

Consulting third parties

A guide to consulting third parties before making a decision on an OIA request

Sometimes releasing information under the Official Information Act (OIA)¹ could affect someone other than the agency or the requester.

As a matter of good practice it may be appropriate to consult that third party before making a decision on the OIA request.

This guide has practical advice on when and how to do that. It also has template letters that agencies can adapt when carrying out the consultation process.

*This guide is primarily about consulting **external** third parties, although it will also be relevant when an agency needs to consult its own employees.*

This guide is not about internal or inter-agency consultation, though some parts of it will be relevant to inter-agency consultation.

A related guide deals separately with the process of consulting Ministers on OIA requests: [Dealing with OIA requests involving Ministers](#).

*While this guide is about OIA requests specifically, it may also be relevant to agencies considering the **proactive release** of official information.*

¹ References to the OIA should also be taken as references to the Local Government Official Information and Meetings Act (LGOIMA).

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What the Act says

Consultation with third parties on an OIA request is **permitted**, but **not required** under the OIA.

The Act says that the agency that receives a request is responsible for making the decision on it,² but this does not prevent the agency from consulting ‘*any other person*’ in relation to that decision.³

The Act allows agencies to extend the maximum statutory timeframe for deciding on a request for a ‘*reasonable*’ period of time, if ‘*consultations necessary to make a decision on the request are such that a proper response to the request cannot reasonably be made within the original time limit*’.⁴

‘Any other person’

The concept of consulting ‘*any other person*’ is very wide. It can include consultation within an agency, consultation with another agency, consultation with the Minister (or Mayor), and consultation with external third parties. In all these situations, a reasonable extension can be made if it is necessary to enable a proper response to the request.⁵ This guide is primarily about consulting external third parties.

When to consult

Agencies must decide whether third party consultation is necessary and appropriate in the circumstances of the particular case.

When reviewing the information at issue, agencies should ask themselves:

- Is it about a third party ie, personal information about an identifiable individual or corporate entity?
- Was it supplied by a third party?

² See s 15(4) OIA and s 13(5) LGOIMA.

³ See s 15(5) OIA and s 13(6) LGOIMA.

⁴ See s 15A(1)(b) OIA and s 14(1)(b) LGOIMA.

⁵ You can read more about extensions in our guides [The OIA for Ministers and agencies](#) and [The LGOIMA for local government agencies](#).

- Could release adversely affect a third party eg, impact on their privacy or lead to harassment,⁶ risk their safety,⁷ breach an obligation of confidence,⁸ or prejudice their commercial position⁹?

If the answer to any of these questions is yes, it may be appropriate to consult the third party.

Consultation is primarily about two things:

1. Treating the third party **fairly** by ensuring they have a chance to comment before information relating to them is released.
2. Making the **best decision** on an OIA request. Third parties may have a better understanding of the sensitivity of the information than the agency. It is therefore important to understand their views, and give them appropriate weight.

There should be a **genuine need** to obtain the third party's views, or forewarn them of the possibility of release, so that an agency's response to an OIA request is not unnecessarily or unreasonably delayed.

Some **other legislation** requires third party consultation to be undertaken on OIA requests (for example, section [129\(4\)](#) of the Land Transport Management Act 2003; section [12](#) of the Agricultural Compounds and Veterinary Medicines Act 1997; and section [57](#) of the Hazardous Substances and New Organisms Act 1996). Some **contracts** may also include explicit commitments to that effect.¹⁰

Tip—staging the response

Think about whether it's possible to respond in stages if not all of the information at issue relates to a third party. It might not be necessary to hold up your decision on all the information while you are consulting a third party on some of it.

Tip—planning ahead when obtaining information from third parties

Try to plan ahead when you're obtaining information from third parties that you think might be requested under the OIA (for example, when soliciting public submissions). Tell third parties about the agency's obligations under the OIA, and whether any of the information is going to be released proactively. Ask them to clearly identify any specific information they would not wish to be released proactively or in response to an OIA request, and why.

⁶ See s 9(2)(a) OIA and s 7(2)(a) LGOIMA.

⁷ See s 6(d) OIA and s 6(b) LGOIMA.

⁸ See s 9(2)(ba) OIA and s 7(2)(c) LGOIMA.

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

¹⁰ It should be noted that agencies cannot contract out of the OIA: *'It is an implied term of any contract between individuals that the promises of their contract will be subject to statutory obligations'*, *Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180 at 191.

When consultation may not be appropriate

There might be circumstances in which it would be unnecessary, impractical, or inappropriate to consult a third party. For example, where:

- the third party cannot be located;
- they have already made their views on disclosure clear;
- it would reveal information to the third party that they would not be entitled to access under the Privacy Act or the OIA, for example, because it would prejudice the maintenance of the law, including the investigation and detection of offences (but consider whether partial disclosure would address this);
- there are too many third parties to consult (but consider whether it would be possible to consult a representative organisation or sample, see [Who to consult](#) below); or
- it would cause the third party undue distress.

An informal 'heads-up'?

Sometimes it might be enough just to give the third party an informal 'heads-up' about the request and the agency's proposed decision. This is likely to be:

- when the agency and third party have a good relationship;
- when they are used to communicating with one another through informal channels; and
- when the agency is reasonably certain the third party will not object to its proposed course of action.

Sometimes an informal 'heads-up' can help to 'test the water' as to whether a more formal or in-depth consultation is required.

Who to consult

Where the third party is an **individual**, it is obviously preferable to consult that person themselves.

Some individuals may need more support than others to understand and express their views on disclosure. People who might be able to help with the consultation process include:

- a trusted relative or friend;
- an independent third party (such as a health care professional or disability support service); or

- someone who has legal authority to act on their behalf.¹¹

Where the person is a **child**, it may be appropriate to consult their parent or guardian. However, children who are old enough to understand and express their own views on disclosure should be consulted directly, or at least involved in the consultation.

Where the individual is **deceased**, agencies can consult someone close to them (eg, their partner or next of kin), or the executor or administrator of their estate.¹²

Where the third party is a **company or incorporated body**, agencies can consult the directors, secretary or chief executive. Where it is an **unincorporated group** (like a group of concerned citizens), agencies can consult the nominated leader or spokesperson for the group.

Where there are a **large number** of third parties involved and it is impractical to consult them all, agencies can consider consulting a representative organisation or sample.

What to tell the requester

It can be helpful to let the requester know that consultation with the third party will be necessary.

This gives the requester an opportunity to say if information about the third party is not required. They may choose to refine their request or agree to redactions that simplify the consultation process or make it unnecessary. This is likely to mean less work for the agency, and a faster response for the requester.

It also lets the requester know that receiving the agency's decision on their request may take longer. The agency can extend the timeframe for deciding on the request if that is likely to be necessary to enable the required consultation to be completed. See our template [Letter to requesters where third party consultation is necessary](#).

What to tell the third party

Third party consultation needs to be **informed**. Agencies should:

- Explain that an OIA request has been received.
- Explain how the OIA works, including the principle of availability and the withholding grounds.

¹¹ For example, their lawyer; someone with power of attorney over their property, or care and welfare; or a court-appointed welfare guardian under the Protection of Personal and Property Rights Act 1988.

¹² The OIA / LGOIMA permit official information to be withheld in order to protect the privacy of deceased persons (see s 9(2)(a) OIA / 7(2)(a) LGOIMA).

- Provide a copy of the information at issue (subject to any necessary redactions¹³), or a schedule if it is already held by the third party.
- Explain the agency's preliminary assessment of the withholding grounds and the countervailing public interest in release, and outline any information that is proposed to be released.
- Ask the third party to confirm whether they have any concerns with release and if so, to explain the basis for them.
- Explain that their views will be taken into account before the agency makes its decision, but that they cannot veto release.
- Provide a date for response, and explain what will happen if no response is received by that time.
- Provide contact details for a staff member with whom they can discuss the request.

See our template [Consultation with third parties letter](#).

Do I tell the third party who the requester is?

Agencies may wonder whether to tell the third party who the requester is. If they don't [volunteer this information](#), the third party may [request it under the OIA or Privacy Act](#).

Volunteering the information

If the requester is an **individual** seeking information in their **personal capacity**, the Privacy Commissioner says that their identity should not usually be disclosed to the third party, unless the individual has consented. The Privacy Commissioner considers this to be personal information about the individual requester, which must be handled in accordance with the Privacy Act.

It may be appropriate to check whether the individual requester consents to disclosure of their identity if it is possible that this could mitigate the third party's concerns, and enable more information to be released than might otherwise be the case.

If the requester is a **group** (like a trust or company) or an **individual** seeking information in their **professional capacity** (like a journalist), there should be no reason why an agency cannot tell the third party who made the request. This may inform whether the third party has any objection to disclosure, and help them to articulate the precise basis for their objection. However, it is a good idea to let the requester know first, as a matter of courtesy, and just in case there is a genuine need for anonymity that is not related to privacy.

¹³ It may be necessary to withhold some of the information at issue from the third party itself.

Dealing with a request for the information

If the agency does not volunteer the requester's identity, and the third party asks for it, this itself will be an OIA or Privacy Act request.

It will be a Privacy Act request if the third party is an individual and they want to know who is requesting personal information about them. Otherwise, it will be an OIA request.¹⁴

As with any OIA request, the information must be released unless there is a good reason for withholding it. Good reason may be to protect the requester's privacy,¹⁵ or to protect their safety.¹⁶

Some reasons for withholding (including privacy) are subject to a public interest test. This means that if the public interest considerations in favour of disclosure outweigh the need to withhold, the information must be released. One relevant consideration might be the public interest in enabling informed consultation to take place.

It may be appropriate to consult the requester before making a decision on the third party's OIA (or Privacy Act) request for their identity. If the requester consents to disclosure, there will be no reason to withhold.

It should be noted that agencies are protected from any civil proceedings for release of information in good faith in response to a request made under the OIA, LGOIMA or Privacy Act.¹⁷

How long will it take?

Third party consultation needs to be handled **fairly and efficiently**.

Agencies should aim to get it underway as soon as possible so they can comply with their obligation to make the decision on a request '*as soon as reasonably practicable*',¹⁸ and to release the information without '*undue delay*'.¹⁹

At the same time, they need to provide third parties with a reasonable opportunity to comment or provide additional information to inform the agency's decision. Where Parliament has specifically mandated third party consultation on OIA requests,²⁰ those parties have been

¹⁴ Note that the special rules in Part 4 of the OIA/LGOIMA will apply if the third party is a corporate entity and they want to know who is requesting personal information about them. For more information about Part 4 requests see our guide: [Requests by corporate entities for their personal information](#).

¹⁵ See s 9(2)(a) OIA and s 7(2)(a) LGOIMA.

¹⁶ See s 6(d) OIA and s 6(b) LGOIMA.

¹⁷ See s 48(1)(a) OIA, s 41(1)(a) LGOIMA and s 115(1)(a) Privacy Act.

¹⁸ See s 15 OIA / s 13 LGOIMA.

¹⁹ See s 28(5) OIA / s 27(5) LGOIMA.

²⁰ See, for example, s [129\(4\)](#) of the Land Transport Management Act 2003; s [12](#) of the Agricultural Compounds and Veterinary Medicines Act 1997; and s [57](#) of the Hazardous Substances and New Organisms Act 1996.

required to respond ‘*within 10 working days*’. In its review of the official information legislation, the Law Commission suggested a minimum 5 working days’ notice.²¹ From this, it can be inferred that 5–10 working days would generally be regarded as a reasonable period of time within which to provide comment.

However, more or less time might be appropriate depending on factors like:

- the volume of information at issue;
- the complexity of the issues;
- the number of third parties to be consulted;
- the reasonable availability of those parties; and
- any legitimate reasons for urgency invoked by the requester.

As noted above, agencies can make a reasonable extension of the 20 working days, if the necessary consultations cannot be completed within that time.²²

Making the decision

Where consultation has taken place, a third party may:

- have no objection to the release of the information at issue;
- not respond to the consultation; or
- object to the release of some or all of the information at issue.

A third party may also provide information that helps the agency to understand the likely consequences of release, or suggest ways to mitigate those consequences (for example, release on conditions, release of contextual information, or release of other information).

Third party has no objection

If the third party has no objection to release of the information at issue, the agency can go ahead and make a decision on the request. In this situation, withholding is unlikely to be necessary to protect the third party’s interests. Any reason for withholding will likely need to relate to the agency’s own interests or concerns.

²¹ *The Public’s Right to Know: Review of the Official Information Legislation* (NZLC R125, 2012) at 188.

²² You can read more about extensions in our guides [The OIA for Ministers and agencies](#) and [The LGOIMA for local government agencies](#).

No response from third party

If the agency is satisfied that it has provided a reasonable opportunity for the third party to comment, and the third party has not responded, then the agency can go ahead and make a decision on the request based on the available information.

However, the agency will first want to make sure that its invitation to comment was actually received by the third party, and that there isn't a reasonable explanation for the delay, or a legitimate reason why the agency should provide longer for them to comment.

The agency should not assume that the lack of response from a third party means that they consent to release. It is safer to assume the opposite is true. However, lack of consent on its own does not mean the information must be withheld. That decision must be made by the agency with regard to all the relevant circumstances of the case.

Third party objects to release

In this situation, the agency must consider the third party's views along with all other relevant considerations. The third party's views are relevant, but not determinative. They cannot veto disclosure. The agency must reach its own decision on the proper application of the withholding grounds, and (where relevant) the countervailing public interest in release. The agency should let the third party know its decision on the OIA request, particularly if it has decided to release any of the information at issue. This can be done at the same time or shortly before the decision is conveyed to the requester. See our template letter [Informing third parties of the decision on the request](#).

What if the third party doesn't like the agency's decision?

Agencies are protected from any civil proceedings for release of information in good faith in response to a request made under the OIA or LGOIMA.²³ This includes liability under the Privacy Act, meaning that an individual cannot complain to the Privacy Commissioner if they feel an agency has infringed their privacy by releasing personal information about them under the OIA.²⁴

However, if the agency is subject to the Ombudsmen Act 1975 (OA),²⁵ a complaint may potentially be made to the Ombudsman that the agency has acted unreasonably:

- in omitting to consult the third party;
- in how they went about that consultation; or

²³ See s 48(1)(a) OIA and s 41(1)(a) LGOIMA.

²⁴ Note, this protection only applies when information is released in good faith in response to an OIA request, not when information is released proactively, ie without an OIA request being made.

²⁵ Ministers are not subject to the OA.

- in deciding to release the information notwithstanding consultation.

The third party would generally be expected to have raised their concerns with the agency first, before coming to the Ombudsman under the OA. The focus of any investigation by the Ombudsman would be on whether the agency followed a fair process, and reached a decision that was reasonably open to it.

Recordkeeping

It is important to keep complete and accurate records of consultation with third parties. This is to comply with obligations under the Public Records Act to create and maintain full and accurate records in accordance with normal, prudent business practice,²⁶ and to assist in the event that a complaint is made to the Ombudsman by either the requester or the third party. Full and accurate records will include:

- a copy of any correspondence to and from the third party;
- a copy of the material consulted on (or a schedule of that material);
- a record of verbal discussions or attempts to contact the third party; and
- a record of the agency's consideration of the third party's comments.

Further information

Appendix 1 of this guide has a [step-by-step worksheet](#) to take agencies through the process of consulting a third party on an OIA request. Appendix 2 has [template letters](#) that agencies can adapt when carrying out the consultation process.

Other related guides include [The OIA for Ministers and agencies](#) and [The LGOIMA for local government agencies](#). Detailed guidance on the withholding grounds can be found [here](#).

You can also contact our staff with any queries about third party consultation on info@ombudsman.parliament.nz or freephone 0800 802 602.

²⁶ See s 17 Public Records Act.

Appendix 1. Third party consultation work sheet

This work sheet takes you through the process of consulting a third party on an OIA request.

Reminder: Think about whether it's possible to respond in stages if not all of the information at issue relates to a third party. It might not be necessary to hold up your decision on all the information while you are consulting a third party on some of it.

1. Should I consult?

Relevant part of guide:

[When to consult](#)

[When consultation may not be appropriate](#)

- Third party consultation is permitted but not required under the OIA/LGOIMA.
- You must decide whether consultation is necessary and appropriate in the circumstances of the particular case. Consider the following:
 - Is the information about a third party ie, is it personal information about an identifiable individual or corporate entity?
 - Did a third party supply the information?
 - Could release adversely affect a third party eg, impact on their privacy or lead to harassment, risk their safety, breach an obligation of confidence, or prejudice their commercial position?
 - Are there any legislative or contractual requirements to consult?

If the answer to any of these questions is **yes**, it may be appropriate to consult the third party.
- Consultation might be unnecessary, impractical, or inappropriate where:
 - The third party cannot be located.
 - They have already made their views on disclosure clear.
 - It would reveal information to the third party that they would not be entitled to access under the Privacy Act or the OIA.
 - There are too many third parties to consult (but consider whether it would be possible to consult a representative organisation or sample, see [Who should I consult](#) below).
 - It would cause the third party undue distress.
- If you decide not to consult, document your reasons, then go ahead and make a decision on the request based on what you

	already know. If you decide to consult, go to step 2.
<p>2. Who should I consult?</p> <p>Relevant part of guide: Who to consult</p>	<ul style="list-style-type: none"> • Identify who should be consulted. <ul style="list-style-type: none"> - If the third party is an individual, consult that person themselves. Some people might need support to be able to understand and express their views on disclosure. People who might be able to help include a trusted relative or friend; an independent third party (such as a health care professional or disability support service); or someone with legal authority to act on the individual's behalf (for example, their lawyer, welfare guardian, or person with power of attorney over their property or care and welfare). - Where the person is a child, it may be appropriate to consult their parent or guardian. However, children who are old enough to understand and express their own views on disclosure should be consulted directly, or at least involved in the consultation. - Where the individual is deceased, agencies can consult someone close to them (eg, their partner or next of kin), or the executor or administrator of their estate. - Where the third party is a company or incorporated body, agencies can consult the directors, secretary or chief executive. Where it is an unincorporated group (like a group of concerned citizens), agencies can consult the nominated leader or spokesperson for the group. - If there are too many third parties to consult, consider consulting a representative organisation or sample. • Once you have identified who should be consulted, go to step 3.
<p>3. Tell the requester you need to consult</p> <p>Relevant part of guide: What to tell the requester</p>	<ul style="list-style-type: none"> • Let the requester know you need to consult the third party. • Consider whether you need to extend the timeframe for deciding on the request at the same time. • Invite the requester to get in touch if they want to amend or refine their request so that consultation may not be necessary. • Use our template Letter to requesters where third party consultation is necessary. • Go to step 4.

<p>4. Consult the third party</p> <p>Relevant part of guide: What to tell the third party How long will it take?</p>	<ul style="list-style-type: none"> • Tell the third party about the OIA request and give them a reasonable opportunity to comment. <ul style="list-style-type: none"> - Explain how the OIA works, including the principle of availability and the withholding grounds. - Provide a copy of the information at issue (with redactions if necessary), or a schedule if they already hold it. - Explain the agency’s preliminary assessment of the withholding grounds and the countervailing public interest in release (if relevant), and outline any information that is proposed to be released. - Ask the third party to confirm whether they have any concerns with release and if so, to explain the basis for them. - Explain that their views will be taken into account before the agency makes its decision, but they cannot veto release. - Provide a date for response, and explain what will happen if no response is received by that time. - Provide contact details for a staff member with whom they can discuss the request. • Use our Consultation with third parties template. Go to step 5.
<p>5. Make the decision on the request</p> <p>Relevant part of guide: Making the decision</p>	<ul style="list-style-type: none"> • If the third party has no objection to release, withholding is unlikely to be necessary to protect their interests. Any reason for withholding in this situation would likely need to relate to the agency’s own interest or concerns. • If the third party doesn’t respond, go ahead and make a decision on the request based on what you already know. However, it does pay to check that the third party received your correspondence, and that there isn’t a legitimate reason why they need longer. Don’t assume that no reply means the third party consents to release. • If the third party opposes release, consider what they have to say objectively, and decide whether it gives rise to a good reason for withholding. The third party’s views are relevant, but not determinative. They cannot veto disclosure. Let the third party know your decision on the request, particularly if you decide to release some or all of the information. This can be done at the same time or shortly before the decision is conveyed to the requester. Use our Informing third parties of the decision to release template.

Appendix 2. Template letters

1. Letter to requesters where third party consultation is necessary

[Date]

[Name and address of requester]

Dear [name]

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

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

This letter is to advise that it is necessary for us to consult [third party] before making a decision on your request. This is because [some of] the information you requested [is about/was supplied by/could affect third party] if disclosed.

[Use if extending the maximum time limit for deciding on the request] Ordinarily we would be required to respond to your request within a maximum 20 working days. However, that timeframe can be extended if the necessary consultations cannot be completed in time. In this case, we need to extend the deadline for our response by [no. (working) days], until [date]. You have the right to complain to the Ombudsman about this extension. Information about how to make a complaint is available at www.ombudsman.parliament.nz or freephone 0800 802 602.

Please let us know if you do not require any information about [third party], because that may make consultation unnecessary.

If you want to discuss this, you can contact [provide contact details of staff member who can assist].

Yours sincerely

[Name]

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2. Consultation with third parties

[Date]

[Name and address of third party]

Dear [name]

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

I am writing to you because [agency] has received an [Official Information Act (OIA) / Local Government Official Information and Meetings Act (LGOIMA)] request [from requester's name, where this can be supplied because the requester has consented, or the requester is a group / individual seeking information in their professional capacity] for [brief details of the subject matter of the request].

We are consulting you on this request because [some of] the information at issue [is about/was supplied by/could potentially affect you if disclosed]. We are prepared to consider your views before making a decision on the request.

What is the [OIA/LGOIMA]?

The [OIA/LGOIMA] enables people to request official information held by [local] government agencies, including [agency]. [Agency] must release the requested information unless there is a good reason for withholding it. The good reasons for withholding official information are listed in sections [6 and 9 of the OIA / 6 and 7 of the LGOIMA]. The reasons that seem most relevant to us in this case are [list relevant sections].

The information at issue

[We enclose a copy of the information at issue for your ease of reference] OR [The information at issue includes the following documents, which should already be in your possession].

[Use if redactions have been made to the information supplied to the third party] We have had to make some redactions to this information in order to protect other interests [specify reasons for redactions].

Our initial views

[If applicable, explain the agency's preliminary assessment of the withholding grounds and the countervailing public interest in release (if relevant), and outline any information that is proposed to be released].

Your views

We would appreciate your views about how disclosure of the information at issue would affect your interests. It may be that you do not object to the information being disclosed. However, if you have concerns about release of the information, the more detail you can provide, the better. It is not enough simply to object to disclosure.

With that in mind, please let us know:

- what information (if any), you are happy for us to release;
- what information you are most concerned about us releasing, and why;
- how release of that information is likely to affect your interests; and
- any other information you think we should take into account before making our decision.

Our decision

It is our responsibility to make the final decision on this request. We will take your views into account in making that decision, but you cannot veto release of the information. We will let you know the decision we end up making.

Please provide your views by [date] to [provide any specific delivery instructions, for example, email address]. Please note that if we do not hear from you by [date], we may assume you do not want to comment, and proceed to make our final decision based on the information before us.

If you want to discuss this [OIA / LGOIMA] request, you can contact [provide details of staff member who can assist].

Yours sincerely

[Name]

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3. Informing third parties of the decision on the request

[Date]

[Name and address of third party]

Dear [name]

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

I refer to our previous correspondence concerning the [Official Information Act (OIA) / Local Government Official Information and Meetings Act (LGOIMA)] request [from requester's name, where this can be supplied because the requester has consented, or the requester is a group / individual seeking information in their professional capacity] for [brief details of the subject matter of the request].

EITHER After carefully considering your views, we have decided to withhold the information at issue.

OR After carefully considering your views, we have decided there is no good reason under the [OIA / LGOIMA] to withhold [some of] the information at issue. [Provide the agency's assessment of the withholding grounds and the countervailing public interest in release, and outline the information that will be released].

Thank you for your assistance.

Yours sincerely

[Name]

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