have been refused. The local authority accepted this opinion and said it would work with the group to help them refine their request.

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### Case 327805 (2016)—Information about mental health

A requester made an extensive request to a district health board (DHB) for information about mental health. The request comprised five parts, one of which had a further six sub-parts, and one of which had a further 15 sub-parts. The request was refused as vexatious and the requester complained to the Ombudsman.

The Ombudsman found that some of the requests were not for *‘official information’*. They sought the DHB’s opinion or explanation on various matters relating to the care and treatment of mental health patients using the requester’s view as the starting premise. The requested opinion or explanation would have to be created in order to respond to the request. For example, one of the requests sought:

*An explanation as to why...inmates are being told that ‘mental illness’ is a) an organic disease, b) genetic in origin, or c) due to a chemical imbalance in the brain and that mind and/or mood altering drugs are administered to correct this imbalance, when there is no evidence to support any of these falsities and, in fact, they were thoroughly debunked as far back as 1983.*

The Ombudsman also found that some of the requests could not be answered without substantial collation or research (section 18(f) of the OIA), because they were for information that was not routinely recorded, and which might only be retrieved following

a manual review of individual patient files. By way of example, the requester sought the percentage of patients advised about alternative therapies and offered alternative therapies instead of *'mind and/or mood altering drugs'*. Given that there were an average 1000 admissions per year to the DHB's mental health services, compiling the information would have had a significant and unreasonable impact on the DHB's operations.

The Ombudsman was satisfied that the request was properly refused, though not on the basis that it was vexatious.

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### Case 391655 (2015)—Copy of LGOIMA request

A requester sought a copy of another person's LGOIMA request for communications by a councillor about a local statue. The Council disclosed a copy of a different LGOIMA request by that person. The requester wrote to the Council to point out that it had provided the wrong information. The Council refused this *'further request'* as being vexatious, and the requester complained to the Chief Ombudsman.

The Council described a long-standing feud between the requester and the person whose LGOIMA request he sought. In Council's view, these individuals were using the LGOIMA to score points off one another. It was inconsistent for these purported *'Council watchdogs'*, who had been highly critical of what they saw as wasted Council resources, to use Council staff time to respond to requests which in no way generated any benefit to the wider public.

The Chief Ombudsman did not agree that the requester's letter to Council pointing out that it had provided the wrong information represented a *'further request'*. It was the same request as the first, restated for the purpose of identifying that the Council's original response was insufficient.

The Council initially decided to meet the request (albeit with the wrong information). It later determined that request to be vexatious. The reason for the Council's change of approach was not clear and seemed incongruous. The original decision to meet the request undermined the later decision to label that same request vexatious.

The Ombudsman was not persuaded that the requester was abusing his right to seek official information. While the purpose for which he sought the information might not be particularly meritorious, that did not make his request vexatious. The request arose from references to the information in other information disclosed to the requester by the Council, and due to a genuine interest in the subject. While the requester may have been critical of the Council, there was nothing to suggest that his request was intended to harass or annoy.

The Chief Ombudsman formed the opinion that the request was not vexatious and the Council released the information to the requester.

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### Case 350799 (2015)—Correspondence regarding dog control officer’s actions

This request arose in the context of an individual’s dispute with a council about a dog control officer’s actions. The requester, in 2014, sought copies of correspondence to particular parties subsequent to a council committee meeting in 1999. The council refused the request as it would require an extensive search through archives and on the grounds that it was vexatious, and the requester complained to the Chief Ombudsman.

The Chief Ombudsman noted that the driving force behind the LGOIMA request was the requester’s substantive concern about matters dating back some 16 years. This concern had already been the subject of court hearings and inquiries by the Ombudsman. In 2007 the former Chief Ombudsman said that a considerable amount of time had been spent on this dispute, and it would be unreasonable to expend any further time on an issue that could have no productive outcome.

The LGOIMA request and subsequent complaint were seen by the Chief Ombudsman as an attempt by the requester to re-litigate already long concluded matters. Such an exercise was an abuse of the right to make a request or complaint under the LGOIMA, and therefore vexatious. The Chief Ombudsman declined to investigate the complaint under section 17(1)(d) of the Ombudsmen Act.

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### Case 343825 (2015)—Evidentiary conclusions in respect of 15 issues or assertions and information about the religious affiliation or association of staff

A father made a complaint on behalf of his daughter to the Health and Disability Commissioner (HDC). He was dissatisfied with the HDC’s decision to take no further action on his complaint, and submitted a number of official information requests. He then complained to the Ombudsman about the adequacy of the HDC’s response to those requests.

#### **Request 1: Evidentiary conclusions**

The requester (being advised that the HDC applied the evidentiary standard of the *‘balance of probabilities’*), asked what conclusions had been reached applying that standard in respect of 15 issues or assertions. The HDC responded that the basis of the Commissioner’s decision to take no further action on the complaint had already been provided.

The Ombudsman noted that questions seeking explanations rather than information held by an agency are not covered by the OIA, unless they are incorporated into a request for a statement of reasons under section 23. The OIA is not a mechanism to allow the requester to interrogate or cross-examine an agency about its decision.

The Ombudsman considered the HDC had adequately responded to the request by

referring the requester back to the decision to take no further action. The reasons for that decision had already been provided to the requester. The HDC was not required to generate new information in order to respond to the 15 issues or assertions.

### **Request 2: Religious affiliation**

The requester sought the number and names of staff with whom the Commissioner shared a church affiliation or association. The Commissioner categorically denied what was seen as the implied impropriety in HDC appointments. He refused to supply information about the church affiliation or association of staff under sections 9(2)(a) (privacy) and 18(h) of the OIA.

In reply, the requester denied that he was implying any impropriety in HDC appointments. He said he sought factual information only, about the number of staff with whom the Commissioner shared a church affiliation or association. The Commissioner replied that this information was not collected by HDC, and reiterated that it was in any event private to the individuals concerned.

The requester complained to the Ombudsman, maintaining that the information need not be collected by the HDC, since it was already in the Commissioner's head. The Ombudsman noted that the church affiliation or association of staff is not needed or recorded by the HDC. To the extent that such information is in the mind of the Commissioner, it would be held by him in a private capacity, and therefore would not be '*official information*' for the purpose of the OIA.

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### **Case 388454 (2014)—Tangata whenua rights**

A requester asked the Minister of Maori Affairs '*what right have today's Maori to call themselves "tangata whenua" or the indigenous people of New Zealand*'. The request was stated to be made under the OIA. The Minister refused the request under section 18(g), on the basis that the information was not held, and section 18(h), on the basis that it was frivolous or vexatious. The requester complained to the Ombudsman, who declined to investigate.

The Ombudsman explained to the requester that while it is permissible to seek information by asking questions under the OIA, a distinction must be drawn between questions which seek information that is '*held*', and questions which seek to elicit an opinion or explanation. The primary purpose of the OIA is to allow requesters to seek information '*held*' by agencies. It is not a mechanism for requesters to seek an agency's explanation or opinion.

The question in this case did not appear to be seeking information held by the Minister. Instead, the requester was seeking an explanation or official statement from the Minister about the basis on which Maori are considered, or call themselves, tangata whenua. This sort of request would require the Minister to create information in order to respond. The

requested information was not held for the purpose of the OIA.

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### Case 310652 (2011)—Breakdown of invoice

The background to this case was as follows:

- 16 September 2010: A council issued an invoice dated 9 September 2010 for the processing of a resource consent.
- 27 September 2010: The requester rang the council seeking a breakdown of the invoice.
- 30 November 2010: The requester wrote to the council seeking a breakdown of the invoice.
- 20 December 2010: The council provided what it described as an itemised list of the charges, but which only gave a partial breakdown of one of the items on the invoice.
- 4 March 2011: The council demanded payment of the overdue amount.
- 12 March 2011: The requester reiterated its request for a full breakdown.
- 8 April 2011: The council replied to the requester, referring to the *'detailed breakdown'* already provided, and noting the level of detail provided was on a par with what other councils would provide.

The requester complained to the Ombudsman about the council's refusal to supply the requested information, or to specify the reason for refusal in terms of LGOIMA. The Ombudsman notified the council of the complaint and sought a copy of the information at issue. The council provided two internal documents setting out the calculation of the invoice. It explained that it was refusing the request as vexatious, as it appeared to be part of a strategy by the requester to delay or avoid payment. The council pointed to the delay between the date of issue of the invoice (9 September 2010) and the date of the request (30 November 2010)—some 56 working days. It also pointed to the delay between the date of the council's first response (20 December 2010) and the date of the requester's follow-up request (15 March 2011)—62 working days.

The Ombudsman did not consider that the council had a basis to refuse the request under section 18(h), or any other ground under the LGOIMA. There was no basis to believe the request was made in bad faith, or that the requester was abusing their rights under the LGOIMA. The council agreed to release the internal documents setting out the calculation of the invoice, and the complaint was resolved.

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### Case 279056 (2011)—Audit report of approved organisation under the Animal Welfare act

A requester sought a copy of an audit report completed by the Ministry of Agriculture and Forestry (MAF) into an organisation called the Animal Welfare Institute of New Zealand (AWINZ). The request was refused on numerous grounds, including that it was vexatious.

AWINZ was an organisation approved under the Animal Welfare Act 1999 to carry out certain animal welfare functions. As an *'approved organisation'*, it had some quite significant law enforcement powers.

The requester had made a number of allegations of fraud against AWINZ and its trustees, and published these on the internet and in writing to a range of agencies. One of these agencies was MAF, to which she made frequent complaints that it was not adequately monitoring the performance of approved organisations including AWINZ. One of the trustees had successfully sued her for defamation, with the court describing her actions as *'a relentless and vindictive campaign'*.

In response to the requester's allegations, MAF decided to conduct an audit of AWINZ. MAF initially indicated that it would make the audit report available to the requester, but it later declined to do so out of concern about her intentions.

MAF noted that the requester had quoted selectively from previous responses to OIA requests to support her allegations. She had published this information to multiple recipients and on the internet. She had also breached an earlier undertaking to present the released information in full or with the appropriate context. MAF considered it highly likely the requester would use the information to fuel her ongoing dispute with the trustees, and that while the trustees might have avenues of legal redress open to them if that were the case, the damage would already be done.

The Ombudsman consulted the AWINZ trustees, who were understandably concerned that release of the report would lead to further defamatory conduct by the requester. The Ombudsman acknowledged the acrimonious history between the requester and the AWINZ trustees, and the prolonged legal dispute that had ensued. He agreed that this background was relevant to determining whether or not the request could be considered vexatious.

However, the request was quite reasonable when seen in the context of the requester's frequent complaints that MAF had not been adequately monitoring the performance of approved organisations, including AWINZ. While the requester's initial interest in the issue stemmed from her conviction that AWINZ and its trustees were doing something fraudulent, the fact remained that she had raised a legitimate question about how effective MAF oversight of such organisations had been.

As the catalyst for the audit MAF carried out into AWINZ, and having been informed initially that she would receive a copy of the final audit report, it seemed to the

Ombudsman that her request for the audit report was a reasonable one. She was genuinely interested in the findings and, of course, wanted to know whether these findings would in any way vindicate her position. In these circumstances, the Ombudsman could not accept that this particular request was vexatious. However, he expressly left open the possibility that future requests for information about AWINZ might be, particularly given that AWINZ had since relinquished its status as an approved organisation.

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### Case 170889 (2010)—Trivial information

A lawyer made a number of requests to the Department of Labour (New Zealand Immigration Service) for information about an individual they were representing. The information was withheld under a number of grounds, and the requester complained to the Privacy Commissioner and the Chief Ombudsman. The Chief Ombudsman investigated the refusal to provide official information that was not personal information about the individual under the OIA.

The information at issue was voluminous—amounting to approximately 4-5000 pages. However, the significance of the matter was such that the Department never sought to rely on *‘substantial collation or research’* as a reason for refusing the request (section 18(f) of the OIA). Given the extent of information at issue, the requester provided information about their priorities, in confidence, to the Chief Ombudsman.

Based on the requester’s priorities, the Chief Ombudsman identified documents that were *‘substantive’* and documents that were *‘peripheral’*. Among the peripheral documents was a category of information that, in the Chief Ombudsman’s opinion, could fairly be characterised as *‘trivial’*, bearing in mind the purpose of the request. This included out of office auto replies, read receipts, undeliverable messages and emails arranging meetings.

It also included a significant amount of material generated as a result of internal or interagency communications intended to facilitate the proper processing of the lawyer’s requests for information. Examples of this information included correspondence referral cover sheets, OIA cover sheets, document tracking printouts generated from the Department’s electronic document management system, and notes or emails simply allocating responsibility for drafting or managing the response to a piece of correspondence to a particular staff member.

Lastly, it included information that was only *‘about’* the individual in question because it contained a fleeting reference to him; the substance of the information was actually irrelevant to the intent of the request. Examples of this information included the Department’s complaints register and scorecard.

The Chief Ombudsman noted that, in cases where a small amount of information is requested, some of which is trivial, an agency may decide to make that information

available because the time and effort of extracting and photocopying it is of no concern. In this case, however, a large amount of information had been requested, a substantial amount of which was trivial and not germane to the requester's concerns. In his opinion, the time and effort that would be required to extract and photocopy that information was unwarranted, and it was not unreasonable for the Department to invoke section 18(h) of the OIA to decline to do so.

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### Case W37113 (1997)—Information in electronic form

In response to an OIA request by a Member of Parliament, the Minister of Education released a table with some statistical modelling in hard copy form. When the requester sought that same information in electronic form the Minister refused the request as falling outside the scope of the OIA. The requester complained to the Chief Ombudsman.

The Minister argued that the OIA did not permit a requester to make a second request for information which had already been made available to them, albeit in a different form. He believed that to release the information again would set a precedent whereby material already released under the OIA would have to be collated and supplied again in a different format. He was concerned that if this became accepted practice, with technological developments, requests could be repeated seeking the same information in different formats and this would become costly.

The Chief Ombudsman was satisfied that this was a request for official information made in accordance with section 12 of the OIA. In general, a requester is entitled to receive the relevant information in their preferred format (section 16(1) OIA). None of the exceptions to this general principle applied in this case (section 16(2) OIA). The Chief Ombudsman went on to consider whether any of the reasons for refusal were applicable, including section 18(h).

The Chief Ombudsman noted that, if a requester had no good reason for seeking information already supplied to them, then section 18(h) may apply on the basis that the subsequent request is frivolous or vexatious. However, in this case it was apparent that the requester had been unaware when he made his request that the statistical information was captured by that request. Had he known that, he would have requested it in electronic form at the outset. That would have enabled the information to be analysed properly so that informed responses could be prepared to government policy initiatives and alternative policy initiatives developed.

In light of these factors, the Chief Ombudsman formed the opinion that the request for the same information in electronic form was not frivolous or vexatious, and recommended that the information be supplied. You can read the full case note on our

website.<sup>16</sup>

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### Case W36125 (1996)—Aggressive or abusive language

The requester in this case had an acrimonious relationship with the Police over several years in the course of which he made a number of requests for official information. Some of those requests had been answered, but latterly the Police had refused to respond to some of his correspondence, taking the view that his letters were offensive and his requests were for the same or similar information to that already dealt with in earlier correspondence. They declined one such request as frivolous or vexatious and the requester complained to the Ombudsman.

The Ombudsman confirmed that an official information request may properly be described as frivolous or vexatious when it amounts to an abuse of the right to make a request, rather than a legitimate exercise of that right.

In looking at case law relating to the striking out of proceedings on the ground of being frivolous and vexatious, it is not enough for proceedings to have disturbed, troubled or annoyed the other party. It must be shown that they were issued with that intent. In other words, the proceedings must be found to carry overtones of impropriety, and such overtones may be found in the surrounding circumstances of a case or in the history of the relationship between the parties.

The Ombudsman referred to a case in which the court had been tempted to strike out proceedings because the statement of claim was a *'diatribe'* of *'scandalous and grossly intemperate allegations'* against a judge and disputes tribunal referee.<sup>17</sup> However, it stopped short of doing so, and instead permitted the plaintiff to lodge a redrafted statement of claim purged of scandalous material.

Similar principles apply in the OIA context. An intemperate and abusive request or one that has a history which lends weight to a vexatious intent may also open the door to a conclusion that a request is *'frivolous or vexatious'*. In this case, the language and nature of the requests tended to the view that they were *'frivolous or vexatious'*. On the other hand, from discussions with the requester it became clear that his intent was not to be troublesome or annoying to the Police. He had a genuine interest in obtaining the requested information.

Taking a steer from the cautious approach adopted by the courts, the solution proposed and accepted by the parties was that the requester would withdraw the abusive remarks and redraft his requests purged of derogatory and intemperate material. Had the requester been unwilling to do so, *'the inference that the motive for his request was*

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<sup>16</sup> Search for 'W37113' using our online library [Liberty](#).

<sup>17</sup> *Van der Kaap v Attorney-General & Ors* (1996) 10 PRNZ 162.

*frivolous or vexatious would be difficult to avoid’.*

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### Case W31433 (1994)—Market information and explanations

A company applied to the Apple and Pear Marketing Board (the Board) for consent to export apples. The Board sought further information from the company to inform its decision. The company refused to supply it on the grounds that it was commercially sensitive. The company made an OIA request to the Board for specified information about its operations *‘in order to allow the Board to more easily come to grips with what sort of information one’s competitor might rightly expect to receive from another’*. The Board refused this request because of the *‘wide-ranging and voluminous nature’* of the information, under sections 9(2)(k) and 9(2)(b)(ii) of the OIA, and the requester complained to the Ombudsman. The Board subsequently declined the company’s application for consent to export apples, and the company sought judicial review of that decision.

The information sought by the company was as follows:

- 1. Full details of each market segment including price premiums, customers, varieties, volumes, sizes, etc.*
- 2. The premium characteristics which will allow ENZA to be sold at a premium, and evidence of the ability the Board has to handle the volumes expected.*
- 3. An explanation as to how [ENZA’s quality control and checking systems] translate to the premium prices which the Board claims it achieves, particularly in respect to Granny Smith and Red Delicious varieties.*
- 4. An explanation as to how, based on the market segment for ENZA, the Board expects the price ‘premiums’ obtained to be affected by the sale of Apple Fields higher specification apples.*

In seeking to justify its decision to refuse the request to the Ombudsman, the Board also sought to rely on section 18(h). It argued that the company did not genuinely want the information but was seeking to make a point about the difficulties it faced in complying with the Board’s request for information in support of its export application.

The Ombudsman rejected the Board’s contention that the request was vexatious; that request was not such that *‘no reasonable person could properly treat it as bona fide’*. He went on to evaluate the other reasons for refusal.

The Ombudsman accepted that the information requested at point 1 could not be made available without substantial collation or research (section 18(f) of the OIA). This was based on the Board’s estimate that it would take at least 100-150 hours to find and collate the information. The Ombudsman also noted that what the company was seeking from the Board was very different to what the Board had sought from the company in support of its application. The Board sought specific information about the company’s

market plans for certain products into certain markets in a particular season. In contrast, the company was seeking all information on all activities in unspecified markets, at unspecified times and seasons.

The Ombudsman also accepted that the information requested at points 2, 3 and 4 was not held by the Board. The Board would be required to create the requested '*explanations*' by conducting further research and seeking opinions from its agents and contacts throughout the world. In his opinion, therefore, points 2, 3 and 4 could be refused under section 18(g) of the OIA, because it was not held. You can read the full case note on our website.<sup>18</sup>

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<sup>18</sup> Search for 'W31433' using our online library [Liberty](#).