

## The OIA and inquiries

The interaction between the OIA and the Inquiries Act 2013

*This guide aims to answer questions about how the Inquiries Act 2013 interacts with the Official Information Act 1982 (OIA).*

*It is intended to help:*

- *inquiries deciding how to regulate their procedure;*
- *agencies dealing with OIA requests for information about the subject of an inquiry; and*
- *members of the public seeking information about inquiries.*

*This guide is only about Inquiries Act inquiries, not other types of inquiry, like Auditor-General inquiries, Parliamentary inquiries or internal agency inquiries.*

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## Introduction

Sometimes the government will decide to appoint an inquiry to examine a matter of public importance. Inevitably, people will want to access information about the matters under inquiry.

The application of the OIA to these requests is not always straightforward. This guide explains when and how the OIA applies to these requests.

There are three questions to consider:

1. Is the information held by an agency that is subject to the OIA?
2. If so, is the information '*official information*'?
3. If so, is there a '*good reason*' for withholding that information?

This guide discusses:

- the background to the Inquiries Act;
- some key provisions of the Inquiries Act;
- information held by inquiries, and when that might be subject to the OIA;
- information held by other government agencies;
- information that is excluded from the OIA (to which the OIA will not apply, even if it is held by an agency subject to the Act); and
- reasons for refusal that are likely to be relevant in this context.

If you're short on time, refer to our [summary on the OIA and inquiries](#).

## Background to the Inquiries Act

Historically, public inquiries were governed by the Commissions of Inquiry (COI) Act 1908.

The COI Act provided for the appointment of commissions of inquiry to inquire into matters of public importance. It also applied to royal commissions of inquiry established by the Governor-General under the Letters Patent.

In 2006, the Law Commission reviewed the law relating to public inquiries, and identified three broad problems:

1. The COI Act was antiquated and confusing.
2. Royal commissions and commissions of inquiry were costly and legalistic.
3. As a result, non-statutory '*ministerial inquiries*' were increasingly preferred, but these took place outside a statutory framework, and lacked coercive powers.

The Law Commission's report, [A New Inquiries Act](#), recommended a new law.

## Key provisions of the Inquiries Act

The Inquiries Act largely replaced the COI Act.<sup>1</sup> It recognises three types of inquiry:<sup>2</sup>

1. royal commissions;
2. public inquiries; and
3. government inquiries.

All three types of inquiry have the same powers. The main difference is their perceived status:<sup>3</sup>

- royal commissions are '*reserved for the most serious matters of public importance*';
- public inquiries are for '*significant or wide-reaching issues that cause a high level of concern to the public and to Ministers*'; and
- government inquiries '*typically deal with smaller and more immediate issues where a quick and authoritative answer is required from an independent inquirer*'.

Other differences relate to how they are established, and how they report back.<sup>4</sup>

The purpose of an inquiry is to inquire and report on matters of public importance.<sup>5</sup> Inquiries cannot make determinations about the civil, criminal or disciplinary liability of a person, but they can (subject to their terms of reference) make findings of fault or recommendations that further steps be taken to determine liability.<sup>6</sup>

Inquiries have wide powers to determine their own procedure, subject to the rules of natural justice and their terms of reference.<sup>7</sup> For example, they can decide whether to call witnesses, whether to hold hearings, and whether to receive oral or written evidence and submissions.<sup>8</sup>

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<sup>1</sup> The COI Act remains in force because a lot of statutory bodies derive their powers from that Act (for example, the Waitangi Tribunal, Broadcasting Standards Authority, Refugee Status Appeals Authority and Social Security Appeal Authority). However, commissions of inquiry can no longer be appointed under the COI Act, and it no longer applies to royal commissions. These types of inquiry can only be done under the Inquiries Act now.

<sup>2</sup> See [s 6\(1\)](#) Inquiries Act.

<sup>3</sup> Cabinet Office. *Cabinet Manual 2017* at paragraphs 4.81, 4.83 and 4.85.

<sup>4</sup> Public inquiries are established by, and report back to, the Governor-General, after which the report is tabled in Parliament (see [ss 6\(2\)](#), [12\(1\)\(a\)](#) and [12\(3\)](#) Inquiries Act). Government inquiries are established by, and report back to, the relevant Minister(s) (see [ss 6\(3\)](#) and [12\(1\)\(b\)](#) Inquiries Act).

<sup>5</sup> See [s 3\(1\)](#) Inquiries Act.

<sup>6</sup> See [s 11](#) Inquiries Act.

<sup>7</sup> See [s 14](#) Inquiries Act.

<sup>8</sup> See [s 14\(4\)](#) Inquiries Act.

Inquiries can also forbid the publication of certain matters, restrict public access to the inquiry, or hold the inquiry in private.<sup>9</sup> Before doing so, they must take into account certain specified criteria, such as privacy and the benefits of open justice.<sup>10</sup> Offence provisions enable inquiries to deal with behaviour that constitutes an abuse of their processes.<sup>11</sup>

Inquiries cannot make orders for general discovery, but they can require information that is received from one person to be provided to another person who is participating in the inquiry.<sup>12</sup>

Legislation is not retrospective,<sup>13</sup> so the Inquiries Act does not apply to historic inquiries conducted under the COI Act.

## Inquiries under the State Sector Act

Relevant parts of the Inquiries Act can also apply to investigations and inquiries under the State Sector Act 1988, where the State Services Commissioner certifies that this is reasonably necessary.<sup>14</sup> Some of the guidance in this document will also apply to this type of inquiry.

## Information held by inquiries

Inquiries under the Inquiries Act are **not subject to the OIA**.

The OIA only applies to Ministers and listed ‘departments’ and ‘organisations’. Inquiries under the Inquiries Act are not ‘departments’ or ‘organisations’.<sup>15</sup> Therefore, people cannot make OIA requests to inquiries for the information that they hold.

However, the Inquiries Act makes it clear that **once an inquiry has reported, all documents** created or received during the course of the inquiry, **are official information**, apart from any matter subject to a [non-publication order](#), and any documents relating to the inquiry’s internal deliberations.<sup>16</sup>

This does not mean that OIA requests can be made to an inquiry after it reports. Once an inquiry reports, its job is done, and it ceases to exist. However, the inquiry’s records will be held by the administering public agency, which is usually the Department of Internal Affairs (DIA).

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<sup>9</sup> See [s 15\(1\)](#) Inquiries Act.

<sup>10</sup> See [s 15\(2\)](#) Inquiries Act.

<sup>11</sup> See [s 29](#) Inquiries Act.

<sup>12</sup> See [s 22](#) Inquiries Act.

<sup>13</sup> See [s 7](#) Interpretation Act 1999.

<sup>14</sup> See [ss 9A](#) and [9B](#) State Sector Act.

<sup>15</sup> See [s 2\(6\)\(ea\)](#) OIA.

<sup>16</sup> See [s 32](#) Inquiries Act.

DIA (or the other agency responsible for administering the inquiry) must, as soon as reasonably practicable after the inquiry has reported, ‘dispose’ of the inquiry’s records, as authorised by the Chief Archivist.<sup>17</sup> ‘Dispose’ does not mean ‘destroy’, although disposal can include destruction. It can also mean (and is more likely to mean in this context) transferring the records to Archives New Zealand (Archives).

## Before the records are transferred to Archives

While DIA (or the other administering agency) holds the records, they will be subject to the OIA, unless they are excluded from the definition of ‘official information’ under that Act. The exclusion most likely to be relevant is discussed [below](#).

One exclusion that will **not** be relevant is paragraph (f) of the definition of ‘official information’, which excludes information held solely as an agent, or for the sole purpose of safe custody, on behalf of another person not subject to the OIA. For that exclusion to apply, the information must be held for **no other purpose**. In this case, DIA (or the other administering agency) holds the inquiry’s records for its own purposes, that is, fulfilling its statutory obligation under section 33 of the Inquiries Act to transfer or otherwise dispose of them, and to determine the access status of any records transferred to Archives.

Accordingly, OIA requests may be made to DIA when it holds inquiry records that have not yet been transferred to Archives. However, DIA may need to transfer such requests if the information at issue is more closely connected with the functions of another agency.<sup>18</sup>

## After the records are transferred to Archives

Inquiry records that are transferred to Archives will be classified as either ‘open access’ or ‘restricted access’ records.<sup>19</sup> This decision is made by DIA (or the other administering agency), having regard to any [non-publication orders](#) made by the inquiry.<sup>20</sup>

Anyone can access **open access** records from Archives free of charge.<sup>21</sup> There is no need to make an OIA request, and if one is made, there may be a basis for refusing it under section 18(d) of the OIA because the information is publicly available.<sup>22</sup>

**Restricted access** can be for a specified period of time or subject to conditions.<sup>23</sup> DIA (or the other administering agency) can change this classification at any time. People seeking access to restricted records can ask DIA (or the other administering agency) to change the classification,

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<sup>17</sup> See [s 33\(2\)](#) Inquiries Act.

<sup>18</sup> See [s 14\(b\)\(ii\)](#) OIA.

<sup>19</sup> See [s 43\(1\)](#) Public Records Act 2005.

<sup>20</sup> See [s 33\(4\)](#) Inquiries Act.

<sup>21</sup> See [s 47](#) Public Records Act.

<sup>22</sup> See our [Publicly available information](#) guide for more on this.

<sup>23</sup> See [s 44\(3\)](#) Public Records Act.

or request the records under the OIA,<sup>24</sup> provided they are not [excluded](#) from the definition of ‘official information’ under that Act. Again, DIA may need to transfer such requests if the information at issue is more closely connected with the functions of another agency.<sup>25</sup>

Status	Can I ask for information that would be held by an inquiry under the OIA?
While the inquiry is underway	No, not from the inquiry. Inquiries are not subject to the OIA.
After the inquiry has reported, but before the records have been transferred to Archives	Yes. You can ask DIA (or the other agency that was responsible for administering the inquiry), provided the information is not <a href="#">excluded</a> from the definition of official information.
After the records have been transferred to Archives—open access records	You don’t need to request open access records under the OIA; they’re already publicly available. Visit <a href="http://www.archives.govt.nz">www.archives.govt.nz</a> for more information.
After the records have been transferred to Archives—restricted access records	Yes. You can ask DIA (or the other agency that was responsible for administering the inquiry) provided the information is not <a href="#">excluded</a> from the definition of official information.  You can also ask DIA (or the other agency that was responsible for administering the inquiry) to re-classify the records as open access records.

## Information held by other government agencies

With very few exceptions, government agencies that interact with inquiries **are subject to the OIA**. The OIA applies to any information they hold about an inquiry, or the matters under inquiry, unless that information is [excluded](#) from the definition of ‘official information’. Nothing in the Inquiries Act affects this position.

### The effect of section 32 of the Inquiries Act

In the past, some agencies have argued that section 32(1) of the Inquiries Act means that information about the subject matter of an inquiry held by government agencies is **not** ‘official information’ until the inquiry reports (see [491854](#) & [491000](#)).

That section states:

**32**      *Application of [the OIA]*

(1)      *When an inquiry has reported in accordance with section 12, all documents created by the inquiry or received in the course of the inquiry are ... official*

<sup>24</sup> See [s 44\(8\)](#) Public Records Act.

<sup>25</sup> See [s 14\(b\)\(ii\)](#) OIA.

*information for the purposes of the [OIA].*

What section 32 does, is turn information held by an inquiry into ‘official information’ after that inquiry reports. It does not affect the status of information that is already ‘official information’ because it is held by an agency subject to the OIA. The OIA is an important ‘constitutional measure’, and Parliament must have made very clear its intention to override that Act by way of other legislation. It is not clear that this was the purpose or intent of section 32.

Having said that, just because this information is ‘official information’ does not necessarily mean that it must be released. There may be justifiable reasons for withholding the information. Some of these reasons are discussed [below](#).

## Information excluded from the OIA

Although information may be **physically** held by an agency subject to the OIA, there is some information that the OIA was never intended to apply to.

The OIA excludes certain types of information from the definition of ‘official information’.<sup>26</sup> The relevant exclusion in this context is found in paragraph (ha). (See also [What about the exclusion in paragraph \(h\)?](#)).

### Paragraph (ha)

Paragraph (ha) says that ‘official information’ does not include:

- any matter subject to a [non-publication order](#) under section 15(1)(a) of the Inquiries Act; and
- documents that relate to the internal deliberations of the inquiry and are created by a member of an inquiry in the course of the inquiry or provided to the inquiry by an officer of the inquiry.

This exclusion was inserted in the OIA when the Inquiries Act was passed, to apply specifically to inquiries under that Act. It is mirrored exactly in section 32(2) of the Inquiries Act.

### Non-publication orders

Section 15(1)(a) of the Inquiries Act empowers inquiries to make orders forbidding publication of:

- the whole or part of any evidence or submissions presented to the inquiry;
- any report or account of the evidence or submissions;

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<sup>26</sup> See [s 2\(1\)](#) OIA.

- the names or other identifying details of witnesses or participants; and
- any rulings of the inquiry.

Before making such an order, inquiries must take into account:<sup>27</sup>

- the benefits of observing the principle of open justice;
- the risk of prejudice to public confidence in the proceedings of the inquiry;
- the need for the inquiry to ascertain the facts properly;
- the extent to which public proceedings may prejudice the security, defence, or economic interests of New Zealand;
- the privacy interests of any individual;
- whether it would interfere with the administration of justice, including any person's right to a fair trial, if an order were not made; and
- any other countervailing interests.

Any information that is subject to one of these non-publication orders will not be *'official information'*. Requests for such information may be refused under [section 18\(g\)](#) of the OIA.

## Guidance for inquiries making non-publication orders

Non-publication orders can be made at any time, and may be temporary and subject to further review, or permanent.

Non-publication orders should be very specific about the information they apply to, and the information they do not apply to. It is not necessary to make overly broad orders because the OIA is capable of protecting official information held by agencies where that is in the public interest (see [Reasons for refusal](#) below).

Orders issued by the Royal Commission of Inquiry Into the Attack on Christchurch Mosques, reflect good practice in stating clearly that they *'do not apply (and thus do not preclude the operation of the Official Information Act 1982) in respect of material held by State sector agencies which was not created for the specific purposes of the Royal Commission'*.<sup>28</sup>

The Office of the Ombudsman can provide advice to inquiries considering making non-publication orders (email [info@ombudsman.parliament.nz](mailto:info@ombudsman.parliament.nz) or freephone 0800 802 602).

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<sup>27</sup> See s [15\(2\)](#) Inquiries Act.

<sup>28</sup> Minute 2: Evidence and Submissions from State Sector Agencies—Orders under Section 15 of the Inquiries Act 2013, accessed at <https://christchurchattack.royalcommission.nz/updates/>, 12 August 2020.

### What about the exclusion in paragraph (h)?

As noted above, the relevant exclusion in this context is found in [paragraph \(ha\)](#). However, some people may wonder whether the exclusion in paragraph (h) is also relevant.

Paragraph (h) says that ‘official information’ does not include ‘evidence given or submissions made to’:

- a royal commission;
- a commission of inquiry appointed by an Order in Council made under the COI Act; or
- a commission of inquiry or board of inquiry or court of inquiry or committee of inquiry appointed, pursuant to, and not by, any provision of an Act, to inquire into a specified matter.

This exclusion has been in the OIA since it was first enacted. However, its future application has been **limited** by the changes in the law relating to public inquiries.

This exclusion does not apply to evidence or submissions made to an inquiry under the Inquiries Act, including Royal Commissions established under that Act.

However, it continues to apply to evidence or submissions made to **historic** royal commissions and commissions of inquiry established under the COI Act. This information will never be ‘official information’, notwithstanding what the Inquiries Act says, because the Inquiries Act is not retrospective.<sup>29</sup>

It will also apply to evidence or submissions made to commissions / boards / courts or committees of inquiry established pursuant to a different Act to inquire into a specified matter.

## Reasons for refusal

The fact that the OIA applies to information held by government agencies, does not necessarily mean that information must be disclosed. The OIA provides good reasons for withholding official information, many of which could potentially be relevant in this context.

Two relevant reasons—section 6(c) ([maintenance of the law](#)), and section 18(c)(i) ([release would be contrary to the Inquiries Act](#))—are dealt with in some detail below. Other potentially relevant [refusal grounds](#) are canvassed briefly.

The sensitivity of this information is likely to be highest while an inquiry is underway. However, there is **no cloak of secrecy** just because an inquiry is underway. Each request must be considered on its merits, and each piece of information must be assessed against the criteria in

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<sup>29</sup> See [s7](#) Interpretation Act 1999.

the OIA for withholding before that request can be refused.<sup>30</sup>

If an agency is concerned about the impact of disclosure of official information on a current inquiry, it may be appropriate to consult the members of the inquiry. More information about how to consult can be found in our [Consulting third parties](#) guide.

## Maintenance of the law—section 6(c)

Section 6(c) of the OIA provides good reason for withholding where release would be likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial.

### Can section 6(c) apply to inquiries?

Section 6(c) is primarily a ‘*law enforcement*’ provision. To engage section 6(c), the information at issue must have some connection with a process of enforcing the law by ensuring compliance or investigating non-compliance with legal rules or standards.

However, Ombudsmen have accepted that prejudice to an inquiry can fit within section 6(c). This arose first in the context of the *Royal Commission into the Pike River Mine Tragedy* (see [301633 & 301637](#)), and then in the context of the *Government Inquiry into Operation Burnham and related matters* (see [481126](#)).

This approach recognises the influential role that inquiries hold in New Zealand, and the increased powers which were conveyed by the enactment of the Inquiries Act, empowering an inquiry to regulate its own procedures, hold oral hearings, compel witnesses and take evidence on oath.

There is clearly a high public interest in ensuring that the public can have confidence in the findings of an inquiry. Premature release of certain information which an agency will need to produce to an inquiry, which is central for the inquiry to make its findings, has the potential to undermine the investigation being undertaken.

### When does section 6(c) apply?

For section 6(c) to apply:

- there must be a direct connection between the information at issue and the matters under inquiry (see [304423](#), compared with [301633 & 301637](#));
- it must be clear how release of that information would prejudice the conduct of the inquiry, or its ability make findings;
- this prejudice must be ‘likely’ to occur—meaning there is a serious or real and substantial risk.<sup>31</sup>

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<sup>30</sup> See *Kelsey v the Minister of Trade* [2015] NZHC 2497 at paragraph 108, and [481126](#).

<sup>31</sup> *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 at 391.

Section 6(c) usually applies on a **temporary** basis—while an inquiry is underway. It will not usually be necessary to withhold information related to an inquiry on a permanent basis, under this particular withholding ground.

Section 6(c) does not apply just because release might lead to **public debate or comment** about a matter that is under inquiry. Increased public debate should not, of itself, prejudice the ability of the members of an inquiry to reach their conclusions free of pressure, or an agency to be able to present its case (see [481126](#)).

Nor does it apply because meeting OIA requests about an inquiry would impact—in **administrative** sense—on the agency or the inquiry ([481126](#)). It can only apply where the **release** of information would prejudice the maintenance of the law, not where the work in preparing release might indirectly bring about an administrative prejudice. If an agency is concerned about the administrative difficulty in responding to an OIA request, it should consider our [Substantial collation or research](#) guide.

## Factors to consider

Relevant factors in assessing the likelihood of a prejudice occurring include:

- the views of the inquiry;
- the terms of reference for the inquiry (whether focused on policy or administration, or the conduct of individuals and agencies);
- the impact on the agency’s ability to participate in the inquiry;
- relevant statutory powers of the inquiry (such as rules around the availability of information, the power to determine release of information and to summon witnesses);
- the procedures adopted by the inquiry (whether adversarial or inquisitorial, and whether witnesses will be summoned and cross-examined); and
- the possibility that fault will be found or recommendations to determine liability will be made.

Section 6(c) is more likely to apply where an inquiry is, in some shape or form, investigating compliance with legal rules or standards.

### Case study—application of factors to consider

Case [481126](#) provides a good example of what this means in practice. That case involved a number of questions directed to the New Zealand Defence Force (NZDF) about Operation Burnham (a military operation in Afghanistan), which was subject to a government inquiry under the Inquiries Act.

The terms of reference for the inquiry were wide-ranging. Some were focused on administrative aspects, such as steps taken by the NZDF to review the operation, and public statements made in relation to civilian casualties. Others focused on *‘the conduct of NZDF forces in Operation Burnham, including compliance with the applicable rules of engagement and international humanitarian law’*.

It was more difficult to see that information relating to the administrative aspects of the inquiry would prejudice the maintenance of the law. However, a finding of fault by the inquiry in relation to the conduct of NZDF forces could have implications for those who may be held accountable for that finding. Adverse findings may require further consideration under the Armed Forces Discipline Act 1971.

The Ombudsman found that requests for basic and uncontested factual material, like *‘what was Afghan local time when the Apache fired the rounds that fell short’*, could be answered without any prejudice to the maintenance of the law.

However, prejudice could arise where a request for information was essentially seeking to interrogate someone on matters that could lead to their subsequent liability. It could be prejudicial to force that person to give their version of events in the OIA forum, when that very question was being considered by the inquiry. There may be a prejudicial effect on the evidence that is provided.

You can read the full case note [here](#).

## Release would be contrary to the Inquiries Act—s 18(c)(i)

Section 18(c)(i) of the OIA provides that a request may be refused if release of the information would be *‘contrary to the provisions of a specified enactment’*.

Inquiries have wide powers to determine their procedure by making orders and directions. They can make orders to restrict public access to any part or aspect of the inquiry,<sup>32</sup> and to hold the inquiry, or any part of it, in private.<sup>33</sup> They can make orders—on application or their own initiative—for information that has been received from one person to be disclosed to

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<sup>32</sup> See [s 15\(1\)\(b\)](#) Inquiries Act.

<sup>33</sup> See [s 15\(1\)\(c\)](#) Inquiries Act.

another person who is participating in the inquiry.<sup>34</sup> Failure to comply with an inquiry's procedural order or direction is an **offence**, punishable by a fine not exceeding \$10,000.<sup>35</sup>

Section 18(c)(i) may be relied on to refuse a request for official information where release under the OIA would **contravene** an inquiry's procedural order or direction, and constitute an **offence** under the Inquiries Act.

This might arise where release under the OIA would, in effect, grant access to a part of the inquiry that has, by order of the inquiry, been restricted. It might also arise where one participant has applied to the inquiry for access to information supplied by another participant, and that application has been declined by the inquiry. Providing that information to the participant under the OIA would circumvent the inquiry's direction.

Agencies should be able to point to the specific order or direction, and say how release of the information at issue under the OIA would contravene it. If this is not clear, it may be appropriate to consult the members of the inquiry about whether release under the OIA would contravene its orders or directions.

## Other refusal grounds

Other potentially relevant refusal grounds are canvassed briefly below.

<a href="#">Section 6(a)</a>	Provides good reason for withholding where release would be likely to prejudice New Zealand's <b>security, defence or international relations</b> .
<a href="#">Section 6(b)</a>	Provides good reason for withholding where release would be likely to prejudice the entrusting of <b>confidential</b> information to New Zealand by <b>another country</b> .
<a href="#">Section 9(2)(a)</a>	Provides good reason for withholding (subject to a <a href="#">public interest test</a> ) where it is necessary to protect the <b>privacy</b> of natural persons. It may be relevant where the matters under inquiry relate to the personal affairs of individuals. For more information see our <a href="#">Practice guidelines on privacy</a> .
<a href="#">Section 9(2)(ba)</a>	Provides good reason for withholding (subject to a <a href="#">public interest test</a> ) where it is necessary to protect information subject to an <b>obligation of confidence</b> , where release would <b>prejudice the ongoing supply</b> of similar information or information from the same source, or otherwise <b>damage the public interest</b> . Damage to the public interest would arise if release impeded an inquiry's ability to get to the truth of a matter, while acting fairly and following the rules of natural justice. Those rules mean, for example, that people should have an opportunity to respond before adverse comment is made about them. For more information see our <a href="#">Practice guidelines on confidentiality</a> .

<sup>34</sup> See [s 22](#) Inquiries Act.

<sup>35</sup> See [s 29\(1\)\(e\)](#) Inquiries Act.

<a href="#">Section 9(2)(g)(i)</a>	<p>Provides good reason for withholding (subject to a <a href="#">public interest test</a>) where it is necessary to maintain the <b>effective conduct of public affairs</b> through the <b>free and frank expression of opinions</b>.</p> <p>This section may be relevant where release would impact on the open and honest exchange of views and opinions that are necessary to enable an inquiry to get to the truth of a matter.</p> <p>For more information see our <a href="#">Free and frank opinions</a> guide.</p>
<a href="#">Section 9(2)(h)</a>	<p>Provides good reason for withholding (subject to a <a href="#">public interest test</a>) where it is necessary to maintain <b>legal professional privilege</b>.</p> <p>This section will apply to confidential communications between a solicitor and client for the purpose of giving or receiving legal advice (known as solicitor-client privilege).</p> <p>For more information see our <a href="#">Practice guidelines on legal professional privilege</a>.</p>
<a href="#">Section 18(d)</a>	<p>Provides that a request may be refused if the information is or will soon be <b>publicly available</b>.</p> <p>This section may be relevant in the very late stages of an inquiry, where the agency is reasonably certain that the specific information at issue (not just the inquiry report, unless that report reproduces the information at issue exactly and in full) will be published in the near future.</p> <p>It will not be relevant in the early stages, when it is not clear when the inquiry will conclude, or whether the specific information at issue will be published.</p> <p>For more information see our <a href="#">Publicly available information</a> guide.</p>
<a href="#">Section 18(g)</a>	<p>Provides that a request may be refused if the <b>information is not held</b>.</p> <p>This section may be relevant if what the requester wants is not held, but would need to be created, for example, by generating opinions or explanations that do not already exist.</p> <p>It will also be relevant where the requested information is physically held, but excluded from the definition of ‘official information’, for example, because it is subject to a <a href="#">non-publication order</a> under section 15(1)(a) of the Inquiries Act.</p> <p>For more information see our <a href="#">Information not held</a> guide.</p>

### What about section 18(c)(ii)?

Section 18(c)(ii) of the OIA provides that a request may be refused if release of the information would ‘constitute contempt of court’. However, **inquiries are not courts**:<sup>36</sup>

*A Commission of Inquiry is certainly not a Court of law. Courts of law by ancient usage have formulated their own rules of procedure and rights of audience, representation, and the like which are now well defined: see Collier v Hicks (1831) 2 B. & Ad. 663, 671; 109*

<sup>36</sup> *In re the Royal Commission to Inquire into and Report upon State Services in New Zealand* [1962] NZLR 96 at 109. Contempt of an inquiry is dealt with under [s 31](#) Inquiries Act.

*E.R. 1290, 1293. Nor is a Commission of Inquiry to be likened to an administrative tribunal entrusted with the duty of deciding questions between parties. There is nothing approaching a lis [a suit or action at law], a Commission has no general power of adjudication, it determines nobody's rights, its report is binding on no one.*

Section 26(2)(b) of the Inquiries Act provides that inquiries and their members and officers cannot *'be compelled to give evidence in court or in any proceedings of a judicial nature in relation to the inquiry'* without leave of the court. From this it follows that an inquiry is not seen to be a court, or as performing functions *'of a judicial nature'*.

Section 27 of the Inquiries Act grants certain immunities *'as if'* the proceedings were civil proceedings in a court, and for that purpose applies subpart 8 of Part 2 of the Evidence Act 2006. That section also distinguishes inquiries from courts. The use of the expression *'as if'* recognises that an inquiry is not a court, and the relevance of the Evidence Act in this context is to define the scope of the immunities enjoyed.

As inquiries are not courts, section 18(c)(ii) of the OIA cannot apply where release would constitute contempt of an inquiry. However, as discussed above, [section 18\(c\)\(i\)](#) may be relied on to refuse a request for official information where release under the OIA would **contravene** an inquiry's procedural order or direction, and constitute an **offence** under the Inquiries Act.

## Public interest test

The withholding grounds in section 9 of the OIA are subject to a public interest test. This means the predicted harm needs to be balanced against the countervailing public interest in release. If the countervailing public interest weighs more heavily, the information must be released. If not, it can be withheld.

In assessing the public interest in release, it may be helpful to consider the following comments by the Law Commission:<sup>37</sup>

*Inquiries are often set up to re-establish public confidence. Public confidence and perceptions of independence are likely to be maximised by an open process. The Salmon Royal Commission on Tribunals of Inquiry emphasised: '[i]t is only when the public is present that the public will have complete confidence that everything possible has been done for the purpose of arriving at the truth'. The more open an inquiry, the harder it is to denounce it as a whitewash. While inquiries are an executive tool, the public also has a proprietary interest in an inquiry. Inquiries are publicly funded and there is an expectation that in general the public should have access to them, unless there are clear reasons otherwise.*

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<sup>37</sup> Law Commission. [A New Inquiries Act](#). (NZLC R102, 2008) at 92.

More information on how to do the public interest test, and factors that can affect the weight of the public interest in disclosure can be found in our [Public interest](#) guide.

## Further information

Appended to this guide are:

- a [summary](#) of its key points; and
- a list of [relevant case notes and opinions](#).

Related guides include:

- [Practice guidelines on privacy](#)
- [Practice guidelines on confidentiality](#)
- [Free and frank opinions—A guide to section 9\(2\)\(g\)\(i\) of the OIA](#)
- [Practice guidelines on legal professional privilege](#)
- [Publicly available information—A guide to section 18\(d\) of the OIA](#)
- [Information not held—A guide to sections 18\(e\) and \(g\) of the OIA](#)
- [Public interest—A guide to the public interest test in section 9\(1\) of the OIA](#)

Questions about the interaction between the OIA and the Inquiries Act can be directed to [info@ombudsman.parliament.nz](mailto:info@ombudsman.parliament.nz) or freephone 0800 802 602.

We can also provide advice and guidance to inquiries considering making non-publication orders under section 15(1)(a) of the Inquiries Act.

[More information about inquiries is also available on the DIA website](#), and in Chapter 4 of the [Cabinet Manual](#).

## Appendix 1. Summary—the OIA and inquiries

<b>Inquiries Act 2013</b>	Provides for royal commissions, public inquiries and government inquiries to inquire and report on matters of public importance.
<b>Information held by inquiries</b>	Inquiries Act inquiries are not subject to the OIA (section 2(6)(ea) OIA). However, the information they hold becomes <i>‘official information’</i> once they have reported (section 32 Inquiries Act). After that time, OIA requests can be made to the government agency administering the inquiry—usually the Department of Internal Affairs. If the records have already been transferred to Archives New Zealand (Archives), they may be able to be accessed from Archives without recourse to the OIA (see <a href="http://www.archives.govt.nz">www.archives.govt.nz</a> ).
<b>Information held by other agencies</b>	With very few exceptions, government agencies that interact with inquiries are subject to the OIA. The OIA will apply to any information that they hold about an inquiry, or the matters under inquiry, unless that information is excluded from the definition of <i>‘official information’</i> . Nothing in the Inquiries Act affects this position.
<b>Is it ‘official information’?</b>	<p>The OIA excludes certain types of information from the definition of <i>‘official information’</i> (section 2(1)). <b>Paragraph (ha)</b> of the definition of <i>‘official information’</i> excludes:</p> <ul style="list-style-type: none"> <li>• any matter subject to a non-publication order under section 15(1)(a) of the Inquiries Act; and</li> <li>• documents relating to the internal deliberations of the inquiry.</li> </ul> <p><b>Paragraph (h)</b> excludes evidence given and submissions made to <b>historic</b> royal commissions and commissions of inquiry. It <b>does not exclude</b> evidence given and submissions made to inquiries (including royal commissions) conducted under the <b>Inquiries Act</b>.</p> <p>Requests for information that is excluded from the definition of <i>‘official information’</i> can be refused under section 18(g) of the OIA (information not held). See our <a href="#">section 18(g)</a> guide for more information and template letters.</p>
<b>Is there a reason for withholding?</b>	<p>There may be reasons for withholding official information about an inquiry, or the matters under inquiry, under the OIA.</p> <p>The sensitivity of the information is likely to be highest while an inquiry is underway. However, there is <b>no cloak of secrecy</b> just because an inquiry is underway. Each request must be considered on its merits, and each piece of information must be assessed against the criteria in the OIA for withholding before that request can be refused (<i>Kelsey v the Minister of Trade</i> [2015] NZHC 2497).</p>

It may be appropriate to consult the members of the inquiry about the likely impact of disclosure of the information at issue on the inquiry. See [Consulting third parties](#) for guidance on how to do this.

### Maintenance of the law

Section 6(c) of the OIA can, depending on the nature of the inquiry, apply where release would be likely to prejudice the conduct of the inquiry or its ability to make findings. There must be a **direct connection** between the information at issue and the matters under inquiry. It must be clear **how** release of that information would prejudice the conduct of the inquiry, or its ability to make findings. This prejudice must be **'likely'** to occur—meaning there is a serious or real and substantial risk.

Factors to consider include: the views of the inquiry; the impact on the agency's ability to participate in the inquiry; the terms of reference for the inquiry (whether focused on policy or administration, or the conduct of individuals and agencies); relevant statutory powers of the inquiry (such as rules around the availability of information, the power to determine release of information and to summon witnesses); the procedures adopted by the inquiry (whether adversarial or inquisitorial, and whether witnesses will be summoned and cross-examined); and the possibility that fault will be found or recommendations to determine liability will be made. Section 6(c) is more likely to apply where an inquiry is, in some shape or form, **investigating compliance with legal rules or standards**.

Section 6(c) will usually only apply on a **temporary** basis—while the inquiry is underway. It will not apply just because release might lead to **public debate or comment** about a matter that is under inquiry. Nor will it apply because meeting OIA requests about an inquiry would impact—in **administrative** sense—on the agency or the inquiry.

### Release contrary to the Inquiries Act

Section 18(c)(i) of the OIA can apply where release would contravene an inquiry's procedural order or direction (for example, restricting public access to any part or aspect of the inquiry), and constitute an offence under the Inquiries Act. Agencies should be able to point to the specific order or direction, and say how release of the information at issue under the OIA would contravene it. It may be appropriate to consult the inquiry about whether release under the OIA would contravene its orders or directions.

### Other refusal grounds

Other potentially relevant refusal grounds include: section 9(2)(a) ([privacy](#)), section 9(2)(ba) ([confidentiality](#)), section 9(2)(g)(i) ([free and frank opinions](#)), section 9(2)(h) ([legal professional privilege](#)), section 18(d) ([publicly available information](#)) and section 18(g) ([information not held](#)).

## Appendix 2. Relevant case notes and opinions

Case	Year	Summary
491854 & 491000	2018	<p><a href="#">Request for correspondence between agencies and Operation Burnham inquiry</a></p> <p><i>Information held by agencies was ‘official information’—no exclusions applied—section 32 of the Inquiries Act did not change the status of the information held by agencies as ‘official’— information released with redactions</i></p>
481126	2019	<p><a href="#">Request for information about Operation Burnham</a></p> <p><i>Section 6(c) OIA can potentially apply to prevent prejudice to the conduct of an inquiry under the Inquiries Act—however, blanket refusal was not justified—basic and uncontested factual material could be provided—section 6(c) applied where questions sought to interrogate someone on an issue which may lead to subsequent questions of liability—likelihood of public debate and administrative concerns not reasons for withholding under section 6(c)</i></p>
304423	2011	<p><a href="#">Request for information about the operation of the Spring Creek Coal Mine</a></p> <p><i>Information was ‘official information’—Section 6(c) OIA did not apply—information not directly relevant to inquiry—release not likely to prejudice the effective conduct of the Royal Commission of Inquiry</i></p>
301633 & 301637	2011	<p><a href="#">Request for information about Pike River Mine</a></p> <p><i>Section 6(c) OIA applied—release of information directly relevant to the Royal Commission of Inquiry would be likely to prejudice the effective conduct of the Inquiry</i></p>