

## Information not held

A guide to sections 18(e) and (g) of the OIA and sections 17(e) and (g) of the LGOIMA

*It is obvious that agencies cannot release official information if they do not hold it; and there is no obligation under the official information legislation for them to have to create it.*

*There are also some types of information an agency may physically hold, but which were never intended to be captured or accessible under the official information regime.*

*This guide explores some of the issues around whether information is held or not. It explains how the refusal grounds that are relevant in this context (sections 18(e) and (g) of the OIA<sup>1</sup>) work.*

*It contains:*

- *a step-by-step worksheet;*
- *an information held 'cheat sheet';*
- *template letters for agencies to use; and*
- *case studies of actual complaints considered by the Ombudsman.*

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<sup>1</sup> References to the OIA should be taken as references to the LGOIMA; references to s 18(e) of the OIA should be taken as references to s 17(e) of the LGOIMA; and references to s 18(g) of the OIA should be taken as references to s 17(g) of the LGOIMA.

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## What the Act says

The OIA starts from a presumption of **availability**—that requested information will be made available unless there is a good reason not to.<sup>2</sup> However, agencies cannot supply information that they do not hold.

There are two refusal grounds relevant in this context:

1. section 18(e) of the OIA, which provides that a request may be refused if the document alleged to contain the information does not exist or cannot be found, despite reasonable efforts to locate it; and
2. section 18(g) of the OIA, which provides that a request may be refused if the information is not held, and there are no reasonable grounds to believe it is held by, or more closely connected with the functions of, another Minister or agency.

### Is the request subject to the OIA?

The right under the OIA is to request *‘any specified official information’*.<sup>3</sup> *‘Official information’* is defined in the Act as any information **held** by an agency or Minister **in their official capacity**.<sup>4</sup> There are also specific **exclusions** to the definition of official information.<sup>5</sup> This suggests that there is no right under the OIA to request information:

- that is not held by any agency, but would need to be created;
- that is not held by a Minister in their official capacity; or
- that is specifically excluded from the definition of official information.

It may be possible to refuse to comply with a request for such information on the basis that it is not *‘official information’*, and is not subject to the OIA. However, the general presumption should be that the OIA applies to any request where the requester is purporting to seek official information, until it can be established otherwise. Such requests should be processed in accordance with the requirements of the OIA, and refused, where necessary, under section 18(g) of that Act, because no *‘official information’* is held by the agency that received the request, or any other agency subject to the legislation. Even if a request is not subject to the OIA, agencies should provide a reasonable response to the requester. If the requester has concerns about the response that they receive, then they can complain to the Ombudsman under the Ombudsmen Act 1975.<sup>6</sup>

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

<sup>3</sup> See s 12 OIA and s 10 LGOIMA.

<sup>4</sup> See paragraph (a) of the definition of *‘official information’* in s 2(1) of the OIA and LGOIMA.

<sup>5</sup> See paragraphs (e)-(l) of the definition of *‘official information’* in s 2(1) of the OIA, and paragraphs (b)-(c) of the definition of *‘official information’* in s 2(1) of the LGOIMA. See discussion of [Excluded information](#) below.

<sup>6</sup> Providing the agency is subject to the Ombudsmen Act (Ministers are not).

## Documents that do not exist or cannot be found

Section 18(e) provides that a request may be refused for the following reason:

- (e) *that the document alleged to contain the information requested does not exist or, despite reasonable efforts to locate it, cannot be found.*

This section applies to **documents**, or information contained in documents. This means recorded information, including electronically recorded information.<sup>7</sup> If the requester is not seeking a document, or information contained in a document, agencies should consider section 18(g) of the OIA, because it applies to information more generally, and not documents specifically.

Section 18(e) applies in two situations:

1. where the alleged document **does not exist**—either because it never did, or because it has been destroyed; and
2. where the alleged document **cannot be found**.

Before refusing a request under section 18(e) agencies **must**:

- make reasonable efforts to try to locate the document (see [Making a reasonable search](#)); and
- consider whether consulting the requester would help them to locate the document (see [Consulting the requester](#)).<sup>8</sup>

When refusing a request under section 18(e), it is good practice to explain:

- the steps taken to try to locate the document; or
- the reasons why the document is believed not to exist.

If a document is known or likely to have been destroyed, this should be explained, if possible by a reference to the date of destruction and the applicable disposal authority.<sup>9</sup>

It is also good practice to consider whether there is any other information that can be released that might satisfy the requester. See our template refusal letter: [Document does not exist or cannot be found](#).

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<sup>7</sup> 'Document' is defined in s 2 of the OIA and LGOIMA.

<sup>8</sup> See s 18B OIA and s 17B LGOIMA.

<sup>9</sup> Public records cannot be disposed of without the permission of the Chief Archivist (see s 18 Public Records Act 2005), which is granted in the form of a 'disposal authority'. There are [general disposal authorities](#) authorising the disposal of non-core business information and records that are common across agencies.

## Information not held

Section 18(g) provides that a request may be refused for the following reason:

- (g) *that the information requested is not held by the [agency] and the person dealing with the request has no grounds for believing that the information is either—*
- (i) *held by another [agency]; or*
  - (ii) *connected more closely with the functions of another [agency].*

To refuse a request under section 18(g), agencies **must** be satisfied that:

1. the information is not held; and
2. the information would not be held by, or more closely connected with, the functions of another Minister or agency.

Before refusing a request under section 18(g), agencies **should**:

- make reasonable efforts to try to locate the information (see [Making a reasonable search](#)); and
- consider whether consulting the requester would help them to locate the information (see [Consulting the requester](#)).

Unlike in section 18(e), these are not explicit requirements with section 18(g), but agencies should consider doing them, in all relevant cases, as a matter of good practice.

When refusing a request under section 18(g), agencies should explain:

- the steps taken to try to locate the information; or
- the reasons why the information is not held.

It is also good practice to consider whether there is any other information that can be released that might satisfy the requester. See our template refusal letter: [Information not held](#).

### Transferring OIA requests to other agencies

You can't refuse a request under section 18(g) if there are grounds for believing the information is held by, or more closely connected with the functions of, another agency. In this situation, you're obliged to transfer the request to the other agency.<sup>10</sup> You can find more information about transfers in our guides: [The OIA for Ministers and agencies](#) and [The LGOIMA for local government agencies](#).

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<sup>10</sup> See s 14 OIA and s 12 LGOIMA.

## What does ‘held’ mean?

The question of whether information is held should be interpreted as broadly as possible. The UK House of Lords, when applying the equivalent of the OIA (the Freedom of Information Act), said ‘*this part of the statutory regime should be interpreted as liberally as possible*’.<sup>11</sup>

‘Held’ **does not just mean physically held**, though it includes it (subject to the [exclusions](#) discussed below). If information is physically held by an agency it will be held for the purpose of the OIA, even if it is seen as ‘*belonging*’ in some way to a third party. Notions of information ‘*ownership*’ or ‘*intellectual property*’ are not relevant in the OIA context. The fact that a third party may hold copyright in the information does not affect its status as information ‘held’ by an agency, nor is it a reason, in and of itself, to withhold copyrighted information.<sup>12</sup>

‘Held’ includes information **in the control** of the agency. The OIA has special provisions (called ‘*deeming provisions*’) aimed at ensuring that information that **should** be ‘*official*’ is **deemed to be held**. So agencies are deemed to hold:

- information held by unincorporated bodies established to assist, advise or perform functions connected with the agency;<sup>13</sup>
- information held by officers, employees, or members of the agency in their official capacity;<sup>14</sup> and
- information held by independent contractors to the agency, in their capacity as contractors.<sup>15</sup>

If this information is not in the agency’s physical possession—for example, because it is held by the contractor, or on an employee’s personal device (see case [411501](#)) or email account (see case [439322](#))—the agency will need to take steps to obtain it, so that it can comply with its obligations under the OIA. Agencies should ensure that any contracts for service include standard terms and conditions enabling them to access official information held by contractors.

‘Held’, in the case of undocumented information, means that it must be **known** to people within the agency (meaning that it is clear, certain or established), and able to be **recalled**. For more discussion on this point, see [Information held by employees](#).

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<sup>11</sup> *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47 at paragraph 15.

<sup>12</sup> Note that s 48 OIA and s 41 LGOIMA provide protection from civil proceedings for agencies that have released official information in good faith under the Act, but that protection does not extend to requesters who have obtained information under the Act. So copyrighted information can be released under the OIA, but not used by the requester in a way that infringes the copyright.

<sup>13</sup> See s 2(2) OIA. There is no equivalent provision in the LGOIMA.

<sup>14</sup> See s 2(4)-(4A) OIA and s 2(3)-(4) LGOIMA.

<sup>15</sup> See s 2(5) OIA and s 2(6) LGOIMA.

'Held' means that the information must be **in existence**. With the exception of providing a response to a request for a statement of reasons,<sup>16</sup> there is no obligation to **create** information in order to respond to a request. For more discussion on this point, see [Creation versus collation](#).

## Excluded information

Some information was never intended to be captured by the official information regime. The following information is excluded from the definition of '*official information*' under the OIA:<sup>17</sup>

1. Library or museum material held solely for reference or exhibition purposes.
2. Information held by an agency solely as an agent or for the sole purpose of safe custody on behalf of another person not subject to the OIA.
3. Information held by the Public Trustee or Maori Trustee in their capacity as a trustee.
4. Evidence or submissions to a Royal Commission or a commission of inquiry.
5. Certain information related to inquiries established under the Inquiries Act 2013.
6. Any correspondence or communication between any agency and the Ombudsman or the Privacy Commissioner, in relation to their investigations.
7. Victim impact statements.
8. Certain information provided to the Judicial Conduct Commissioner, a Judicial Conduct Panel, or the Judicial Complaints Lay Observer.

Exclusions **1, 2 and 6** apply under the LGOIMA as well.<sup>18</sup>

Even though this information may be physically held, it will not be accessible under the OIA. Requests may be refused under section 18(g) (see our template letter [Information excluded from the definition of '\*official information\*'](#)). The Ombudsman may also find that [the request is not subject to the OIA](#).

### Information held solely as an agent or for the sole purpose of safe custody on behalf of another person not subject to the OIA

The purpose of this exclusion is to ensure that information of a type that should never be covered by the OIA does not come within the Act simply because of a safe keeping arrangement with an agency.

For this exclusion to apply, there should be evidence to support an assertion that the holder of the information is acting solely as another person's agent. Acting as another person's agent

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<sup>16</sup> See s 23 OIA and s 22 LGOIMA, and our guide [Requests for reasons for a decision or recommendation](#).

<sup>17</sup> See paragraphs (e)-(l) of the definition of '*official information*' in s 2 of the OIA.

<sup>18</sup> See paragraphs (b)-(c) of the definition of '*official information*' in s 2 of the LGOIMA.

means that person has expressly or impliedly authorised you to be able to alter their legal relationship with third parties.<sup>19</sup>

Alternatively, it should be clear from the circumstances that the agency holds the information for **no other purpose** than to provide for its safe custody. Factors to consider include:

- the nature and content of the information;
- the context in which it came to be held;
- the agency's role and function;
- how the information relates to that role and function; and
- whether the agency has used the information, or is entitled to do so.

The Ombudsmen considered this exclusion in cases [363632](#) and [402092](#).

## Information held by Ministers

While Ministers are subject to the OIA, only information held in their **official capacity** is '*official information*'.<sup>20</sup>

'*Official information*' does not include information that is held by a Minister:

- in their private capacity;
- in their capacity as an MP (electorate information); or
- in their capacity as a member of a political party (caucus information).

Even though this information may be physically held, it will not be accessible under the OIA. Requests may be refused under section 18(g) (see our template letter [Information not held in Minister's official capacity](#)). The Ombudsman may also find that [the request is not subject to the OIA](#).

Note that information can become '*official information*' if it is used for ministerial purposes. The following factors should be considered in deciding whether information is held in a Minister's official capacity:

- the nature and content of the information;
- the context in which it came to be held; and
- the use to which it has been put.

See cases [467651](#) & [467523](#).

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<sup>19</sup> *LC Fowler & Sons Ltd v St Stephens College Board of Governors* [1991] 3 NZLR 304 and *Dowsing v State Insurance Ltd* [1996] 3 NZLR 622.

<sup>20</sup> See paragraph (a) of the definition of '*official information*' in s 2 OIA.



## Information held by former Ministers

Once an individual ceases to be a Minister, they are no longer subject to the OIA in their own right. Information that was held by former Ministers will only be subject to the OIA if it is held by a current Minister or agency subject to the OIA.

On leaving office, Ministers are required to return all internal departmental material to the originating department.<sup>21</sup> An OIA request may therefore be made to the originating department.

Remaining Ministers' papers may be deposited at Archives New Zealand, subject to agreed conditions,<sup>22</sup> or destroyed securely. Archived Ministers' papers can only be accessed in accordance with the imposed conditions.<sup>23</sup> Nothing in the OIA can derogate from this statutory access regime.<sup>24</sup>

Emails that were held by former Ministers in their official capacity may be deemed to be held by the Department of Internal Affairs (Ministerial Services)—see case [363632](#). Such information is held by Parliamentary Services, which is contracted by the Department to provide ministerial network services.

## Information held by employees

As noted above, agencies are deemed to hold information held by their officers, employees, or members in their official capacity.<sup>25</sup> This applies to **current** officers, employees or members, not former ones.

This **includes**:

- Information held in the minds of employees that has not yet been reduced to writing. Such information must be **known** to the individual (meaning it is clear, certain or established), and able to be **recalled**. Obviously, the more recent the information, the more likely it can be recalled. On request, any unrecorded information should be reduced to writing and released, unless there is a good reason for withholding. Reducing unrecorded information to writing does not amount to the creation of new information. Rather, it is the provision of existing information in a different form.
- Information held on employees' personal devices or email accounts, if it was generated, communicated, received or otherwise held in their official capacity. As the Ombudsman

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<sup>21</sup> Guidance on ministerial recordkeeping, including retention and disposal of public records, can be found in section 8 of the [Cabinet Manual 2017](#).

<sup>22</sup> See s 42 of the Public Records Act.

<sup>23</sup> See s 42(6) of the Public Records Act.

<sup>24</sup> See s 52(3)(b) OIA.

<sup>25</sup> See s 2(4) OIA and s 2(3) LGOIMA.

has noted (see case [439322](#)), ‘the use of private email accounts or personal devices does not override the application of [the official information legislation]’.

**It does not include:**

- Information that an officer, employee or member would not hold but for their membership of, or connection with, another body not subject to the OIA, except where that membership or connection is in their capacity as an officer, employee or member of the agency.<sup>26</sup>
- Information that is only known in an employee’s **private capacity** (see cases [343825](#), [178230](#) and [A12997](#)).

Note that information can become ‘official information’ if it is used by an employee in their official capacity. In determining whether information is held by an employee in their official capacity, agencies should consider:

- the nature and content of the information;
- the context in which it came to be held;
- the role and functions of the employee;
- how the information relates to that role and function;
- any use to which the information has been put by the employee.

## Creation versus collation

As noted above, there is no obligation to **create** information in order to respond to a request. However, there is an obligation to **collate** information that is already held. Sometimes it can be tricky to determine whether a task amounts to the collation of existing information, or the creation of new information.

A task is likely to amount to the creation of new information if:

- it requires the application of **complex skill, judgement or interpretation**; and
- the new information is **fundamentally different** to the existing information.

An agency will normally be collating existing information, rather than creating new information, where:

- it presents existing information in the form of a [list or schedule](#);
- answering the request involves [simple manual compilation](#) of information in the agency’s records;
- it [extracts information from an electronic database](#) by searching it in the form of a query.

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<sup>26</sup> See s 2(4A) OIA and s 2(4) LGOIMA.

See our template letter for refusing a request on the basis that [the information is not held, but would need to be created](#).

## Requests for lists or schedules

Agencies often receive requests for lists or schedules of documents, correspondence or other information where the list itself is not in existence. Where it is possible to extract the information requested (either manually or electronically) and present it in the form of a list or schedule, this does not amount to the creation of new information. While producing the list is a new task, it is not creating new information. It is simply a representation of existing information, as a by-product of responding to the request.

## Simple manual compilation

Information dispersed throughout an agency's records is still held. The fact that it has not been compiled in one place before does not mean it is not held. The manual compilation or extraction of such information does not amount to the creation of official information. Nor does the application of a simple mathematical calculation to generate a total that has not been generated previously. This is presenting existing information in a different form, not creating new information.

However, manual compilation and extraction of information can be time-consuming. Agencies may impose a reasonable charge for supplying the information.<sup>27</sup> Agencies may also be able to refuse requests where the amount of work involved in compiling or extracting the information would require substantial collation or research.<sup>28</sup>

In cases [441597 & 442496](#), [454915 & 454859](#), and [282242](#) the Ombudsmen confirmed that manual compilation of information does not amount to creation. In case [400121](#), the Ombudsman found that simple cross-checking of information contained in two databases did not amount to creation.

## Extracting information from electronic databases

Electronic databases are designed to make use of the data recorded in them. Individual items of information are stored in fields. Tables are made up of a number of fields. It is possible to extract information from a database by sorting or filtering the data sources, running a report, or by using a database query tool.

Information held in electronic databases that can be retrieved and manipulated using tools in the software, or by exporting to another piece of software (like Excel), is still held for the purpose of the OIA. Retrieval and manipulation of the data in this way does not amount to the creation of official information.

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<sup>27</sup> See s 15(1A)-(3) OIA and s 13(1A)-(4) LGOIMA, and our guide to [Charging](#).

<sup>28</sup> See s 18(f) OIA and s 17(f) LGOIMA, and our guide to [Substantial collation or research](#).

In cases where the Ombudsmen have accepted that responding to a request would require the creation of information, the work required to generate the information has been highly complex or specialised. Examples include data programming and analysis by a specialist with a high degree of skill and knowledge of the data, or the development and testing of new code to extract the relevant data from a database.

The issues to consider are whether meeting the request requires the application of **complex skill, judgement or interpretation**, and whether the information sought is **fundamentally different** to the information that is held.

## Answering questions

Requesters may seek answers to questions rather than the provision of specified documents. Provided the questions can be answered with pre-existing information (documentary or non-documentary), there is no problem with this (ie, the information is held).

However, if, in order to answer the questions, an agency would need to generate an opinion or explanation, this will be problematic. Generating an opinion or explanation may amount to the creation of new information, rather than the provision of information already held.

Such requests may be refused under section 18(g). However, agencies should consider whether they could be met in part through the provision of pre-existing documentary information.

The Ombudsman may also find that [the OIA does not apply](#). Even if the OIA does not apply, agencies should endeavour to provide a response that is reasonable in the circumstances, in accordance with good administrative practice. If the requester has concerns about the response that they receive, then they can complain to the Ombudsman under the Ombudsmen Act 1975.<sup>29</sup>

See cases [327805](#), [343825](#), [388454](#) and [W31433](#).

## Incomplete or inaccurate information

Information is *'held'* even if it is incomplete or inaccurate. The fact that information may be incomplete or inaccurate cannot justify refusal under section 18(g). That fact on its own is also unlikely to give rise to any substantive reason for withholding under sections 6 or 9 of the OIA (sections 6 or 7 of the LGOIMA). The right of access is to information which is held, not information which is accurate.

Where the requested information is incomplete or inaccurate it is possible to release it with a contextual statement explaining the limitations. In case [427255](#), a DHB should have provided the limited information held about access to staff records, even though it was not complete. In case [177815](#), Police should have provided the limited information held about the cost of investigations, even though the *'total'* costs were not held.

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<sup>29</sup> Providing the agency is subject to the Ombudsmen Act (Ministers are not).

## Making a reasonable search

Agencies must make *'reasonable efforts'* to find the requested document before refusing a request under section 18(e). While this is not an explicit requirement in section 18(g), it is expected, in all relevant cases, as a matter of good practice.<sup>30</sup>

Agencies do not have to apply unlimited time and resources in order to try to find information. A *'no stone unturned'* approach is not required.<sup>31</sup> However, it is not enough to make a *'desultory attempt'* at finding the information, as this would thwart the object of the legislation.<sup>32</sup>

A reasonable search will be thorough and intelligent, rather than mechanical.<sup>33</sup> The agency should have tried its best to find the information, and followed all obvious lines of inquiry. It should have convincing reasons for concluding that the document does not exist, or cannot be found, or that the information is not held.

*'Reasonable efforts'* can include:

- Asking people who might hold the information, or know something of its whereabouts, to search for it, provide details of the searches, and confirm the outcome.
- Searching physical filing systems.
- Searching email accounts, shared drives, document or content management systems, business systems, databases or other electronic repositories. A search by a user with administrative rights will be more comprehensive than a search by a general user.
- Seeking advice from information management staff about how to find the information, and any disposal actions that may have been taken.
- Seeking advice from information technology staff about how to find the information, and if it has been deleted, whether it is reasonably possible to recover it.

Where information has been destroyed in accordance with a disposal authority,<sup>34</sup> it will not usually be necessary for agencies to try and recover it by searching backup systems. However,

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<sup>30</sup> These points about making a reasonable search might not be relevant in cases where section 18(g) applies because:

- although the information is physically held, it is not *'official information'*; or
- the information is not held but would need to be created.

<sup>31</sup> *Yiasoumi v Attorney General* [2017] NZHRRT 12.

<sup>32</sup> See *Mitchell v Police Commissioner* [1995] NZAR 274.

<sup>33</sup> See above and *Geary v Accident Compensation Corporation* [2013] NZHRRT 34.

<sup>34</sup> Public records cannot be disposed of without the permission of the Chief Archivist (see s 18 Public Records Act), which is granted in the form of a *'disposal authority'*.

searches of backup systems may be required where information has been disposed of without the approval of a disposal authority.<sup>35</sup>

Where the information should be held by the agency, *'reasonable efforts'* can include making enquiries outside the agency. For example, in case [W44474](#), the Police could not find their report on the Cave Creek tragedy. Reasonable efforts in that case included asking the Commissioner of the Cave Creek Inquiry, and counsel assisting the Commission, whether they held a copy, and searching records at the Crown Law Office.

## Keeping a record of the search

It is important to keep a full record of the steps taken to search for the information, in case the requester complains to the Ombudsman.

This should include:

- the name and function of the system searched (physical or electronic);
- why these were the relevant systems to search;
- the search terms or methods used, including any filters and refiners, and any security restrictions that applied in respect of the user conducting the search;
- which staff were involved and why they were considered relevant; and
- the outcome of the searches (it can be good to take screenshots of the searches to provide to the Ombudsman if a complaint is made).

It can be helpful, when consulting staff, to use a form that they are obliged to return, certifying that they have searched all relevant systems and locations, giving details of how this search was conducted, and confirming that the information has not been found.

## Consulting the requester

Agencies must consider consulting the requester before refusing a request under section 18(e).<sup>36</sup> While this is not an explicit requirement in section 18(g), it is expected, in all relevant cases, as a matter of good practice.<sup>37</sup>

If an agency contacts the requester and explains the difficulty in meeting the request, and the

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<sup>35</sup> Law Commission. *The Public's Right to Know: Review of the Official Information Legislation*. (NZLC R125, 2012) at 196.

<sup>36</sup> See s 18B OIA (s 17B LGOIMA).

<sup>37</sup> Consulting the requester might not help in cases where section 18(g) applies because:

- although the information is physically held, it is not *'official information'*; or
- the information is not held but would need to be created.

steps they've taken to try and find the information, requesters may be able to:

- withdraw the request;
- make a different request; or
- think of additional lines of inquiry, for example, different search locations or search terms.

Requesters who have been given this opportunity are less likely to complain to the Ombudsman.

Use our [template letter](#) for consulting the requester prior to refusing a request under section 18(e) or (g) of the OIA.

## The Ombudsman's approach to complaints

Requesters who are dissatisfied with an agency's decision to refuse their request under section 18(e) or (g) of the OIA can complain to the Ombudsman. The Ombudsman will attempt to resolve complaints informally, or failing that, to form an opinion on whether the request should have been refused.

The Ombudsman will consider whether the agency took all reasonable steps to try and find the information, and whether it had a reasonable basis for concluding that the document did not exist or could not be found, or that the information was not held (either by the agency that received the request or any other agency). Demonstrating the adequacy of the agency's search should be a simple matter if [appropriate records](#) have been kept.

If the agency's issue is not about finding the information, but about whether the information is '*official information*', then the Ombudsman is likely to want to see the information in order to make a determination on this issue. The OIA would be undermined if the Ombudsman simply accepted an agency's assurances that the information was not '*official information*'.

If the agency's contention is that the information is not held but would need to be created, it will need to explain:

- the steps that would need to be taken to create the information;
- how these steps require the application of complex skill, judgement or interpretation; and
- how the new information is fundamentally different to the information held.

The Ombudsman may decide to seek independent technical advice to determine the issue of whether information is held or would need to be created.

## Should the information be held?

The question under the OIA is whether the information **is** held not whether it **should** be held. If the document does not exist, or can't be found, or the information isn't held, there is a legitimate reason to refuse the request under the OIA, and the Ombudsman will find as much following investigation of a complaint.

However, if the Ombudsman is sufficiently concerned that poor recordkeeping practices have hindered an agency's ability to meet an OIA request, they can notify the Chief Archivist under section 28(6) of the OIA (section 27(6) of the LGOIMA). The Chief Archivist can then take that information into account in exercising their functions under the Public Records Act 2005.

In addition, it is possible that an Ombudsman could choose to investigate an agency's recordkeeping practices under the Ombudsmen Act (provided the agency in question is subject to that Act).

## Further information

Appendix 1 of this guide has a [step-by-step worksheet](#).

Appendix 2 has an information held '[cheat sheet](#)'.

Appendix 3 has helpful [template letters](#).

Appendix 4 has [case studies](#) illustrating the application of sections 18(e) and (g).

Other related guides include:

- [\*The OIA for Ministers and agencies\*](#) and [\*The LGOIMA for local government agencies\*](#).
- [\*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\*](#)

You can also contact our staff with any queries about whether information is held 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

<p><b>1. What's the difficulty?</b></p> <p><b>Relevant part of guide:</b>  <a href="#">Documents that do not exist or cannot be found</a>  <a href="#">Information not held</a></p>	<ul style="list-style-type: none"> <li>• Document doesn't exist or can't be found—consider section 18(e).</li> <li>• Information isn't held, and there's no reason to think it would be held by, or more closely connected with, another agency's functions—consider section 18(g). (Don't forget the obligation to transfer if the information is held by, or more closely connected with, another agency's functions.)</li> <li>• Section 18(g) can also apply where the requested information:             <ul style="list-style-type: none"> <li>- would need to be <a href="#">created</a>;</li> <li>- isn't held by a <a href="#">Minister in their official capacity</a>; or</li> <li>- is <a href="#">excluded</a> from the definition of 'official information'.</li> </ul> </li> </ul>
<p><b>2. Make a reasonable search</b></p> <p><b>Relevant part of guide:</b>  <a href="#">Making a reasonable search</a></p>	<ul style="list-style-type: none"> <li>• Take all reasonable steps to try and find the information, or to determine that it doesn't exist or isn't held.</li> <li>• This could include:             <ul style="list-style-type: none"> <li>- Asking people who might hold the information, or know something of its whereabouts, to search for it, provide details of the searches, and confirm the outcome.</li> <li>- Searching physical filing systems.</li> <li>- Searching email accounts, shared drives, document or content management systems, business systems, databases or other electronic repositories. A search by a user with administrative rights will be more comprehensive than a search by a general user.</li> <li>- Seeking advice from information management staff about how to find the information, what the relevant recordkeeping policies are in relation to it, and any disposal actions that may have been taken.</li> <li>- Seeking advice from information technology staff about how to find the information, and if it has been deleted, whether it is reasonably possible to recover it.</li> </ul> </li> <li>• Keep full records of your searches, including screenshots, so they can be provided to the Ombudsman if a complaint is made.</li> </ul>

<p><b>3. Consider consulting the requester</b></p> <p>Relevant part of guide: <a href="#">Consulting the requester</a></p>	<ul style="list-style-type: none"> <li>• Explain the difficulty in meeting the request, and the steps taken to try and find the information.</li> <li>• Explain the information that is held, and see if they're prepared to withdraw or change the request.</li> <li>• See if they can think of additional lines of inquiry, for example, different search locations or search terms.</li> <li>• Use our <a href="#">template consultation letter</a>.</li> </ul>
<p><b>4. Can you release other information?</b></p>	<ul style="list-style-type: none"> <li>• Consider whether there is any other information that is held that could be provided to the requester.</li> </ul>
<p><b>5. Refuse the request</b></p>	<ul style="list-style-type: none"> <li>• If, having taken these steps, the agency believes that the document does not exist or cannot be found, or that the information is not held, refuse the request. Use our template refusal letters: <ul style="list-style-type: none"> <li>- <a href="#">Document does not exist or cannot be found</a></li> <li>- <a href="#">Information not held</a></li> <li>- <a href="#">Information excluded from the definition of 'official information'</a></li> <li>- <a href="#">Information not held in Minister's official capacity</a></li> <li>- <a href="#">Information not held—no obligation to create it</a></li> </ul> </li> </ul>

## Appendix 2. Information held cheat sheet

Information held	Information not held
Information physically held by agencies	Information that is excluded from the definition of official information
Information held by Ministers in their official capacity	Information held by Ministers in their private capacity, or their capacity as an MP or political party member
Information held by unincorporated bodies established to assist, advise or perform functions connected with the agency	Information that is only held by private organisations that are not subject to the official information legislation
Information held by independent contractors in their capacity as contractors to the agency	Information held by independent contractors in some other capacity
Information held by current officers, employees or members of an agency in their official capacity, including information held on personal devices or email accounts	Information held by former officers, employees or members of an agency
	Information held by current officers, employees or members of an agency in their private capacity
Undocumented information held in the minds of current officers, employees or members of an agency	Undocumented information that cannot be recalled
Information (including lists or schedules) that can be compiled manually or extracted from electronic databases	New information that is fundamentally different to existing information, and must be created through the application of complex skill, judgement or interpretation
Questions which can be answered with information that is already known	Questions which require agencies to generate an opinion or explanation
The reasons for a decision that personally affects the requester (section 23 OIA / 22 LGOIMA)	

## Appendix 3. Template letters

### 1. Document does not exist or cannot be found

[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].

Unfortunately, the document you requested [does not exist / cannot be found].

We have made every possible effort to locate the document, including [detail steps taken to try to locate the document, and explain the outcome of any attempt to consult the requester, as required by section [18B](#) of the OIA / [17B](#) of the LGOIMA, or why no such attempt was made].

We are therefore refusing your request under section [18(e) of the OIA / 17(e) of the LGOIMA] because the requested document [does not exist / cannot be found].

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

Yours sincerely

[Name]

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## 2. Information not held

[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].

Unfortunately, we do not hold the information you requested, and we cannot think of any other agency that would hold it, or whose functions would be more closely connected to it.

[Explain the steps taken to try to locate the information and/or the reasons why the information is not held].

I am therefore refusing your request under section [18(g) of the OIA / 17(g) of the LGOIMA] because the information is not held.

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

Yours sincerely

[Name]

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### 3. Information excluded from the definition of ‘official information’

[Date]

[Name and address of requester]

Dear [name]

#### **Request for [brief detail of subject matter of request]**

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

Unfortunately, the information you have requested is not ‘official information’. This is because the [OIA/LGOIMA] specifically excludes [insert relevant paragraph of the definition of ‘official information’ in [section 2 of the OIA](#)/[section 2 of the LGOIMA](#)].

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’.

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

Yours sincerely

[Name]

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## 4. Information not held in Minister's official capacity

[Date]

[Name and address of requester]

Dear [name]

### **Request for [brief detail of subject matter of request]**

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

Unfortunately, the information you have requested is not *'official information'*. *'Official information'* means any information held by a Minister in their official capacity. The information you requested is not held by me in my official capacity. [Explain the basis for this belief].

I am therefore refusing your request under section 18(g) of the OIA, because no *'official information'* is held by me.

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

[Date]

[Name and address of requester]

Dear [name]

### **Request for [brief detail of subject matter of request]**

I refer to your 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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## 6. Consultation with requester before relying on section 18(e) or (g) OIA / 17(e) or (g) LGOIMA

[Date]

[Name and address of requester]

Dear [name]

### **Request for [brief detail of subject matter of request]**

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

Unfortunately, we are having considerable difficulty finding the information you requested. We may have to refuse your request under section CHOOSE [18(e) of the OIA / 17(e) of the LGOIMA because the document does not exist or cannot be found] OR [18(g) of the OIA / 17(g) of the LGOIMA because the information is not held].

Before doing so, we wanted to check whether we have understood your request correctly, and whether you have any ideas about where we ought to look for the information. This might include specific search locations or specific search terms.

If you do, we would be grateful to hear from you by [insert date that will enable the agency to meet its statutory obligation to make and communicate its decision on the request no later than 20 working days after it was received].

If you want to discuss your request, please feel free to contact [details of contact person].

Yours sincerely

[Name]

### **Note:**

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

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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.

Case number	Year	Subject	Outcome
441597 & 442496	2018	<a href="#">Statistics on allegations of assault against Corrections staff</a> <i>Section 18(g) did not apply—manual compilation is not creation</i>	Refusal not justified
467651 & 467523	2017	<a href="#">Document related to coalition negotiations between Labour and New Zealand First</a> <i>Information not 'official information'—information not held in Prime Minister's official capacity</i>	Refusal justified
460422	2017	<a href="#">Employee's recollection of events</a> <i>Section 18(e) did not apply because the information was not comprised in a document—section 18(g) did apply—agency not deemed to hold information held in the mind of an employee in her capacity as a former employee of another agency—Information that cannot be recalled is not held</i>	Refusal justified, but under section 18(g) not 18(e)
454915 & 454859	2017	<a href="#">Firearms statistics</a> <i>Section 18(g) did not apply—manual compilation is not creation—section 18(f) applied—compilation would require substantial collation or research</i>	Refusal justified in part, but under section 18(f) not 18(g)
439322	2017	<a href="#">Emails from Regional Councillor's private email account</a> <i>Information held in Councillor's private email account was 'official information' because it was communicated in his official capacity</i>	Refusal justified in part
427255	2017	<a href="#">Information about access to staff records</a> <i>Section 18(g) did not apply—incomplete information could have been released along with contextual statement</i>	Refusal not justified

Case number	Year	Subject	Outcome
411501	2017	<p><a href="#">Footage of the battle of Baghak recorded on personal devices</a></p> <p><i>NZDF was deemed to hold battle footage recorded by soldiers on their personal devices in their official capacity</i></p>	Refusal justified because no further footage was held, not because it was not official information
400121	2017	<p><a href="#">Information about academic misconduct by international students</a></p> <p><i>Simple cross-checking of information contained in two databases did not amount to the creation of information</i></p>	Information held—charge for supply reasonable
363632 etc and 402092 etc	2016/17	<p><a href="#">Emails of former Ministers</a></p> <p><i>Emails of former Ministers held by Parliamentary Services pursuant to contract with DIA deemed to be official information held by DIA—Information not held by DIA solely as an agent or for the sole purpose of safe custody on behalf of former Ministers</i></p>	Refusal justified
327805	2016	<p><a href="#">Information about mental health</a></p> <p><i>Section 18(g) applied—information not held but would need to be created</i></p>	Refusal justified
356171	2015	<p><a href="#">Information about Novopay payment errors</a></p> <p><i>Section 18(g) applied—information not held but would need to be created</i></p>	Refusal justified
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>The requested explanation was not held but would need to be created—information that is only known in an employee’s private capacity will not be held</i></p>	Refusal justified
388454	2014	<p><a href="#">Tangata whenua rights</a></p> <p><i>The requested opinion or explanation was not held but would need to be created</i></p>	Refusal justified

Case number	Year	Subject	Outcome
282242 etc	2012	<p><a href="#">Information regarding Ministerial conflicts of interest</a></p> <p><i>Section 18(e) applied—handwritten notes recording conflict of interest declarations at Cabinet committee meetings did not exist—section 18(g) did not apply—Statistical information required compilation not creation</i></p>	Refusal justified in part
177815 etc	2010	<p><a href="#">Police investigation costs</a></p> <p><i>Section 18(g) applied to request for ‘total’ costs, but incomplete cost information should have been released with a contextual statement</i></p>	Refusal not justified
178230	2009	<p><a href="#">Police rules and regulations and information about officers from 1974</a></p> <p><i>Section 18(e) applied—documents could not be found despite reasonable search—section 18(g) applied—information that is only known in an employee’s private capacity will not be held</i></p>	Refusal justified
176152	2008	<p><a href="#">Comparison of current and original proposals</a></p> <p><i>Section 18(e) applied—requested document did not exist but would need to be created</i></p>	Refusal justified
A12997	2008	<p><a href="#">Lecture research notes</a></p> <p><i>Section 18(g) applied—information held in staff member’s private capacity not held</i></p>	Refusal justified
W44474	2001	<p><a href="#">Cave Creek Police report</a></p> <p><i>Section 18(e) applied—document could not be found despite reasonable efforts</i></p>	Refusal justified
W31433	1994	<p><a href="#">Market information and explanations</a></p> <p><i>Section 18(g) applied—information not held but would need to be created</i></p>	Refusal justified

### Cases 441597 & 442496 (2018)—Statistics on allegations of assault by Corrections staff

A requester sought statistics on allegations of assault by Corrections staff. The Department of Corrections responded that this information was not centrally held, but stored on individual files, and did not exist in a form that could be readily supplied. The request was refused under sections 9(2)(a) (privacy), 18(g) (information not held) and 18(f) (substantial collation or research). The requester complained to the Ombudsman.

The Chief Ombudsman noted that under the Prison Operations Manual all allegations of staff assault are required to be notified, using IR.07.Form.01, to the Corrections Services Helpdesk, which in turn notifies all relevant persons, including the Inspector of Corrections. Therefore, it seemed that the source information to answer the request should be held by the Department, albeit not in a centralised location. What was required was essentially retrieval of existing data, not creation of new data.

The Prison Operations Manual also requires completed investigations of alleged staff assaults to be forwarded to the National Commissioner Corrections Services, *‘in order that the statistical record of the allegation may be completed’*. However, the Department advised this was not happening in practice, as the National Commissioner was notified only when an allegation was sustained.

The Chief Ombudsman stated that, quite apart from the Department’s own reporting requirements, he would expect the Department to keep records of alleged staff assaults in compliance with its obligations under section 17 of the Public Records Act 2005. Had it done so, the requested statistics would be generally available.

While the difficulty in extracting or compiling the information might be considered under section 18(f) of the OIA (substantial collation or research), the Chief Ombudsman did not accept that this section applied. It would not be too great a task to compile the relevant incident reports and, in any event, it would be unreasonable to rely on section 18(f) when the fundamental difficulty in providing the information was down to the Department’s own administrative lapses.

The Chief Ombudsman did not need to make any recommendations because the Department agreed to collate and release the information to the requester, and to change its practices so that it was recorded systematically.

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### Cases 467651 & 467523 (2017)—Document related to coalition negotiations between Labour and New Zealand First

The day after the Labour and New Zealand First political parties agreed to form a governing coalition, the New Zealand First leader revealed the existence of a 38-page document developed during the coalition negotiations. He described the document as one *‘of precision on various areas of policy commitment and development’*, and said it

contained *'directives to ministers with accountability and media strategies to ensure that the coalition works'*. He also said the document would be made public, but it was *'for the province of the Prime Minister to release'*.

When the Prime Minister, Hon Jacinda Ardern, received OIA requests for the document, she refused them on the basis that the document was not *'official information'* because it was not held in her official capacity as a Minister of the Crown. The requesters complained to the Ombudsman.

To determine whether the document was held by the Prime Minister in her official capacity as a Minister of the Crown, the Chief Ombudsman considered:

- the purpose of the document;
- the nature and content of the document;
- the context in which it came to be held; and
- the use to which it had been put.

The document was created in the course of coalition negotiations between Labour and New Zealand First, for the purpose of facilitating those negotiations, prior to the final coalition agreement being signed and the formation of the government. While the document was considered during the coalition negotiations, it did not form part of the final coalition agreement. That agreement was subsequently published by Ms Ardern, notably acting in her capacity as the Leader of the Labour Party.

The content of the document supported this, as it contained discussion points designed for negotiation, and did not in fact include any *'directives to Ministers'*. The document was clearly created prior to the coalition agreement, and therefore before the formation of the government. It followed that the information, when it was created, was capable of being held by Ms Ardern only in her capacity as Leader of the New Zealand Labour Party. The contents of the document therefore were clearly not *'official information'* at that time.

To then become *'official information'*, the document would need to have been used by Ms Ardern, or any other Minister of the newly formed government, in their official capacity. The Prime Minister confirmed that the document had not been used since the formation of the government, or shared with any Ministers or agencies subject to the OIA. It had played no part in policy decisions, and was not available to Ministers as reference material when making official decisions.

The Deputy Prime Minister (and leader of New Zealand First, who publicised the existence of the document) also affirmed that the information was created during coalition negotiations for the purpose of discussion between the parties, and that it did not form part of the final agreement that was reached. He agreed that the document did not contain any guidance or directives to Ministers as to how to carry out their roles, and

said he had not used the document in his official capacity as Deputy Prime Minister.

The Ombudsman concluded that the document was held solely in Ms Ardern's capacity as Leader of the Labour Party. Therefore, it was not *'official information'* for the purpose of the OIA.

Read the full opinion [here](#).

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### Case 460422 (2017)—Employee's recollection of events

A requester sought a Department of Internal Affairs (DIA) employee's recollection of events that occurred in 1997/98 when she was employed at the Inland Revenue Department (IRD). He complained to the Ombudsman when DIA transferred his request to IRD, and when IRD refused that request under section 18(e). He noted that official information could include information in the minds of staff.

The Ombudsman found the transfer to IRD was reasonable because the request was more closely connected with its functions. The only way DIA could be deemed to hold the information was under section 2(4) of the OIA, but although the information may have been held in the mind of a DIA employee, it was not *'in that person's capacity as **such an employee**'*, but in their capacity as a former IRD employee.

IRD had also enquired of the DIA employee whether she recalled the events in 1997/98. She did not. The Ombudsman consulted the DIA employee himself, and accepted her assurance that she did not recall the events, twenty years ago, relating to this OIA request.

The Ombudsman concluded that, although the refusal under section 18(e) was not appropriate because the requested information was not comprised in a document, it was open to IRD to refuse the request under section 18(g) because the information was not held.

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### Cases 454915 & 454859 (2017)—Firearms statistics

The Police refused two requests for firearms statistics under section 18(g), and the requester complained to the Ombudsman.

#### Case 454915

The first request was for:

- the number of random checks of firearm endorsement holders in the last year;
- the number of crimes discovered as a result; and

- missing restricted weapons discovered as a result.

The Police explained that information on random checks is stored in its NIA database against each individual's licence in the form of free text. Thus, it was not stored quantitatively in Police databases. Police argued they would need to analyse the qualitative data contained in the free text fields, and hard copy files, to generate new data in the form requested.

#### **Case 454859**

The second request was to know, out of the last 100 cases where a firearm was used in an assault, robbery or murder, how many were military-style semi-automatic rifles, and how many were lawfully owned by the perpetrator.

Police argued that this information would need to be created; this was not a case of searching for and pulling together existing information. Police statistics distinguished the type of firearm used, but not whether the offender lawfully owned it. To create this information, someone would be required to search three different areas of the Police database and create a tally in order to eventually arrive at a statistic.

#### **Outcome**

In both cases, the Chief Ombudsman did not accept that section 18(g) applied. While the Police could not simply run an electronic report to obtain the statistics, they could manually extract and compile them. This did not amount to the creation of information. The information was held, it was just more time-consuming to extract. In the first, but not the second, case, the Chief Ombudsman concluded that the work involved would require substantial collation or research, and the request could therefore be refused under section 18(f).

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#### **Case 439322 (2017)—Emails from Regional Councillor's private email account**

A request for emails between a Regional Councillor and specified third parties was refused, and the requester complained to the Ombudsman. Most of the emails were conducted and stored on the Councillor's private email account. The Regional Council did not physically hold those emails, and the Councillor suggested that information stored in his personal email account was not official information, and therefore was not subject to the LGOIMA.

The issue was whether the Councillor held the information in his official capacity as a Councillor, in which case, the information would be deemed to be held by the Council, and subject to the LGOIMA (see section 2(3) LGOIMA). The Ombudsman stated *'the LGOIMA could not be circumvented by conducting or storing those communications on private email accounts or personal devices'*.

Because the Ombudsman could not obtain the emails directly from the Council, he



required the Councillor to supply them under section 19(1) of the Ombudsmen Act. The Ombudsman considered the nature and content of the emails and the context in which they were sent and received.

He concluded that some of the emails were sent in the Councillor's capacity as a political candidate standing for election, and as an editor of a magazine. These were not held in the Councillor's official capacity as Councillor, and were therefore not deemed to be held by the Council, and subject to the LGOIMA.

Other emails, with an NGO, were clearly sent in the Councillor's official capacity. These were deemed to be held by the Council, and subject to the LGOIMA. The Ombudsman went on to consider whether there was good reason under the LGOIMA to withhold these emails, and concluded there was, in part.

In relation to whether information is 'held' for the purpose of the LGOIMA, the Ombudsman commented:

*The use of private email accounts or personal devices does not override the application of LGOIMA. The question of whether information is official information turns on both the content of the information and the capacity in which it is generated, communicated, received or otherwise held.*

Read the full case note [here](#).

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### Case 427255 (2017)—Information about access to staff records

The Association of Salaried Medical Specialists (ASMS) asked the Waikato District Health Board (the DHB) whether human resources staff had accessed employee records maintained by the DHB's Health and Safety Service, and if so, since when, and how many records had been accessed.

The DHB provided confirmation that human resources staff had accessed the records when necessary, but advised that 'Health and Safety do not maintain records of who has accessed the records'. It refused to provide 'details of when and how many records have been accessed' under section 18(g).

The ASMS complained to the Ombudsman, advising that DHB staff had said there was a ledger recording the date a file was removed, who by, and when it was returned. They also stated that relevant information ought to be held in the minds of the human resources staff.

During the investigation, the DHB explained that because the records were hard copy only, it could not electronically audit access to them. It said there was no ledger, but when a file is removed from the room, a card is completed marking its absence. The card records who removed the file and when. Cards are used multiple times before being discarded. The cards will not record those instances when a file was accessed but not

removed from the room.

The Ombudsman found that, although limited information was held, it was not the case that no information was held. The marker cards may not have contained all the requested information, but that was not a reason to withhold the relevant information they did contain. A contextual statement could be provided regarding the purpose of the marker cards and the limitations of the information they provided.

The Ombudsman also considered that information in the minds of the human resources staff should have been provided. Official information includes information which is known to an agency, but which has not yet been written down. While this information may not be precise, staff could have given some indication of how many records they had accessed and when that practice began.

The Ombudsman formed the opinion that section 18(g) did not provide a proper reason for refusal. The DHB agreed to release the information in the marker cards, and the recollections of the human resources staff, with appropriate contextual information.

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### Case 411501 (2017)—Footage of the battle of Baghak recorded on personal devices

A requester sought full footage of the battle of Baghak. While some footage was supplied, the New Zealand Defence Force (NZDF) advised that *'footage captured on personal devices ... is not footage held by the NZDF'*. The requester complained to the Ombudsman.

The Chief Ombudsman concluded that battle footage recorded by soldiers was official information, notwithstanding that it may have been recorded on a personal device. It did not matter that the footage was not physically held by the NZDF.

The footage was *'official information'* because the NZDF was deemed to hold it under section 2(4) of the OIA, which provides that agencies are deemed to hold information held by their officers, employees or members in their official capacity:

*...the individual soldiers who carried out the filming and captured the footage were in a position to do so solely due to their presence at the Battle in an official capacity. The footage at issue is filmed evidence of a live conflict. But for the fact of the soldiers' official position as members of NZDF, they would not have had access to events at Baghak or been in a position to capture the footage.*

It was irrelevant that the soldiers may not have appreciated that the OIA would apply, and may have intended the footage for their personal use only:

*While those soldiers may not have turned their minds to the application of the OIA, it remains the case that the footage forms part of the official record of events at Baghak. It cannot be a satisfactory answer to a request under the OIA for footage concerning the operations of a branch of the New Zealand government and depicting the actions of*

*personnel in an official capacity while on duty, to maintain that the footage was intended for personal use only and therefore is not subject to the OIA. Taken to an extreme this would allow a dangerous situation to develop where information could be recorded on a personal device by personnel who were acting in their official capacity at all relevant times, but withheld from public scrutiny upon assertion that it was intended only for personal use.*

The Chief Ombudsman required the NZDF to take steps to collect any footage held by its serving members at the time the request was received.

Of the 60 operational and support personnel involved with the engagement at Baghak, 45 members were still serving at the time the request was received. Thirty-five of them had since left. The NZDF made direct enquiries of its 10 still-serving members. It attempted to communicate with the 35 former members by posting public notices on its Facebook page, the Veterans' Affairs website, the *Army News* magazine and the RSA newsletter. As a result of this process, the NZDF was able to confirm that the footage recorded by soldiers on their personal devices was amongst that previously released, and there was in fact no additional information held. The Chief Ombudsman discontinued his enquiries.

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### Case 400121 (2017)—Information about academic misconduct by international students

Victoria University initially refused to supply information about academic misconduct by international students because of the amount of work involved, but subsequently decided to charge for supplying this information. The requester asked the Ombudsman to review the reasonableness of the charge.

The University explained that information about academic misconduct is held in its Academic Misconduct Register (AMR). However, this register does not show whether a student is domestic or international, so the University would need to manually cross-check the information in the register with information in its central student record system. The University argued that the cross-checking of information across two databases was actually the creation of information, which the OIA does not require agencies to do.

The Ombudsman did not accept the argument that cross-checking information across two databases amounted to the creation of information. In previous cases where an Ombudsman has accepted that responding to a request would require the creation of information, the work required to generate the information was significantly more complex or specialised. Examples include data programming and analysis by a specialist with a high degree of skill and knowledge of the raw data, or the development and testing of new code to extract the relevant data from a database.

In this case, the information could be generated by a simple cross-checking exercise.

Although the University stated that there were only two senior members of staff who could complete the work, that was due to the University's restrictions on access to the AMR, not the complexity of the task.

The requested information was held by the University. The Ombudsman concluded that the charge for supplying that information was reasonable in the circumstances. Read the full case note [here](#).

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### Cases 363632 etc and 402092 etc (2016/17)—Emails of former Ministers

In cases 363632 etc, requesters asked the Department of Internal Affairs (DIA) for emails between the former Minister of Revenue and a journalist. They asked DIA because the emails were held by Parliamentary Services, which was contracted by DIA to provide ministerial email services. The request was refused on the basis that DIA did not hold the emails, and the requesters complained to the Ombudsman.

DIA argued that the emails were held solely as an agent, or for the sole purpose of safe custody, on behalf of the former Minister (see paragraph (f) of the definition of '*official information*' in section 2), and, therefore, they were not official information.

The Chief Ombudsman did not accept this. The provision of ministerial services, including email services, is a core function of DIA. Ministerial email services are provided by Parliamentary Services pursuant to an MOU and service level agreement with DIA. Parliamentary Services held the emails pursuant to its contract with DIA. DIA was in turn deemed to hold the emails under section 2(5) of the OIA.

DIA held the emails for its own purposes as part of its core function, and not solely as an agent for the former Minister. There was no evidence to support the assertion that DIA was acting as '*agent*' for the Minister (meaning that the Minister had expressly or impliedly authorised DIA to be able alter his legal relationship with third parties).

Even if DIA held the emails solely as an agent or for the sole purpose of safe custody, this was on behalf of the Minister, and not on behalf of someone else not subject to the OIA. The purpose of the exclusion in paragraph (f) is to ensure that information of a type that should never be covered by the OIA does not come within the Act simply because of a safe keeping arrangement with an agency. That was not the case here. The Minister's subsequent resignation should not convert what was official information, into information that is not official.

In the Chief Ombudsman's view, ministerial emails held by Parliamentary Services would be deemed to be held by DIA. This would not apply to Ministers' personal, constituency or party political emails, because DIA's functions are limited to the provision of **ministerial** email services.

In the end, final determination of this issue was unnecessary because the Minister was reinstated. The Chief Ombudsman determined that, in the circumstances of this

particular case, the emails in question related to a position the Minister held solely in his capacity as leader of a political party and not as a Minister of the Crown. Therefore, the emails were not ‘official information’.

In a subsequent series of cases (402092 etc), DIA accepted the Ombudsman’s rationale for concluding that it is deemed to hold emails held by Ministers in their official capacity, and that in the case of current Ministers, the appropriate response is to transfer the request to the current Minister on the basis that it is more closely connected with their functions, and in the case of former Ministers, it is appropriate for DIA to deal with the request, which may involve transferring the request, along with any information held, to the most appropriate Minister or agency.

DIA has established a process for dealing with these requests that was agreed with the Speaker and the Chief Ombudsman.

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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 was refused and the requester complained to the Ombudsman. The Ombudsman found that parts of the request could be refused under section 18(g), as the information was not held.

For example, the requester 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.*

Requests like this required the DHB to form an opinion or provide an explanation. The requester sought the DHB’s view/explanation on various matters relating to the care and treatment of mental health patients using his view as the starting premise. These were not requests for official information that was held by the DHB, but for information that would need to be created. It was therefore open to the DHB to refuse the requester under 18(g).

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### Case 356171 (2015)—Information about Novopay payment errors

A requester asked the Ministry of Education how much money had been unpaid, overpaid, or underpaid into superannuation schemes since the launch of the Novopay school payroll system, how many transactions were incorrect, and how many teachers were affected. The Ministry refused the request on the grounds that it would require substantial collation or research to make the information available (section 18(f)), and

the requester complained to the Ombudsman.

The Ministry explained that the payroll reporting system only identified the amounts paid to staff and deductions made. It did not identify whether these payments were correct. To do that, the Ministry would need to investigate every individual claim that an underpayment had occurred and every suspected overpayment. Following determination of whether these had occurred, it would then have had to identify if, and by how much, superannuation deductions were affected.

The Ombudsman noted that information that can be retrieved from a database will be *'held'* for the purposes of the OIA. However, this is not so where a request necessitates research or analysis of source data in order to generate fresh information that is fundamentally different to the base data. At the time of this request, pay and deduction data existed, but these did not in themselves contain the information requested. It would have required extensive manual research and investigation in order to create the information sought. Thus the information was not *'held'* and the Ministry was entitled to refuse the request under section 18(g).

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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 denied any suggestion of 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 (frivolous or vexatious).

In reply, the requester said he was not suggesting 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 is 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 also 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 'official information' for the purpose of the OIA.

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### Case 282242 etc (2012)—Information regarding Ministerial conflicts of interest

A number of requesters sought information from the Department of the Prime Minister and Cabinet (DPMC) about ministerial conflicts of interest. The requests were refused on numerous grounds and the requesters complained to the Ombudsman.

The Chief Ombudsman formed the opinion that section 18(e) applied to documents containing declarations of interest made at Cabinet committee meetings prior to 1 April 2010. While such declarations are now recorded in a confidential register, previously the only record was the handwritten notes of committee secretaries. Such notes were destroyed after a short period of time because they were not the formal record of the meetings. The Chief Ombudsman accepted that the documents alleged to contain the information did not exist as they had been destroyed.

The Chief Ombudsman also formed the opinion that section 18(g) did not apply to statistical information about the types of actions taken to manage conflicts of interest. DPMC argued that the process of compiling the statistics from the raw data held on file amounted to the creation of information, and justified a refusal on the basis that the information was not held. The Chief Ombudsman considered that provision of this information required research and collation, but in so doing the Cabinet Office would not be creating new information, it would merely be providing the information in the form requested.

Read the full opinion [here](#).

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### Case 177815 etc (2010)—Police investigation costs

A requester asked the Police for ‘total costs’ of certain high profile investigations. Police refused the request under section 18(e), and the requester complained to the Ombudsman.

The Police explained that they do not record cost data on an individual case level. In some cases, Police may assign a project code against which certain direct operational costs may be recorded. However, these may not be recorded in a reliable fashion. Even if a project code is used, this will not include staff costs—the most significant component of the total investigation cost—because Police stopped recording staff time in 2006.

Section 18(e) did not apply because the information was not comprised in document. However, section 18(g) did apply to the request for **total** costs. The total could not be provided without staff costs, and these were not held. While Police may know roughly how many staff were working on a particular investigation and for how long, and could therefore estimate staff costs, this would amount to creation of information, rather than provision of information already held.

Having said that, the Ombudsman found that the Police should have released the cost



information they did hold, even if it was incomplete, along with a statement describing the limitations of that information. The Police agreed to release the relevant cost information. The general principles applying to requests for Police investigation costs were set out in the Ombudsman's [Annual Report for 2009/10](#) (page 33).

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### Case 178230 (2009)—Police rules and regulations and information about officers from 1974

A requester sought copies of various Police rules and regulations from 1974, as well as information about two former officers, including where they were stationed, who they worked with on a particular day in 1974, and who their supervisors were. The Police refused the request under section 18(e), and the requester complained to the Ombudsman.

#### **Rules and regulations**

The Ombudsman formed the opinion that the Police were entitled to refuse this request under section 18(e).

Their current disposal authority provided that policies and procedures could be destroyed after being superseded. While the authority in effect in 1974 was itself no longer held, the National Recordkeeping Manager considered that obsolete policies and procedures would have been destroyed similarly according to any authority in place at that time.

Police had consulted with policy staff undertaking a major review of all Police general instructions who, for the purpose of that review, had attempted to locate old policies and procedures. The officer in charge said the oldest general instructions held by Police only went back to the 1980s. Prior to that, policies and procedures were contained in Gazette notices, none of which were retained by Police (but which might be obtained by contacting Parliament).

The Ombudsman enquired whether the requested documents might be held in the Police National Library, or deposited with the National Library or National Archives. Police conducted a further search at the Police College Library which turned up one potentially relevant document which was disclosed to the requester.

The Ombudsman concluded that all reasonable steps had now been taken to try and find the requested documents.

#### **Information about former officers**

The Ombudsman formed the opinion that the Police were entitled to refuse this request under section 18(g).

The Police explained that they had searched for the personnel records of the former

officers. They located the personnel file of one of the officers, but it did not contain the information the requester wanted. They could not locate the other file, and believed it would have been destroyed after 10 years, in accordance the retention and disposal schedule.

The requester argued that Police should ask the still-serving ex-husband of one of the former officers, and staff who were stationed at Mt Roskill with the other officer. The Police made enquiries of a number of officers, but none of them were there in 1974, or could not recall the information sought. The Ombudsman concluded that, given the length of time elapsed since the events in question (34 years), it was unlikely that any still-serving Police officers would be able to accurately recall the officers' location and supervising officers, let alone who they were working with on the particular day in question.

The Ombudsman accepted that Police did not need to make enquiries of the former officer's ex-husband, on the basis that they had no working relationship, and anything he might know about her relating to this request would result from his marriage relationship. The OIA does not capture information that is held by an officer purely in his private capacity.

The Ombudsman concluded that reasonable steps had been taken to determine that this information was no longer held.

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### Case 176152 (2008)—Comparison of current and original proposals

At a public hearing, submitters sought information comparing a proposal that had been declined, with one that was preferred. They received what they considered to be an assurance, from the Electricity Commissioner who was presenting at the hearing, that the information would be supplied. When an OIA request for the comparison was subsequently refused under section 18(e), the requester complained to the Ombudsman.

The Chief Ombudsman's investigation established that the requested comparison had never been done and did not exist, and therefore section 18(e) applied. However, in light of the requester's belief that they had received an assurance that the comparison would be provided, the Chief Ombudsman considered whether it was reasonable in the circumstances for the Commission to rely on section 18(e). The Chief Ombudsman reviewed the statements made by the Commissioner, and asked the Commission how much work would be involved in creating the information sought.

The Chief Ombudsman concluded that the statements made by the Commissioner did not amount to an unequivocal assurance that the information would be provided. The Commission said it would take 2-3 weeks work from internal staff, plus the use of an external contractor, at an estimated cost of \$75,000. Having regard to the estimated cost and diversion from other activities, the Chief Ombudsman concluded the Commission

had not acted unreasonably in declining the request.

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### Case A12997 (2008)—Lecture research notes

Auckland University received a request for the research notes of a staff member who had presented the Keith Sinclair Memorial Lecture. The requester was dissatisfied with the University's response and complained to the Ombudsman. After investigating, the Chief Ombudsman concluded it was open to the University to refuse the request under section 18(g).

The Keith Sinclair Memorial Lecture was not a University lecture. It was set up by a group of historians, who each year choose a lecturer. The University does not designate the lecturer and the appointment does not go through the formal University vetting procedures for University lectures.

The lecture was based on research funded by the Marsden Fund, which provides grants to researchers in their own right, not because they are carrying out research at the direction of the institution by which they are employed.

The Chief Ombudsman accepted that the research notes were held by the staff member in her private capacity, not in her capacity as an employee of the University. The University was not putting on a public lecture which the staff member was designated to give in her capacity as a member of the University staff.

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### Case W44474 (2001)—Cave creek Police report

The father of one of the victims of the Cave Creek tragedy sought a copy of the Police report. The Police refused the request because the document could not be found. The requester complained to the Ombudsman.

The Police explained that they had made exhaustive but fruitless efforts to find the report in Christchurch, where the report was compiled, and in Greymouth, where the Cave Creek Commission of Inquiry hearings were conducted.

The requester suggested that either the Counsel assisting the Cave Creek Commission of Inquiry or the Commission of Inquiry itself might hold a copy of the report. It was also suggested that a copy of the report might be found at either Police Headquarters in Wellington or the Crown Law Office.

The Police advised that they had consulted the Commissioner of the Cave Creek Inquiry and the Counsel assisting the Commission and searched the records of the Crown Law Office and the Office of the Police Commissioner but had been unable to find the report. They said they had no other avenues of inquiry to pursue.

The Ombudsman concluded there was no alternative but to accept that the report could

not be found, and the Police had a proper basis to refuse the request under section 18(e). You can read the full case note on our website.<sup>38</sup>

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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, and 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:

- 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.*

The Ombudsman accepted that this information 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, these aspects of the request could be refused under section 18(g) of the OIA, because the information was not held.

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<sup>38</sup> Search for ‘W44474’ using our online library [Liberty](#).