

Request for data gathered by Inland Revenue contractor

Legislation	Official Information Act 1982, s 18(c)(i), s 18(e)
Agency	Inland Revenue
Ombudsman	Peter Boshier
Case number(s)	498402
Date	March 2020

Request made for data gathered by Inland Revenue contractor - unreasonable to rely on s 18(c)(i) to refuse release without retrieving from contractor and reviewing the information and unreasonable to rely on s 18(e) as the information existed and was retrievable – Chief Ombudsman recommended that the request be reconsidered after retrieving and reviewing the data – given s 18(e) decision was based on an unrecorded meeting, under s 28(6) the Ombudsman notified the Chief Archivist regarding possible recordkeeping concerns.

Background

On 12 February 2019, the complainant made a request to Inland Revenue (IR) for ‘polling data’ gathered by a contractor, advising that they sought the raw data in a usable spreadsheet. On 12 March 2019, IR refused the request under section 18(c)(i) of the Official Information Act 1982 (OIA), advising that releasing the information would be contrary to the requirement to maintain secrecy under section 81 of the Tax Administration Act 1994 (TAA).¹

The complainant made a complaint to the Chief Ombudsman.

¹ Section 81 was repealed, on 18 March 2019, by section 49 of the Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Act 2019, and replaced with s 18 which is a substantially similar provision.

Investigation

Section 18(e) refusal of the request

The complainant asked for polling information gathered by an IR contractor that included political leanings data and other data. During the Ombudsman's investigation, IR revised its decision and, regarding the political leanings data, advised that it was refusing the request under section 18(e) of the OIA. This decision was made on the basis that *'the document alleged to contain the information requested does not exist or, despite reasonable efforts to locate it, cannot be found'*. According to IR, the position was that:

- The polling information collected was initially held by the contractor. On 9 February 2019, IR instructed the contractor to delete the political leanings data.
- The contractor advised IR that the political leanings data had been deleted and could not be unarchived. IR had not subsequently asked the contractor whether they had retained a copy or copies of the requested information in a backup system or archive.
- During the Ombudsman's investigation, and after IR had purported to rely on s 18(e) of the OIA, at the Ombudsman's request IR sought further confirmation that the political leanings data was no longer available. The contractor then advised IR that the political leanings data could in fact be recovered from its backup recovery systems.

The Ombudsman has previously concluded that where information had been destroyed in accordance with a disposal authority,² it would not usually be necessary for agencies to recover it from backup systems. However, searches of the backup systems may have been required where information has been disposed of without the approval of a disposal authority.

IR considered that its Disposal Authority authorised the disposal of this kind of information. However, IR had not documented its decision of 9 February 2019 to delete the data, and could not provide a written record of the meeting at which the instruction was given to the contractor, or details of the decision makers' considerations.

Archives New Zealand's guidelines were clear that agencies should, when disposing of records, consider their current Disposal Authority, and should make a record (including in a disposal register) of what happened to the record, and under what authority.³ Regarding IR's decision of 9 February 2019 and consideration of section 18(e) of the OIA, the Ombudsman was not satisfied that IR properly turned its mind to its Disposal Authority when it decided to instruct the contractor to delete the data.

² Disposal authorities provide agencies with ongoing authorisation for the disposal of non-core business information and records related to administration, corporate services, human resources, and finance. Disposal authorities specify what types of information can be destroyed and retained as public archives, and the length of the retention period.

For more information about disposal authorities, refer to <https://archives.govt.nz/manage-information/how-to-manage-your-information/disposal/general-disposal-authorities>.

³ See [Archives NZ Disposal Sentencing guidelines: section 2.1.8](#).

Section 18(c)(i) refusal of the request

As noted above, on further review by IR, including making further enquiries of the contractor, it came to light that the data still existed in the contractor's backup recovery systems and it was retrievable. IR therefore reverted to relying on section 18(c)(i) of the OIA, as the disclosure of the requested information would be contrary to the secrecy provisions of the TAA.

With reference to the precedent set by *Kelsey v Minister of Trade*,⁴ IR had not retrieved or viewed the information at issue. Accordingly, neither the Ombudsman nor IR was in a position to be satisfied that section 18(c)(i) of the OIA applied in this case.

Outcome

The Ombudsman formed the opinion that it was unreasonable for IR to rely on sections 18(e) and 18(c)(i) of the OIA in this case.

The Ombudsman recommended IR retrieve the political leanings data from the contractor before reconsidering the complainant's request.

Regarding IR's application of section 18(e) of the OIA to this request, the Ombudsman exercised his discretion under section 28(6) of the OIA and notified the Chief Archivist of this matter.

In respect of IR's intention to have the information permanently destroyed, the Ombudsman advised IR that he expected it would be retained until the complainant had exhausted their rights of review to the Ombudsman regarding the release of the information.

IR accepted the Ombudsman's opinion, actioned his recommendation, and then released some aggregated raw data to the complainant.

Disclaimer

This case note is published under the authority of the Ombudsmen Rules 1989. It sets out an Ombudsman's view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.

⁴ *Kelsey v Minister of Trade* [2015] NZHC 2497, paragraph 108 states:

...the fundamental point [is] that the Act required the Minister to assess each piece of information requested by Professor Kelsey that was held by the Minister and/or MFAT against the criteria in the Act for withholding official information before that request could be refused.