

Copies of court proceedings held by an agency and subject to Official Information Act 1982

Legislation	Official Information Act 1982, ss 18(c)(i), 18(c)(ii)
Agency	Kāinga Ora
Ombudsman	Peter Boshier
Case number(s)	595191
Date	August 2023

Complaint about the decision to rely on section 18(c)(i) to refuse an Official Information Act 1982 request for documents related to court proceedings – Chief Ombudsman found that copies of court proceedings are held by the agency – there are circumstances when an agency could rely on section 18(c)(i) to refuse a request for this type of information – in this case Kāinga Ora was not entitled to rely on section 18(c)(i) to refuse this request

Background

The Ombudsman received a complaint under the Official Information Act 1982 (OIA) about a refusal by Kāinga Ora to provide copies of documents related to court proceedings that Kainga Ora was involved with.

Kāinga Ora refused this request on the basis that 18(c)(i) of the OIA applied to the information. In its decision letter, Kāinga Ora noted:

Access to documents in a court proceeding is a matter for the Court. We suggest that you engage directly with the Court under the Senior Courts (Access to Court Documents) Rules 2017.

Your request is therefore refused under section 18(c)(i) of the Act, as the making available of the information requested would be contrary to the Senior Courts (Access to Court Documents) Rules 2017.

Investigation

The Ombudsman investigated whether Kāinga Ora was entitled to rely on section 18(c)(i) of the OIA to refuse this request.

Comments from Kāinga Ora

In response to the Ombudsman's investigation, Kāinga Ora submitted its view that:

Releasing court documents under the OIA would circumvent the Court Access Rules regime and usurp the inherent ability of the Court to control its proceedings, processes, and practices.

Kāinga Ora submitted that Rules 8, 10 and 11 of the Senior Court (Access to Court Documents) Rules 2017 (the Rules) established the framework for members of the public to request information of the type being requested. It also pointed to Rule 5 as being relevant to the Court being able to preserve the Court's *'inherent jurisdiction to control its own proceedings.'*

It considered that releasing these documents under the OIA would be contrary to section 173(1) of the Senior Courts Act 2016 (the Act), which provides:

Any person may have access to court information of a senior court to the extent provided by, and in accordance with, rules of court.

Kāinga Ora suggested that releasing court documents that are currently before the Court would be in breach of *sub judice* rules requiring parties to *'maintain confidentiality of court documents and not release them for reasons outside the litigation process, unless and until a Court grants permission for their publication or wider distribution.'*

Kāinga Ora also considered that its refusal did not impact on the requester's ability to access the information, saying that the requester was able to rely on the process set out by the Court Access Rules. Kāinga Ora considered this to be an adequate remedy to seek access to the information.

Section 18(c)(i) of the OIA

Section 18(c)(i) of the OIA states that a request may be refused if making the information available would be *'contrary to the provisions of a specified enactment'*. In addition section 18(c)(ii) states a request may be refused if making the information available would *'constitute contempt of court or of the House of Representatives'*.

For an agency to be able to rely on section 18(c) of the OIA, it must be able to point to something specific that would be breached if the information was released, for example:

- a specific section of legislation that prohibits the release / publication of information; or
- a non-publication order that has been made by a court.

While the court proceedings relevant to this information were still in progress, there were no specific non-publication orders nor were the proceedings subject to any legislation that carried automatic suppression of information.¹

The Ombudsman did not agree with Kāinga Ora's suggestion that *sub judice* or Access to Court Document rules amounted to a general limit on the release of any court documents held by Kāinga Ora under section 18(c)(i). It is necessary to point to a more specific restriction applying to the particular documents being sought by a requester.

In addition, the release of court documents under the OIA would not generally amount to a contempt of court that would enable an agency to rely on section 18(c)(ii) of the OIA. There may be instances when an agency could rely on this section, but the agency would have to point to specific reasons why it would be a contempt of court (such as a specific direction, order or statute relevant to the information that has been requested).

Consultation with the Solicitor-General

The Ombudsman consulted the Solicitor-General on this matter. The Solicitor-General confirmed that any request to an agency for court information, which that agency holds, must be determined in accordance with the OIA.

Outcome

The Ombudsman formed the final opinion that Kāinga Ora was not entitled to rely on section 18(c)(i) of the OIA to refuse the request.

The Ombudsman recommended that Kāinga Ora reconsider its decision and determine whether the information can be released and communicate a fresh decision.

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¹ For example, name suppression or other specific court orders, or statutory prohibitions such as section 11B Family Courts Act 1980. See also the discussion in *Simes* about confidentiality in court ordered reports ([80] – [81]).