

CONTRARY TO LAW, CONTEMPT OF COURT OR THE HOUSE: A GUIDE TO SECTION 18(C) OF THE OIA AND SECTION 17(C) OF THE LGOIMA

Section 18¹ provides several administrative grounds for refusing a request. In general, these grounds will apply where for some “*procedural*” or “*administrative*” reason it is not reasonable for the agency to fulfil the request.

The principle of availability set out in section 5 requires that “*information shall be made available unless there is good reason for withholding it*”. These administrative grounds are not “*good reasons*” for withholding information, they are simply authority for refusing a request in circumstances.

Section 18(c)² of the (OIA) provides that a request may be refused if:

“... *the making available of the information requested would –*

- (i) *Be contrary to the provisions of a specified enactment; or*
- (ii) *Constitute contempt of Court or of the House of Representatives.”*

Contrary to the provisions of a specified enactment

While for the most part requests for information must be considered within the terms of the OIA, there are a number of other provisions in various pieces of legislation which control whether and how certain information should be released. Such provisions usually relate to very specific types of information, or information provided in specific circumstances.

Where release of certain information would be contrary to the provisions of such an enactment, a request for that information may be refused pursuant to section 18(c)(i)³ of the OIA.

Relying on section 18(c)(i)

When considering whether or not a request should be refused under section 18(c)(i) of the OIA, the agency should carefully consider the specific provision of the enactment being relied upon:

- (a) Would release of the information requested be “*contrary*” to this provision?

If so, does this provision apply to *all* the information requested – if it does not, can *some* of the information be considered for release under the OIA?

- (b) Does the provision confer any discretion as to whether the information can be released in the circumstances of this case?

¹ Section 17 LGOIMA.

² Section 17(c) LGOIMA.

³ Section 17(c)(i) LGOIMA.

If so, would it be appropriate to exercise that discretion in the circumstances of this particular case?

Examples

One provision which is frequently encountered by the Ombudsmen is section 81 of the Tax Administration Act 1994. In particular it requires that, subject to certain limited exceptions, the Inland Revenue Department must maintain secrecy with regard to taxation matters. The fact that section 81 of the Tax Administration Act controls the availability of information about taxation matters means that the OIA does not apply. Release of such information in terms of the OIA would be contrary to section 81, and as such a request for that information could be refused under section 18(c)(i).

However, where a person has made a request for information about his or her own personal taxation matters, the Commissioner of Inland Revenue has a discretion to release that information if the Commissioner:

- ❖ is satisfied that the information is readily available in the Department; and
- ❖ considers it reasonable and practicable to give that information.

Contempt of Court or the House of Representatives

If releasing the requested information would constitute contempt of Court or contempt of the House of Representatives, that request “*may*” be refused under section 18(c)(ii)⁴ of the Act. Section 52(1)⁵ of the Act also provides that:

“Nothing in this Act authorises or permits the making available of any official information if the making available of that information would constitute contempt of Court or of the House of Representatives.”

While the use of the word “*may*” in section 18(c)(ii) suggests that a decision to refuse a request under that section is discretionary, section 52(1) of the Act confirms that the OIA does not provide authority or permission to release information if such disclosure would constitute contempt of Court or of the House of Representatives.

Contempt of Court

Contempt of Court exists to:⁶

“... preserve an efficient and impartial system of justice and public confidence in it, by dealing with challenges to the fundamental supremacy of the law”.

⁴ Section 17(c)(ii) LGOIMA

⁵ Section 44(1) LGOIMA which reads “*Nothing in Parts I to V of this Act authorises or permits the making available of any official information if that information would constitute contempt of Court or of the House of Representatives*”

⁶ “Contempt of Court” Volume 7, paragraph 5, page 4 “*The Laws of New Zealand*” (Butterworths, Wellington, June 2001

It may consist of:⁷

- ❖ words or acts obstructing, or tending to obstruct or interfere with, the administration of justice; or
- ❖ disobedience of the judgments, orders or other processes of the Court.

The OIA allows an agency to refuse a request for information if the release of that information would constitute contempt of Court.

Relying on section 18(c)(ii)

Set out below are the questions that the agency should be able to answer before deciding to refuse a request on the basis that release of the information would constitute contempt of Court:

- (a) In what way would release of this information constitute contempt of Court?

For example, would it breach an order made by the Court?

- (b) Would release of *all* of the information constitute contempt of Court?

That is, is there any information encompassed by the request which can be released without being in contempt of Court? If so, that information should be considered for release under the OIA.

Examples

Section 18(c)(ii) of the OIA has been found to apply where:

- ❖ the information requested is the subject of a permanent suppression order by the Court; and
- ❖ a Coroner has prohibited the publication of evidence given at an inquest.

Contempt of the House of Representatives

In Erskine May's "*Parliamentary Practice*",⁸ contempt of the House of Representatives is described in the following manner:⁹

"Generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence."

⁷ Above n 6

⁸ "*Erskine May's Treatise on The Law, Privileges, Proceedings and Use of Parliament*" (21st Edition, Butterworths, London 1989)

⁹ Above n8, 115

This has been codified in the Standing Orders of the House of Representatives.¹⁰ Standing Order 396 states that:

“The House may treat as a contempt any act or omission which –

- (a) obstructs or impedes the House in the performance of its functions, or*
- (b) obstructs or impedes any member or officer of the House in the discharge of the member’s or officer’s duty, or*
- (c) has a tendency, directly or indirectly, to produce such a result.”*

If release of official information would constitute contempt of the House of Representatives, a request for that information may be refused under section 18(c)(ii) of the OIA.

Relying on section 18(c)(ii)

The agency should consider the following questions before deciding whether to refuse a request under section 18(c)(ii) of the Act:

- (a) In what way would release of the information requested constitute contempt of the House of Representatives?

Can a specific Standing Order defining the contempt¹¹ or an established form of contempt¹² be pointed to?

- (b) Would release of *all* of the information constitute contempt of the House of Representatives?

That is, is there any information encompassed by the request which can be released without being in contempt? If so, that information should be considered for release under the OIA.

Examples

Some examples of what constitutes contempt of the House of Representatives are set out in Standing Orders 397-400 and are discussed in more detail in the book *“Parliamentary Practice in New Zealand”* by David McGee.¹³

One example of where section 18(c)(ii) of the OIA might apply is found where, in accordance with Standing Order 219, a select committee has declared evidence to be secret evidence. Disclosure of that secret evidence without authorisation by the House of Representatives may constitute contempt of the House.¹⁴

¹⁰ (1999)

¹¹ See for example Standing Order 397

¹² Established forms of contempt are discussed in David McGee *“Parliamentary Practice in New Zealand”* (2nd edition, GP Publications, Wellington, 1994) 488 – 498

¹³ Above n12

¹⁴ See Standing Order 397(m); *“Parliamentary Practice in New Zealand”* above n12, 483, 489, 493