Guidelines on Grounds Commonly Used by LINZ for Withholding Information Under Sections 6 and 9 of the Official Information Act and Refusing Requests Under Section 18 of the Official Information Act

The following guidelines on selected withholding grounds under sections 6, 9 and 18 of the Official Information Act and have been adapted from the Ombudsman's' Practice Guidelines.

Section 6

Section 6 of the OIA provides:

> *"**6** **Conclusive reasons for withholding official information -** Good reason for withholding official information exists, for the purpose of section 5 of this Act, if the making available of that information would be likely—*
>
> *(a) To prejudice the **security or defence** of New Zealand or the **international relations** of the Government of New Zealand; or*
>
> *(b) To prejudice the **entrusting of information** to the Government of New Zealand on a **basis of confidence** by—*
>
> *(i) The government of any other country or any agency of such a government; or*
>
> *(ii) Any international organisation; or*
>
> *(c) To prejudice the **maintenance of the law**, including the prevention, investigation, and detection of offences, and the right to a fair trial;*

Consideration should be given to this withholding ground where the information requested relates to a:

- Current investigation being undertaken; and/or
- Matter that is the subject of legal proceedings or is likely to be the subject of legal proceedings

Generally, 6(c) only applies until the investigation or the legal proceedings have concluded - Refer https://www.ombudsman.parliament.nz/sites/default/files/2019-01/W35205%20.docx

> *(d) To endanger the **safety of any person**; or*

The test implicit in section 6(d) is a high one. The phrase 'endanger the safety' of any person has generally been accepted as meaning there must be a substantial risk that a person's life is likely to be put in peril or there is danger that their physical safety will be jeopardised, should the information at issue be released.- Refer

https://www.ombudsman.parliament.nz/sites/default/files/2019-01/W39955.docx

> *(e) To damage seriously the **economy of New Zealand** by disclosing prematurely decisions to change or continue Government economic or financial policies relating to—*
>
> *(i) Exchange rates or the control of overseas exchange transactions:*
>
> *(ii) The regulation of banking or credit:*
>
> *(iii) Taxation:*
>
> *(iv) The stability, control, and adjustment of prices of goods and services, rents, and other costs, and rates of wages, salaries, and other incomes:*
>
> *(v) The borrowing of money by the Government of New Zealand:*
>
> *(vi) The entering into of overseas trade agreements."*
>
> (Emphasis added)

When considering whether section 6 applies to a particular request you must consider:

- Precisely how would disclosure of the information requested prejudice an interest protected in subsections (a) to (e)?

  It is not sufficient to simply assert that disclosure of the information will have a prejudicial effect. The public sector agency must be able to identify, with sufficient particularity, the nature of the prejudicial effect and explain how such prejudice will occur in order to meet the tests for withholding in section 6.

- Whether the predicted prejudice would be "likely" to occur?

  The phrase "would be likely" requires more than mere possibility that disclosure may have a prejudicial effect. The Court of Appeal has interpreted the phrase "would be likely" to mean "a serious or real and substantial risk to a protected interest, a risk that might well eventuate".

Note for the reasons for refusal set out in section 6 there is no requirement to consider whether the interest in withholding is outweighed by countervailing public interest considerations. Effectively, the Act deems it to be in the public interest for information to be withheld where the requirements of section 6 have been met.[1] For this reason, any potential redaction under section 6 must be very carefully considered.

Assessing the public interest test – Section 9(1)

The grounds for withholding official information in section 9(2) of the OIA are subject to a 'public interest test'. This means agencies must balance the public interest in disclosing information against the need to withhold it. If the public interest in disclosure outweighs

[1] *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, 391

the need to withhold the information, then it must be released. Guidelines to the section 9(2) withholding grounds are set out and discussed in the following pages.

Public interest does not mean *'interesting to the public'*. It means the issue is one of legitimate public concern. As the High Court has said:[2]

> *Once again it is necessary to draw attention to the distinction between matters properly within the public interest, in the sense of being of legitimate concern to the public, and those which are merely interesting to the public on a human level—between what is interesting to the public and what it is in the public interest to be made known*

The High Court in Kelsey v the Minister of Trade explained the public interest test in the following terms[3]:

> *Before official information can be withheld under s 9 of the Act, the decision-maker must do more than conclude that the information requested falls within one of the categories listed in s 9(2) of the Act. Section 9(1) of the Act requires the decision-maker to undertake a balancing exercise and decide whether the public interest in withholding information is outweighed by other considerations that support disclosure of the information.*

To help identify the public interest considerations favouring disclosure agencies should consider:

- the purpose of the request; and
- the nature and content of the information.

You should read the request carefully. Does the requester state their purpose? While there is no requirement to do so, they may have volunteered this information.

You can always ask the requester about the purpose of their request. They can explain that the reason for asking is to help identify the public interest considerations favouring disclosure of the information. You must be careful not to suggest that provision of this information is compulsory, or that the request will necessarily be refused if it is not supplied.

The following link provides more detailed guidance
https://www.ombudsman.parliament.nz/sites/default/files/2019-08/Public%20interest%20August%202019.docx

Section 9(2) Withholding Grounds

Assessing the privacy interest - Section 9(2)(a).

Both the OIA and the Privacy Act (PA) need to be considered when a request is for personal information or the documentation requested contains personal information.

[2] *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720 at 733.
[3] *Kelsey v the Minister of Trade* [2015] NZHC 2497 at paragraph 27.

Deciding whether personal information is covered by the PA or the OIA can sometimes be difficult.

As a general rule:

- requests for personal information or the documentation requested contains personal information about persons other than the requester must be considered under the OIA;
- requests by, or on behalf of, natural persons who are New Zealand citizens, permanent residents of New Zealand, or in New Zealand, for personal information about themselves, must be considered under the Privacy Act.

These guidelines deal only with privacy issues raised under the official information legislation.

Section 9(2)(a) cannot be automatically relied on to refuse a request simply because the information relates to another person. The issues which need to be considered are:

- what the effect of the disclosure of information would be, and
- whether the effect of disclosure means that it is necessary to withhold the information to protect the privacy of natural persons.

The decision maker must then consider whether the interest in protecting the privacy of the person concerned in the circumstances is outweighed by other considerations which make it desirable in the public interest to make that information available.

Where practicable, consultation should be undertaken with the person to whom the information relates or with any other person whose privacy might be affected by the release of the information. However, the fact that the person does not consent to disclosure is not in itself a reason for refusal. Although a third party can reasonably expect their concerns to be taken into account, they cannot veto the release of the information. The Ombudsman's office has stated that it is for the Department or Agency to assess whether there is a good reason for withholding the information.

LINZ policy is that a staff member's name and work contact details can only be withheld if a real likelihood of harm can be identified, such as safety concerns. Therefore, generally such details cannot be withheld under section 9(2)(a) and it is likely that the more appropriate withholding ground would be section 9(2)(g)(ii) "the protection of such Ministers, members of organisations, officers, and employees from improper pressure or harassment".

The following link provides more detailed guidance
https://www.ombudsman.parliament.nz/resources/privacy-guide-section-92a-oia-and-section-72a-lgoima

Assessing unreasonable prejudice to a 3rd party's commercial position – Section 9(2)(b)(ii)

Section 9(2)(b)(ii) provides good reason for withholding information where it is necessary to 'protect information where the making available of the information would

be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information'.

This section is directed at protecting the commercial interests of third parties - i.e., parties other than the agency that holds the information.

Put simply, the test under section 9(2)(b)(ii) is whether release of the information at issue would be likely unreasonably to prejudice the third party's commercial position. The third party must be either the supplier or the subject of the information.

"Would be likely" has been interpreted as "a serious or real and substantial risk to a protected interest, a risk that might well eventuate."[4]

A mere assertion of prejudice will not be sufficient; nor will vague and unsubstantiated references to 'commercial sensitivity' or 'confidentiality'. Agencies must be able to:

- demonstrate that the third party has a commercial position; and
- explain how release of the information at issue would be likely unreasonably to prejudice that position.

It is important to consider all the information contained in a document, and not just the document as a whole. Commercial documents, such as contracts, can often be released in part without any prejudice.

Confidentiality clauses in contracts will not prevent the release of official information.[5]

Where practicable, consultation should be undertaken with the third party to whom the information relates. However, the fact that the third party does not consent to disclosure is not in itself a reason for refusal. Although a third party can reasonably expect their concerns to be considered, they cannot veto the release of the information. The Ombudsman's office has stated that it is for the Department or Agency to assess whether there is a good reason for withholding the information.

The following link provides more detailed guidance
https://www.ombudsman.parliament.nz/resources/commercial-information-guide-sections-92b-and-92i-oia-and-sections-72b-and-72h-lgoima

Assessing unreasonable prejudice to an Agency's commercial position – Section 9(2)(i)

Section 9(2)(i) provides good reason for withholding information where it is necessary to 'enable a Minister [or agency] holding the information to carry out, without prejudice or disadvantage, commercial activities'.

This section is directed at protecting the commercial interests of the agency that holds the information. It cannot apply where the agency holding the information is not the one carrying out the commercial activities. If the holder of the information is concerned about another agency's commercial activities, it should consider whether it is obliged to

[4] Commissioner of Police v Ombudsman [1988] 1 NZLR 385
[5] Wyatt Co. v Queenstown Lakes District Council [1991] 2 NZLR 180

transfer the request to that agency because the information is more closely connected with that agency's functions.

The test under section 9(2)(i) is whether withholding is reasonably necessary to enable the agency to carry out commercial activities without prejudice or disadvantage. This means there must be reason to believe that release would prejudice or disadvantage the agency in carrying out commercial activities. A mere assertion of prejudice or disadvantage will not be sufficient; nor will vague and unsubstantiated references to 'commercial sensitivity' or 'confidentiality'. Agencies must be able to:

- demonstrate that they are engaged in commercial activities; and
- explain precisely how release of the information at issue would prejudice or disadvantage them in carrying out those activities.

The following link provides more detailed guidance
https://www.ombudsman.parliament.nz/resources/commercial-information-guide-sections-92b-and-92i-oia-and-sections-72b-and-72h-lgoima

Assessing information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied – Section 9(2)(ba)

This section may apply where a third party has provided the information at issue to an agency and that information has either been supplied under compulsion or on a voluntary basis, subject to an obligation of confidence.

- **Information that is subject to an obligation of confidence**

  To establish that information is subject to an obligation of confidence, there must generally be a mutual understanding between the supplier of the information and the agency receiving the information that it is subject to an obligation of confidence.

  A simple declaration that information is confidential is insufficient to establish that such an obligation exists, without providing the basis for the understanding.

  The fact that information is disclosed to certain third parties for a limited purpose does not waive confidentiality in respect of other third parties. The agency will, therefore, be bound by an obligation not to use or disclose the information for any other purpose, or to any other person, beyond that for which the information was imparted.

- **Information which any person has been or could be compelled to provide under statutory authority**

An agency must be able to identify the specific statutory authority in question.

Where there is a statutory power to compel the supply of information, it is usually likely that future supply can be assured. However, there are circumstances where, notwithstanding the power to compel the supply of information, an agency has to rely on the supplier to provide information of a certain quality to enable it to discharge its functions effectively. In some cases, a public sector agency may only be able to ensure the future supply of information of this quality if the information is supplied on the basis that it will be held in confidence.

The following link provides more detailed guidance
https://www.ombudsman.parliament.nz/resources/confidentiality-guide-section-92ba-oia-and-section-72c-lgoima

Assessing maintaining the constitutional convention protecting the confidentiality of advice tendered by Ministers and officials — Section 9(2)(f)(iv)

The primary purpose of section 9(2)(f)(iv) is to protect the orderly and effective conduct of executive government decision making processes. In other words to run the country effectively the government of the day needs to be able to take advice and to deliberate on it, in private, and without fear of premature disclosure.

Section 9(2)(f)(iv) protects advice related to executive government decision making processes. This means decisions made by Ministers of the Crown, either individually or collectively through the Cabinet process.

Section 9(2)(f)(iv) does not protect advice related to internal decision making processes within a government agency.

Section 9(2)(f)(iv) does not apply to information provided by:

- agencies other than the public service departments;
- members of the public for example, public submissions;
- external consultants or lobbyists; or
- external advisory groups or taskforces.

Section 9(2)(f)(iv) generally provides temporary protection for advice related to ministerial or Cabinet decision making. Once the relevant decisions have been taken and any necessary political consultations or negotiations concluded, there is usually no need for ongoing protection of the advice under this section. Also at this point the public interest in disclosure to promote the accountability of the decision maker comes into play, which may outweigh any residual need to withhold information.

The OIA does not explicitly recognise the convention of budget secrecy. However, budget-related advice to Ministers and Cabinet may be protected by section 9(2)(f)(iv). The Ombudsman has noted that 'the general constitutional convention which protects

the confidentiality of advice tendered by Ministers and officials is heightened during Budget preparation'.

The following link provides more detailed guidance
https://www.ombudsman.parliament.nz/sites/default/files/2019-08/Confidential%20advice%20to%20government%20August%202019.docx

Assessing withholding official information to maintain the effective conduct of public affairs through the free and frank expression of opinions - Section 9(2)(g)(i)

Section 9(2)(g)(i) is not about protecting free and frank opinions per se. It doesn't apply just because the information comprises free and frank opinions. Section 9(2)(g)(i) is about maintaining the effective conduct of public affairs through the free and frank expression of opinions. It recognises that the effective conduct of public affairs requires the candid and unreserved expression of opinions, and that public exposure of those opinions can sometimes have a chilling effect on people's willingness to express themselves openly, honestly and completely in future.

Section 9(2)(g)(i) protects opinions by, between or to Ministers (in the case of the OIA) and people who are members, officers or employees of an agency. It therefore protects the exchange of opinions within an agency, or the government more generally, and to an agency by external parties.

The following are some common situations where section 9(2)(g)(i) has been found to apply.

- Information generated in the early stages of policy development, such as exploratory ('*blue skies*') thinking or discussions—for more information, see *The OIA and the public policy making process*
- Discussions between Ministers and Chief Executives—see cases 276248 & 365853
- Records of meetings convened to coordinate the response to a crisis situation—see case 178451
- Communications strategies and media lines—see case 310983
- Draft briefings to the incoming government—see case 173358
- Draft ministerial correspondence—see case 407773
- Comments generated during the OIA decision making process—see case 313287

However, section 9(2)(g)(i) **cannot be relied on** for documentation/information that contains comments that are critical, expressed in blunt terms, identify gaps and recommendations for improvement, etc. The fact that information might cause embarrassment is not a reason for withholding it.
https://www.ombudsman.parliament.nz/resources/request-draft-report-department-labour-internal-controls-prepared-kpmg

The following link provides more detailed guidance
https://www.ombudsman.parliament.nz/sites/default/files/2019-08/Free%20and%20frank%20opinions%20August%202019.docx

Assessing maintaining the effective conduct of public affairs through the protection of such Ministers, members of organisations, officers, and employees from improper pressure or harassment - Section 9(2)(g)(ii).

The purpose of this provision is not simply to provide protection against improper pressure or harassment, but to maintain the effective conduct of public affairs through such protection. If the section is to apply, there must not only be a reasonable likelihood of improper pressure or harassment, but a link must be made between the anticipated behaviour, the impact upon the person to whom it is directed, and the effective conduct of public affairs. This section will only apply if the improper pressure or harassment is so serious that it will place the effective conduct of public affairs at risk.

Improper pressure or harassment is something more than ill-considered or irritating criticism or unwanted publicity.

It is a course of conduct that has such an effect on the person against whom it is directed that he or she is unable to perform his or her duties effectively and hence the conduct of public affairs is at risk.

When considering whether release of the information is likely to lead to improper pressure or harassment, it is necessary to determine:

- what sort of behaviour may be expected as a result of the release of this information;
- whether that behaviour would be of such a nature that it can be described as "improper pressure" or "harassment";
- against whom the behaviour will be directed; and

If it can be established that release of the information will cause improper pressure or harassment and provide a basis for that position in terms of the factors set out above, then this section may be applicable.

Consideration may be given to the past behaviour and the effects of such behaviour either of the requesters or of others who may have access to the released information. This may provide assistance in making an assessment of the risk of future behaviour and consideration of whether that behaviour might amount to improper pressure or harassment sufficient to affect the effective conduct of public affairs

Redacting staff names and work contact details

The LINZ policy is that a staff member's name and work contact details can only be withheld under section 9(2)(g)(ii) if a real likelihood of harm can be identified, such as safety concerns. The section will only apply if the improper pressure or harassment is so serious that it will place the effective conduct of public affairs at risk. Improper pressure

or harassment is something more than ill-considered or irritating criticism or unwanted publicity.

The following links provide more detailed guidance
https://www.ombudsman.parliament.nz/resources/improper-pressure-or-harassment-guide-section-92gii-oia-and-section-72fii-lgoima

Releasing or withholding staff names and work contact details

Assessing Legal Professional Privilege – Section 9(2)(h)

Legal professional privilege is a public policy privilege designed to protect confidential communications between solicitor and client. It is based on the impossibility of conducting legal business without professional assistance and the need for full and unreserved confidence between adviser and client in order to receive that assistance effectively.

There are two aspects to the law relating to legal professional privilege:

- "solicitor/client privilege" which extends to all communications between a solicitor (acting in that capacity) and the client for the purposes of seeking or giving legal advice or assistance, irrespective of legal proceedings; and,
- "litigation privilege" which extends the privilege to communications with third parties where that communication has, as its dominant purpose, the object of enabling a legal adviser to advise a client on the conduct of litigation (whether current or anticipated).

Legal professional privilege is a privilege held by the client. Accordingly, even if information is subject to legal professional privilege, it is always open to the client to decide whether to waive that privilege and release the information at issue.

The essential question in any consideration of whether or not a document is privileged is, was it brought into existence for the purpose of 'getting or giving confidential legal advice or assistance?

The following link provides more detailed guidance
https://www.ombudsman.parliament.nz/resources/legal-professional-privilege-guide-section-92h-oia-and-section-72g-lgoima

Assessing where withholding is necessary to enable the agency to carry on negotiations without prejudice or disadvantage - Section 9(2)(j)

Section 9(2)(j) applies where withholding is necessary to enable the agency 'holding the information' to carry on negotiations without prejudice or disadvantage.

It cannot apply where the agency holding the information is not the one carrying on the negotiations. If the holder of the information is concerned about another agency's ability

to negotiate, it should consider whether it is obliged to transfer the request to that agency because the information is more closely connected with that agency's functions.

'Negotiations' must be genuine, meaning there is 'at least the possibility of give and take between the parties involved'. Dealings conducted on a 'take it or leave it' basis are not 'negotiations'.

The 'negotiations' in question should generally be in train or reasonably contemplated. It may not be enough that the information could be relevant to unspecified negotiations at an undefined point in the future. The prospect of negotiations must be 'real'.

'Negotiations' are not just consultations or discussions (although they can include them). There must be 'at least two parties at arm's length each seeking to obtain a result favourable to itself and a belief by both that this is possible'.

'Prejudice or disadvantage' means something more than just 'unhelpful'. 'Prejudice' means the agency's ability to conduct or conclude the negotiations would be impaired.

The following link provides more detailed guidance
https://www.ombudsman.parliament.nz/resources/negotiations-guide-section-92j-oia-and-section-72i-lgoima

Assessing withholding of information to "prevent the disclosure or use of official information for improper gain or improper advantage" – Section 9(2)(k)

Assessing whether a gain or advantage is "improper" is not easy because section 9(2)(k) is directly concerned with the use of information once it has been disclosed and requesters do not have to specify or justify the purpose for which the information is sought.

The word "improper" is defined in the Concise Oxford Dictionary as meaning, "…not in accordance with accepted rules of behaviour, inaccurate, wrong…." The word "improper" has also been held by the courts to import an element of illegality or moral turpitude.[6]

An agency wishing to rely upon section 9(2)(k) will have to demonstrate that any advantage to be gained by the requester through the release of information is "improper" in the sense indicated above. In other words, it is not sufficient for the purposes of the section to argue that requested information is not relevant to the concerns of a requester or simply that the information might be used to the advantage of the requester.

The agency must demonstrate that the prejudice or harm is so likely to occur that it is necessary to withhold the information in order to prevent that harm or prejudice from arising. A mere possibility that prejudice could occur is not sufficient to meet the requirement under section 9 that withholding is ***necessary***.

[6] Waitemata County v Expans Holdings Ltd [1975] 1 NZLR 34, 46

The following link provides more detailed guidance
https://www.ombudsman.parliament.nz/resources/improper-gain-or-advantage-guide-section-92k-oia-and-section-72j-lgoima

Section 18 Administrative Reasons for Refusing a Request

Section 18 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.

These administrative grounds are not "good reasons" for withholding information, they are simply authority for refusing a request in circumstances where:

- the information is or will soon be publicly available;
- the information does not exist or is not held;
- the information cannot be made available without substantial collation or research; or
- the request is frivolous or vexatious or the information requested is trivial.

Refusing a Request Where the Information is Publicly available – Section 18(d)

This reflects the fact that people shouldn't need to resort to the OIA to access information that is already publicly available. It also enables agencies to refuse requests where there is a clear plan to publish the information, provided it is published soon.

It must be the '**information requested**' that is or will soon be publicly available.

Agencies must identify the **specific** information requested, and be satisfied that this information is or will soon be publicly available. If there is any lack of clarity about what has been requested, the agency should consult the requester.

Publicly available means available to the general public. Information will be publicly available if:

- it is freely available on a website;
- it is available for purchase;
- it is available in a public library; or
- it is available for public inspection, for example, in open access records held by Archives New Zealand.

Section 18(d) recognises that where the requested information is already publicly available, requesters should generally be able to get it themselves, without recourse to the OIA. This should be clear on the facts of the case. When refusing a request on this basis, the agency must, as a matter of good practice, tell the requester where and how the information can be obtained.

Section 18(d) also recognises that agencies may have a plan in place to publish information that is the subject of an OIA request. It enables agencies to refuse such requests, provided the publication is *'soon'*.

To justify refusal, the agency must be reasonably certain that the requested information will be published in the near future. Ombudsmen have accepted that release 8 and 14

working days from refusal is 'soon'. As a general rule of thumb, release more than 8 weeks after the refusal is unlikely to be considered 'soon'.

Refusal is also more likely to be justified if there is a pre-existing decision to publish the information—meaning that there is an intention to publish before the request is received, and not just because it was received.

As a matter of good practice, agencies should provide the precise or approximate date by which the information will be published. A failure to do so may suggest that there is no reasonable certainty that the information will be published in the near future. However, there is no legal requirement under the OIA to provide the planned publication date, and a failure to do so will not mean that section 18(d) does not apply.

Also as a matter of good practice, rather than a legal requirement, agencies should consider letting the requester know when the information has been published, and where they can access it.

The following link provides more detailed guidance
https://www.ombudsman.parliament.nz/resources/publicly-available-information-guide-section-18d-oia-and-section-17d-lgoima

Refusing a Request Where the Documentation/Information does Not Exist or cannot be Found – Sections 18(e) & 18(g)

Obviously agencies cannot release official information if they do not hold it and there is no obligation under the official information legislation for an agency to have to create it.

Section 18(e) of the OIA, which provides that a request may be refused if the **document** alleged to contain the information does not exist or cannot be found, despite reasonable efforts to locate it.

Section 18(g) of the OIA, which provides that a request may be refused if the **information** is not held, and there are no reasonable grounds to believe it is held by, or more closely connected with the functions of, another Minister or agency.

Before refusing a request under section 18(e) agencies must:

- make reasonable efforts to try to locate the document; and
- consider whether consulting the requester would help to locate the document.

Before refusing a request under section 18(g), agencies should:

- make reasonable efforts to try to locate the information; and
- consider whether consulting the requester would help to locate the information.

It is important to keep a full record of the steps taken to search for the information, in case the requester complains to the Ombudsman.

This should include:

- the name and function of the system searched (physical or electronic);
- why these were the relevant systems to search;
- the search terms or methods used, including any filters and refiners, and any security restrictions that applied in respect of the user conducting the search;

- which staff were involved and why they were considered relevant; and
- the outcome of the searches (it can be good to take screenshots of the searches to provide to the Ombudsman if a complaint is made).

When refusing a request under section 18(e) or section 18(g), it is good practice to explain:

- the steps taken to try to locate the document; or
- the reasons why:
    - the document is believed not to exist; or
    - the information is not held.

While there is no obligation to **create** information in order to respond to a request there is an obligation to **collate** information that is already held. Sometimes it can be tricky to determine whether a task amounts to the collation of existing information, or the creation of new information.

A task is likely to amount to the **creation** of new information if:

- it requires the application of complex skill, judgement or interpretation; and
- the new information is fundamentally different to the existing information.

An agency will normally be **collating** existing information, rather than creating new information, where:

- it presents existing information in the form of a list or schedule; or
- answering the request involves simple manual compilation of information in the agency's records;
- it extracts information from an electronic database by searching it in the form of a query.

Agencies often receive requests for lists or schedules of documents, correspondence or other information where the list itself is not in existence. Where it is possible to extract the information requested (either manually or electronically) and present it in the form of a list or schedule, this does not amount to the creation of new information. While producing the list is a new task, it is not creating new information. It is simply a representation of existing information, as a by-product of responding to the request.

The following link provides more detailed guidance
https://www.ombudsman.parliament.nz/resources/information-not-held-guide-sections-18e-and-g-oia-and-sections-17e-and-g-lgoima

Refusing a Request as it wold involve Substantial Collation & Research – Section 18(f)

Before refusing a request on the grounds of substantial collation or research, agencies must consider whether charging or extending the timeframe for response would enable the request to be met. Agencies must also consider whether consulting the requester would enable them to redefine the request in a way that wouldn't require substantial collation or research.

Refusing a request on the grounds of substantial collation or research is a last resort, to be done only if the other mechanisms in the legislation do not provide a reasonable basis for managing an administratively challenging request.

Collation and research

'**Research**' means finding the information and '**collation**' means bringing it together. These terms can encompass the following tasks:

- identifying the requested information;
- determining whether the requested information is held;
- searching for the requested information;
- retrieving the requested information;
- extracting the requested information; and
- assembling or compiling the requested information.

Collation or research can also include reading and reviewing information, and consulting on the request, but only to the extent that these tasks are necessary in order to find what has been requested, and bring it together.

Substantial

The above tasks may be considered '**substantial**' where they would have a **significant and unreasonable impact** on the agency's ability to carry out its other operations.

Time required making a decision on withholding or release of information that has already been found and brought together does not go toward establishing 'substantial collation or research'. Where the following tasks relate to decision making on withholding or release, they should not be taken into account:

- reading, review and assessment; and
- consultation (including consultation with legal advisors, or affected third parties); and
- redacting information that an agency has decided there is good reason to withhold.

Sometimes requested information can be found and brought together relatively easily, but it will take a substantial amount of time to read, review and assess it all for release. While agencies cannot charge for this work, or refuse the request on the grounds of substantial collation or research because of it, there are other mechanisms under the OIA that can help. In particular, agencies can:

- extend the maximum timeframe for making a decision on the request;
- consult the requester to help them redefine the request in a way that is more manageable.

Also agencies may provide information in an alternative form to that requested if meeting the requester's preference would 'impair efficient administration'. The relevant provision is section 16 of the OIA.

The impairment of efficient administration is something more than administrative inconvenience. The impact of meeting the request must be so significant that it would

damage the agency's ability to carry out its other operations, including responding to other OIA requests that have been made. In deciding this, the agency is entitled to take into account all tasks reasonably required to meet the request, including any necessary consultation, and time required for decision making and redaction of withheld material.

Information may be provided in alternative form by giving:

- a reasonable opportunity to inspect the information (with or without conditions);
- an excerpt or summary of the content of the information; or
- an oral briefing on the information.

It is not necessary for an agency to create a summary of the content of the information if one is already effectively held. For instance, a summary may already exist in the form of a key document such as a final report.

An agency that chooses to provide information in an alternative form to that requested must give its reasons for doing so. These are the reasons specified in section 16(2) of the OIA. In this particular context, the relevant reason will be that provision of copies would impair the efficient administration of the agency.

The following link provides more detailed guidance
https://www.ombudsman.parliament.nz/sites/default/files/2019-08/Substantial%20collation%20or%20research%20August%202019.docx

Refusing a Request as the request is Frivolous or Vexatious or the Information is Trivial – Section 18(h)

The threshold for the proper application of section 18(h) is high. While requests can sometimes be **annoying** and **inconvenient**, these factors on their own are not sufficient grounds for concluding they are frivolous or vexatious.

At the same time, section 18(h) recognises that there must be an ability to refuse requests that, in all the circumstances of the case, amount to an **abuse of the right** to access official information.

It is important to remember that it is the **request not the requester** that must be vexatious. Just because someone has made a vexatious request before doesn't mean their next request will automatically be vexatious. Each request must be considered on its own merits.

As noted above it is the request not the requester that must be frivolous or vexatious. However, agencies can take into account the history and context of the request, including previous requests for official information, in deciding whether it is frivolous or vexatious.

In relation to the history and context of the request, agencies should consider the complexity and frequency of the requester's correspondence with the agency.

In relation to previous requests for official information, agencies should consider:

- The number, complexity and frequency of previous related requests
- The extent of information supplied in response to those requests
- The time and resources required to process those requests

- The impact on staff and the agency's other operations.

A request is more likely to be considered frivolous or vexatious if it is set against a background of long and complex correspondence and requests, that have collectively taken a lot of time and resources to address, and had a significant impact on staff and the agency's other operations.

The following link provides more detailed guidance
https://www.ombudsman.parliament.nz/sites/default/files/2019-08/Frivolous%2C%20vexatious%20or%20trivial%20August%202019.docx