

Request for information about vaccination certificates for domestic use

Legislation	Official Information Act 1982, ss 18(d), 30(1)(b)
Agency	Minister for COVID-19 Response
Ombudsman	Peter Boshier
Case number(s)	568703
Date	December 2022

Request refused because proactive release of information was in train – proactive release does not absolve decision-maker of responsibilities under the Official Information Act – cumulative failings meant refusal unreasonable in terms of section 18(d)

Background

On 9 October 2021, the New Zealand Council of Civil Liberties (NZCCL) sent a joint letter to the Minister for COVID-19 Response and the Prime Minister expressing concern about the civil liberties implications of the planned introduction of vaccination certificates. In particular, that the government had not consulted widely enough before Cabinet had made its decision. NZCCL stated:

We urge you to promptly publish all information that has been provided to the sectors or organisations the government is consulting with on the vaccine certificate, as well as all advice from the Privacy Commissioner and from the Ministry of Justice or Crown Law on the NZ Bill of Rights Act and Human Rights Act implications of the proposals. We also request this information urgently under the Official Information Act.

The NZCCL requested the information urgently, noting ‘a very strong public interest in the immediate release of this information’. It commented:

The Government may suggest that the public and NZCCL will have an opportunity to make a submission to a select committee when legislation is introduced to Parliament. This is unacceptable as it comes after Cabinet has decided on the

details of the scheme and time is very short.¹ In our experience of making submissions on legislation, this is too late – particularly with a scheme that the government is introducing so soon – to enable anyone to have influence on the shape of the scheme.

On 11 November 2021, the NZCCL emailed the Prime Minister and the Minister to note the maximum statutory response time had expired, and asked when it could expect a response.

On 12 November 2021, the Minister's Office responded on behalf of the Minister and the Prime Minister. The Minister's Office noted that as the request fell within the responsibilities of the Minister, the Minister would respond on behalf of the Prime Minister as well. The Minister's Office apologised for the delay in responding and advised that the team would look to expedite the decision.

On 22 November 2021, the Minister wrote to the NZCCL. He apologised for the delay in responding and explained that owing to an administrative error, the request was not processed within the statutory timeframes. The Minister provided a list of five key decision-making documents relating to vaccine certificates for domestic use. He advised that he had made the decision to proactively release all decision-making documents relating to COVID-19 vaccination certificates, including the listed documents on the 'Unite against COVID-19' website. The Minister noted that the documents would be published by late January 2022. However, the Minister did not refer to any specific section of the OIA when conveying his decision, nor clarify whether or not the request made under the OIA was refused.²

Ultimately the listed documents were published on 10 December 2021, but some of the information requested by NZCCL was redacted pursuant to section 9(2)(h) of the Official Information Act 1982 (OIA).³ Furthermore, no information was published which pertained to NZCCL's request for the information that had been 'provided to the sectors or organisations the government is consulting with on the vaccine certificate'.

NZCCL complained to the Chief Ombudsman about the Minister's response of 22 November 2021.

Investigation

The Ombudsman's investigation established that on 3 November 2021, the Minister's Office confirmed with the Department of Prime Minister and Cabinet that it would like all COVID-19 vaccine certificate advice created prior to 10 December 2021 to be prepared for proactive release by the end of January 2022. The requested information about advice on the proposals

¹ Ultimately the bill providing the powers passed through the House in 24 hours.

² Section 19 OIA requires that reasons must be provided for refusing a request. Section 18(d) of the OIA states a request may be refused if the information requested is or will soon be publicly available.

³ Section 9(2)(h) applies where the withholding of information is necessary to maintain legal professional privilege.

was part of the bundle of briefings that had been commissioned for that release and this accounts for the advice to the NZCCL on 22 November 2021.

In effect, the Minister's response of 22 November 2021 constituted a refusal under section 18(d) of the OIA. This provision gives agencies a discretion to refuse a request for information that is or will soon be publicly available. However, like any discretion, it must be exercised reasonably. This means that agencies should take into account all the relevant circumstances of the request.

The Minister commented:

The circumstances of the agencies involved in the All-of-Government COVID-19 Response from October to December last year is of particular relevance. During that time, the relevant agencies were working on transitioning from the Alert Level Framework to the COVID-19 Protection Framework, including reviewing New Zealand's vaccination progress. Agencies and the...Minister's Office were working under extreme pressure during this time and had to alternate between producing policies and making them publicly available proactively or via the OIA.

The particular circumstances of [NZCCL's] request was taken into account on commissioning. ... the...Office did not consider it was reasonable to give the NZCCL request additional priority over its existing work addressing the COVID-19 pandemic, given the pressures the Office and other agencies were facing...

The Ombudsman acknowledged the pressure under which the agencies were working at the time. However, in the circumstances of this case he determined that cumulative failings to meet the requirements of the OIA meant that the response of the Minister on 22 November 2021 was unreasonable.⁴

First, there was the failure to make and communicate a decision on the NZCCL request within the maximum statutory timeframe. In the Ombudsman's opinion, the delay in making the decision exacerbated the unreasonableness of the subsequent decision to refuse the request.

Secondly, although there was a plan in place in early November 2021 to proactively release decision-making documents relating to COVID-19 vaccination certificates by late January 2022 (including the five key decision-making documents which contained some of the requested information) the fact remained:

- the NZCCL had made a genuine request on 9 October 2021 for its request to be treated urgently to enable 'effective participation in the making and administration of laws and policies' (section 4(a)(i) OIA refers). Deferring release would inhibit this legitimate objective;

⁴ Section 30(1)(b) provides that in the context of an investigation of a complaint made under section 28, an Ombudsman can form the opinion that the decision complained of is unreasonable.

- what was planned for proactive release was evidently not exactly the same as what NZCCL had requested;⁵
- there had been an insufficient assessment of whether the requested information that was proposed for proactive release would include redactions.⁶

Thirdly, and as a result of the omission noted in the latter bullet point, the decision letter failed to specify that requested information was refused under section 9(2)(h) of the OIA. This meant that the NZCCL's ability to complain to the Ombudsman about the decision to withhold information under this section was effectively delayed.

Finally, the Minister's letter on 22 November 2021 failed to refer to the particular subsection relied on under the OIA to confirm refusal of the request. The notification of the decision simply stated:

I have made the decision to proactively release all decision making documents relating to...on the Unite against COVID-19 website... I intend to publish this information by late January 2022.

As noted in *Kelsey v Minister of Trade* [2015] NZHC 2497:

[125] The noun "reason" in s 19(a)(i) of the Act refers to one of the statutory reasons for refusing a request to release official information set out in s 18(a)-(h) of the Act. The Act requires the decision-maker to specify one of those reasons at the time a request for official information is refused. All the decision-maker needs to do is specify which of the provisions in s 18(a)-(h) has been relied upon when the request for official information is refused.

The bottom line is that a decision to release information proactively does not absolve a decision-maker of their responsibilities to a requester under the OIA. The discretion to refuse a request under section 18(d) must be notified properly and exercised reasonably, and with regard to the particular circumstances of each case. In this instance, the decision on the request was made outside the statutory timeframe. It also did not specify the reason for refusal, consider the requested information that would not be included in the information to be published, or advise that the published information would contain redactions. All this occurred in the context of a genuine request for urgency.

⁵ NZCCL's request for 'information provided to the sectors or organisations the government is consulting with on the vaccine certificate' was not addressed in the response of 22 November. The Minister apologised for this oversight and released this information to the requester during the course of the Ombudsman's investigation.

⁶ A guide to [section 18\(d\) of the OIA and section 17\(d\) of the LGOIMA](#), at page 3 provides 'Agencies must identify the specific information requested, and be satisfied that this information is or will soon be publicly available. ...If only some of the information requested is or will soon be publicly available, then a partial refusal may be justified. However, a decision on the remaining information that is not publicly available, or is not intended to be made publicly available, must be made.'

Outcome

For these reasons, the Ombudsman formed the opinion that the response the Minister communicated to the NZCCL on 22 November 2021 was unreasonable.

The Ombudsman decided to issue this case note to make his expectations around the use of section 18(d) clear and so that his findings could inform decision-making on all official information requests.

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.