Te Kawa Mataaho
Public Service Commission

Official Information Forum

7 September 2020

Agenda

Housekeeping and welcome

Stephen Moore, Te Kawa Mataaho Public Service Commission

Names and contact details of public sector employees

Gareth Derby, Office of the Ombudsman

Short break (around 2.15pm)

Proactive release – guide from the Office of the Ombudsman

Gareth Derby, Office of the Ombudsman

Proactive release – OIA responses

Stephen Moore, Te Kawa Mataaho Public Service Commission

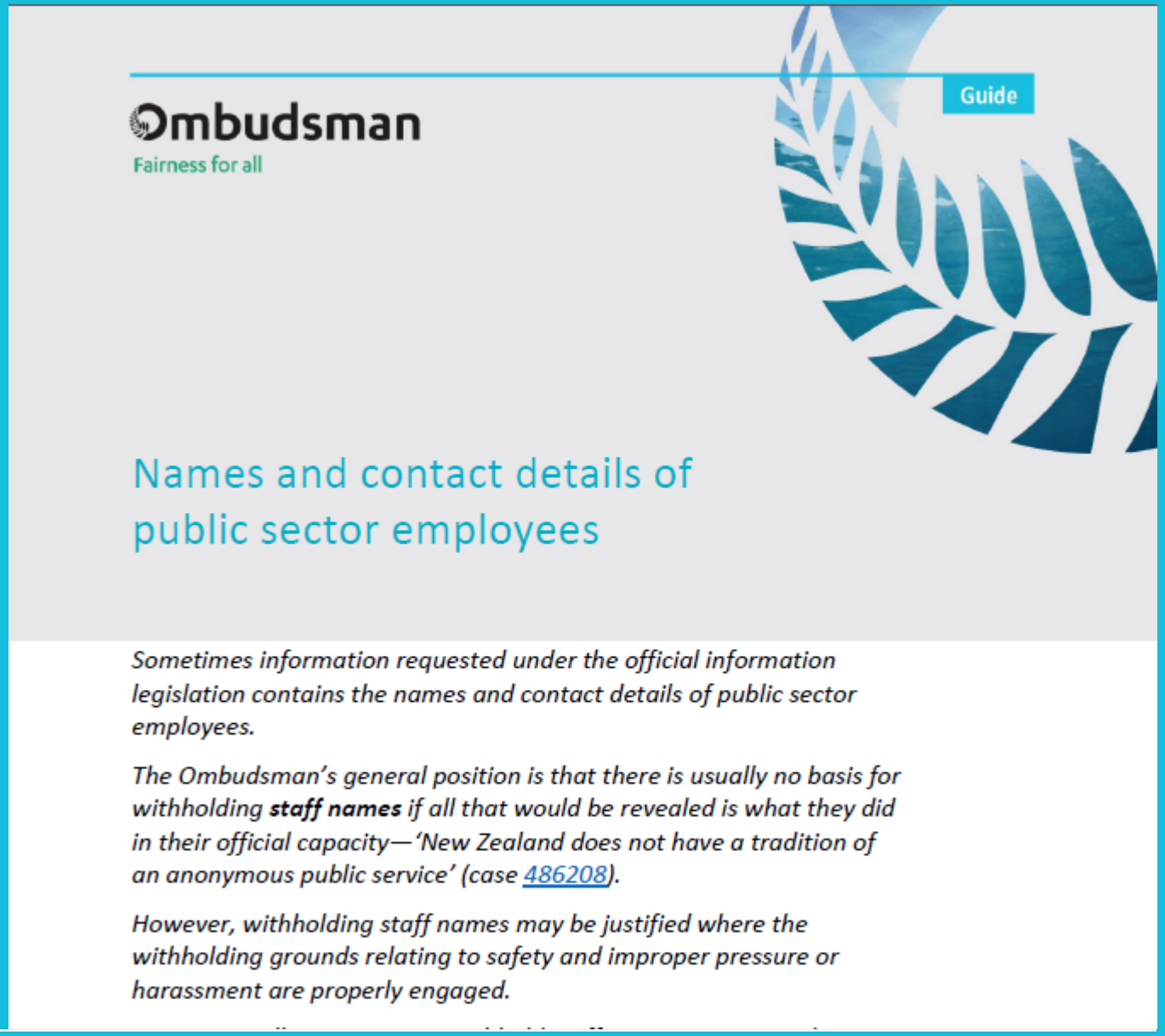
New guide: Names and contact detail of public sector employees

Gareth Derby
Principal Advisor

Ombudsman

New guide available

- Published April 2020
- Sets out the thinking of the Ombudsmen on:
  - Officials' names; and
  - Contact details
- Links through to 22 case notes concerning various aspects covered in the guide.



Starting point: presumption of availability

Section 5 of the OIA states:

> *The question whether any official information is to be made available … in accordance with the purposes of this Act and the principle that* ***the information shall be made available unless there is good reason for withholding it.***

Names of officials

- Names of officials are released unless a harm would arise through disclosure, and that harm is not outweighed in the public interest.
- A past Ombudsman said:

  The names of officials should, in principle, be made available when requested. All such information discloses is the fact of an individual's employment and what they are doing in that role. Anonymity may be justified if a real likelihood of harm can be identified but it is normally reserved for special circumstances such as where safety concerns arise.

- The difficulty is in identifying the particular harm which might arise.

Contact details of officials

- Information which is already publicly available (e.g. on LinkedIn) or can readily be inferred (e.g. firstname.lastname@agency email accounts) does not usually need to be withheld;
- Information which is not publicly available or cannot be inferred – an official's DDI or extension or, in particular, a work mobile number – could attract protection where withholding is necessary to protect an official's privacy bubble or prevent harassment;
- Personal contact details of staff – including home phone numbers or personal email addresses – might attract a stronger protection due to a higher risk of intrusion on their personal privacy bubble.

What harm would arise through disclosure?

Would disclosure of staff names or contact details:

- be likely to endanger the safety of the staff member(s) or their family?

  Consider section 6(d)

- interfere with the ability of the agency to perform its functions by opening its staff up to improper pressure or harassment?

  Consider section 9(2)(g)(ii)

- otherwise interfere with the private life of the staffer or their family?

  Consider section 9(2)(a)

Endanger the safety of an individual – section 6(d)

Section 6(d) permits information to be withheld if its disclosure '*would be likely … to endanger the safety of any person*'.

- The Court of Appeal has interpreted '*would be likely*' *to* mean '*a serious or real and substantial risk to a protected interest, a risk that might well eventuate*';
- There needs to be a real and substantial risk to a person's safety.
- This does not require certainty of danger. An agency doesn't need to wait until actual threats of harm arise or are acted upon.
- Agencies would need evidence supporting the perception of a threat, like a history of violence or threatening behaviour by the requester or the likely ultimate recipients of information.

Improper pressure or harassment - s 9(2)(g)(ii)

Section 9(2)(g)(ii) applies where withholding information is necessary to '*maintain the effective conduct of public affairs through … the protection of Ministers, members, officers or employees from improper pressure or harassment*'.

The ground:

- Applies to protect a certain class of individuals which, notably, doesn't include contractors or private citizens; and
- Is designed to protect the effective conduct of public affairs through protection of this class of people. It recognises that an agency's ability to function can be compromised if its staff is subjected to improper behaviour.

‘Improper pressure’

Improper pressure is something less than ‘harassment’. It might the use of persuasion or intimidation.

Pressure alone to do something is not enough. That pressure needs to be ‘improper’, meaning not in accordance with accepted standards of morality or legality.

In practice, this might resemble someone using inappropriate or threatening language, internet trolling or doxing to persuade them to take a particular decision.

‘Harassment’

Harassment can be described as a pattern of behaviour directed against another person, which might include:

- Making unreasonable or improper contact with a person;
- Physically entering or being around a premises to force an interaction with a person; or
- Giving offensive material to them or putting it in places where they would see it.

But does not include:

- Unwanted scrutiny or criticism, or negative publicity; or
- Reasonable attempts to contact an individual.

Privacy – section 9(2)(a)

Section 9(2)(a) applies to protect information if withholding it is '*necessary to protect the privacy of natural persons*'.

- Ordinarily, there is no privacy interference if disclosure simply reveals the fact a person works for an agency in a particular role.
- The ground might apply to protect the names of officials, subject to the public interest test, if disclosure would:
  - reveal something private or personal about them; or
  - in some other way would interfere with their privacy.
- Agencies would be expected to have evidence that disclosure of information would go beyond merely revealing an official's name or contact details, but would lead to a privacy interference.

Public interest test – section 9(1)

Sections 9(2)(a) and 9(2)(g)(ii) are subject to the public interest test:

- Identifying staff is consistent with the principles of transparency and accountability enshrined in the Act.
- There is a particularly strong public interest in knowing the identities of decision-makers, to allow those who are affected by those decisions an opportunity to identify bias or predetermination.
- However that does not mean there is no public interest in release of other officials names. There is often a public interest in knowing the provenance of advice that informed those decisions, and in knowing officials are qualified and free of conflicts of interest.

Common misconceptions

"We don't need to release names below Tier 3"

- No prima facie expectation that staff below a certain level may remain anonymous;
- The High Court has recognised that decision-makers must be identifiable (see: *CE of the MSD v L* [2018] NZHC 2528);
- However the fact an official is in a 'junior' or 'administrative' and not in a decision making role does not, in and of itself, warrant anonymity;
- The question, as always, is whether a harm would arise through disclosure.

Common misconceptions

"No public interest in releasing staff names, especially junior staff"

- The presumption of availability is the starting point.
- What is the harm in releasing staff names, including junior staff, that justifies a departure from the presumption of availability?
- Also – to what extent is that information actually private? Is it already on the official's Facebook or LinkedIn? If so, it is hard to say it remains 'private' in the absence of special circumstances.
- Only where you can identify such a harm in disclosure do you go on to consider the public interest considerations favouring disclosure.

Common misconceptions

"The Health and Safety at Work Act 2013 requires anonymity"

- The HSWA requires employers to ensure, as far as reasonably practicable, the health and safety of their staff;
- However it does not provide a reason for withholding staff names on a blanket basis, or in response to a particular request; and
- The tests within the OIA are sufficient to protect staff's health and safety where necessary.

Common misconceptions

"Signatures are private because they can be used to defraud"

- Assuming a signature is legible, its disclosure might reveal an identity. Even if it isn't, it could be linked to other documents the person has signed;
- That alone is not anything inherently private, and so it is not ordinarily necessary to withhold signatures; and
- Releasing signatures does not necessarily facilitate identity fraud. Usually a signature alone isn't sufficient – the would-be fraudster needs other information (credit card info, date of birth, drivers license number, etc) to do malicious things with a signature.

Ways of managing the concerns of staff

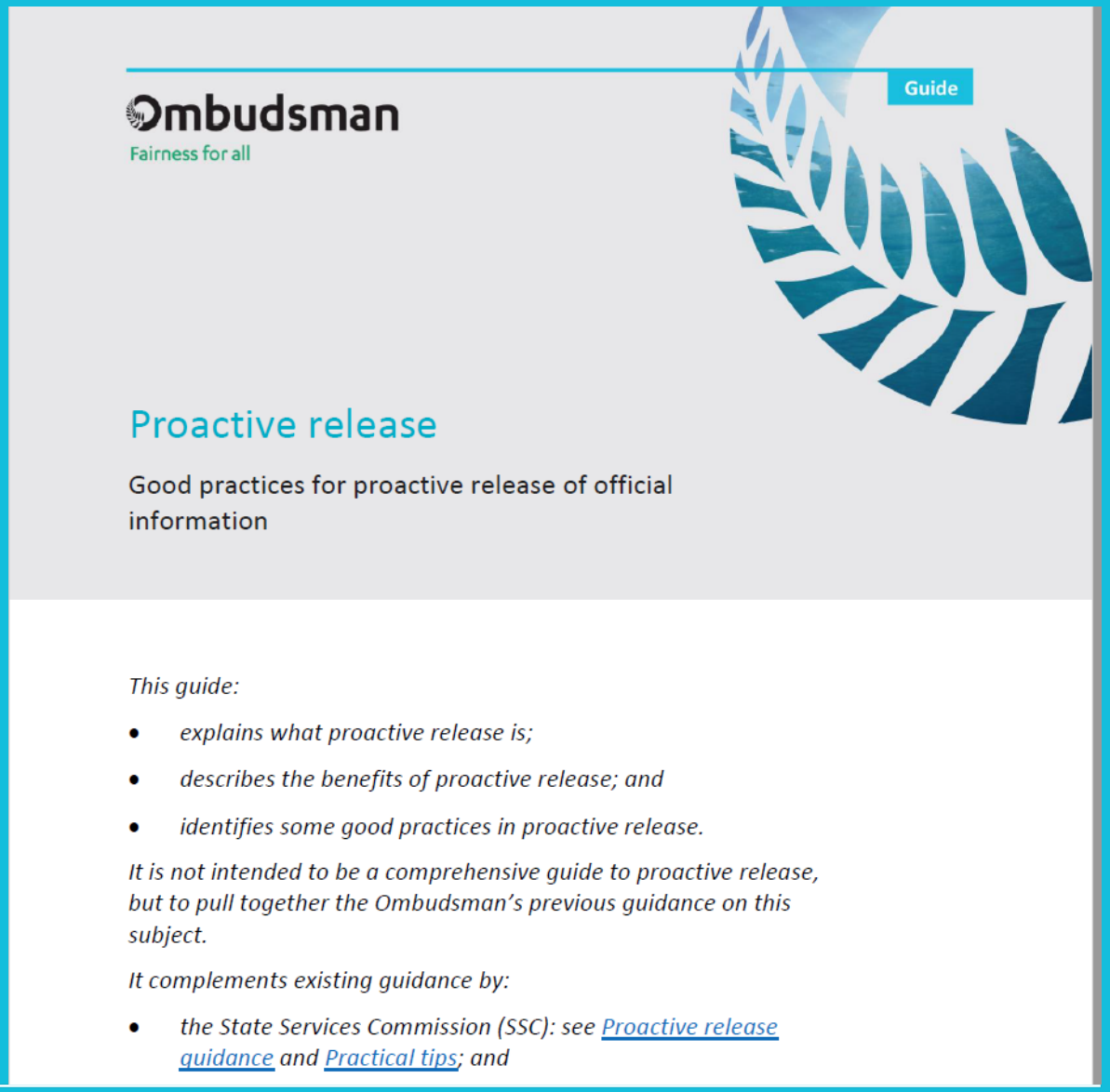
- Consult the requester – do they even want the names or contact details of officials?
- If the harm wouldn't arise necessary through release to the requester but is instead because others in the community might abuse the information, you might consider:
  - Release on conditions (e.g. no further publication/distribution);
  - Allowing the person to inspect the information or to provide them an oral briefing;
  - Release to a third party (e.g. legal counsel); or
  - Release with unique identifiers (e.g. Official A, Official B) (NB – the courts are skeptical this is sufficient for decision-makers).

New guide: Proactive release

Gareth Derby
Principal Advisor

New guide available

- Published June 2020
- Contains the Ombudsman's thoughts on:
  - What it is;
  - What are the benefits; and
  - Some good practices
- Intended to complement PSC's guidance as well as the Cabinet Office guide on Cabinet papers.


Ombudsman
Fairness for all

Guide

Proactive release

Good practices for proactive release of official information

This guide:

- *explains what proactive release is;*
- *describes the benefits of proactive release; and*
- *identifies some good practices in proactive release.*

It is not intended to be a comprehensive guide to proactive release, but to pull together the Ombudsman's previous guidance on this subject.

It complements existing guidance by:

- *the State Services Commission (SSC): see Proactive release guidance and Practical tips; and*

What is proactive release?

Proactive release is the disclosure of information without anyone asking for it.

- Usually done by way of publication on the internet;
- Not just publishing previous OIA responses, however that is part of a good proactive release regime and is strongly encouraged;
- A good example is Cabinet's proactive publication of Cabinet Papers, in line with the Cabinet Office circular CO(18) 4, which includes handy reference to:
  - Creating information with a view to proactive release;
  - Due diligence in ensuring no harm with arise through release.

What are the benefits?

- Promoting accountability through transparency, and informing the public of decisions that affect them, promoting trust;
- Facilitating informed participation in government policy-setting and decision-making;
- Reducing the burden of responding to individual requests, by signposting what is already publicly available;
- Consistent and effective messaging to a wider audience, including the ability to put information into its proper context; and
- Allowing the agency to become a reliable and authoritative source of its own information – that is, telling your own story.

Why does it matter?

- Aligns with government's priorities, including the Declaration on Open and Transparent Government;
- In line with NZ's obligations under the Open Government Partnership. NZ's National Action Plan has commitments including publishing OIA responses;
- The Public Service Commission encourages agencies to develop proactive release regimes and publishes data on the number of published OIA responses every six months; and
- The Ombudsman reviews this through Official Information Practice Investigations, including the agency's leadership and culture towards proactive disclosure of information.

What does a good culture look like?

An agency that has a good proactive release culture will:

- Generate and handle its own information with a view towards publication from the outset, and the likelihood of disclosure will factor into its every step – a true cultural shift;
- Agency leadership will send clear and regular messaging to its staff that they encourage and support proactive release of information; and
- Adopt and operate in accordance with a proactive release policy that guides principled decision-making.

Proactive release policy

A proactive release policy should set out:

- Agency's commitment to proactive release;
- The types of information it commits to releasing, including criteria for publication of individual OIA responses;
- A process for preparing information for release;
- The frequency and timing of publication;
- The commitment to release information in accessible and usable forms; and
- Provision for the policy and information released under it to be maintained and reviewed from time to time.

Systems to support release

This might involve:

- A proactive release 'champion' within the organisation;
- A mechanism for staff to identify proactive release opportunities;
- Active monitoring of issues and trends to identify where proactive release might be helpful ('hot topics', trends in incoming OIAs, website searches, media enquiries, stakeholder feedback);
- Regular reporting to senior managers on opportunities for proactive disclosure opportunities; and
- Records management and business systems that facilitate proactive release.

Types of suitable information

An agency should consider what should be released proactively in the public interest and/or to limit the need for people to ask for it, which might include:

- Descriptions of the agency's role, structure, information it holds;
- Corporate information;
- Policies, procedures and manuals, including its OIA and proactive disclosure policies;
- Information about policy development work, including Cabinet papers, or about its work programmes or regulatory activity; and
- Information released in response to prior OIA requests.

Criteria for publication of OIA responses

PSC and the Ombudsmen endorse agencies developing policies for publishing individual OIA responses.

- Some agencies have adopted a '*publish unless there's good reason not to*' approach. This is in line with the principle of availability, but can create additional administrative burden;
- Others have adopted a '*publish if there's sufficient public interest*' approach. This might limit the administrative burden, but might lead people to believe only 'good news stories' are selected.
- Either way, agencies should adopt clear criteria and publish them, so as to manage the public's expectations

Other factors to consider

- **Giving notice to a requester** – does the requester have a right to veto proactive publication? Where do you build this in?
- **Timing –** As soon as reasonably practicable? An inbuilt delay to permit a requester to use it?
- **Charging** – do you charge a requester if you subsequently intend to publish the response anyway?
- **Third parties** – should you consult third parties if their information is contained in information proposed for proactive release?
- **Due diligence** – section 48 of the OIA does not apply to protect proactive disclosures – is there sufficient due diligence to be sure publication isn't opening the agency up to legal action?

Other factors to consider

- **Accessibility –** published information should be accessible/usable, including for those with disabilities.
- **Reviewing and maintaining proactive disclosures** – is there an inbuilt review function to review what information is proactively released and ensure it is either:
  - Removed or archived when it becomes out of date; or
  - Amended or replaced by correct information?
- **Individual OIA responses** should be replaced or amended if the agency's decision is revised as a consequence of an Ombudsman's investigation.

Next steps

The Ombudsman's proactive release guide is subject to further review, and we'd be very keen to receive your feedback.

In particular, we'd like to know:

- What works well, or what is missing?
- Whether any agencies have insights or experience from prior proactive release exercises which would be illuminating to others?
- Any agencies who have proactive release policies or pages they're proud of and wish to share, including the process by which they were developed?
- Any case studies that might be incorporated into the guidance?

If so, we would love to learn of them.

Official Information Act statistics to June 2020

Across 115 agencies (i.e. excl Police and NZDF which we report separately) 19,935 official information requests were collectively completed between January and June 2020, a 0.5% increase in volume on the previous six months.

Fifty agencies completed 100% of their OIA requests within the legislated timeframe

Overall, agencies responded to 19,406, or 97.3%, of requests on time, compared with the 97.8% requests answered on time in the July to December 2019 period

Official Information Act statistics to June 2020

The ability of some agencies to respond to requests in a timely manner was affected by the Covid-19 pandemic

Front line agencies directly involved in the government's Covid-19 response reported capacity issues due to redeployed and/or unavailable staff

Some agencies encountered technology and business continuity challenges in the transition to the level 4 lockdown

Drop off in OIA responses published (down over 30%)

Agencies publishing down from 49 to 46

DHBs continue to perform well in this area as a sector

Proactively releasing responses to OIA requests

OFFICIAL INFORMATION
PUBLISHING RESPONSES TO OFFICIAL INFORMATION ACT REQUESTS ON AGENCY WEBSITES

STATE SERVICES COMMISSION
Te Komihana O Ngā Tari Kawanatanga

The principle of availability underpins the proactive release of responses to OIA requests

One of the key purposes of the Official Information Act is to make information more freely available, which promotes good government and trust and confidence in the State services. Proactively releasing completed OIA requests that may be of interest to the wider public is easy to do. It helps reduce the need for individuals to make requests for information and it can reduce the work for agencies in responding to requests.

This information sheet is to help you get ready to publish information that has already been released to an individual requester under the OIA. It supports the high level guidance we issued in 2017.

Did you know the SSC website has information for OIA requesters that your agency website can link directly to?

http://www.ssc.govt.nz/official-information-act-requests

OIA request received

Acknowledge OIA request
- Advise requester the response may be published. (See suggested wording on page 2)

Process OIA request
- When preparing the OIA response, consider its suitability for publication.
- See guidance on assessment on page 2.

Publish on website
- Publish on an easily accessible webpage (e.g. as ready or according to a predetermined publication schedule).

Prepare response for publication
- Make any additional redactions and check they can't be reversed.

Send OIA response
- Advise requester whether the response will be published. (See suggested wording on page 2)

Reduce time and effort by preparing for proactive release in the processing of the OIA request

If considering proactive release separately from processing the OIA request
- Assess the response for any risks of releasing it more widely (see page 2).
- Good record keeping is important, particularly for any additional redactions as this makes it easier to verify what was done and why in the future. Also remember to update the security classification of any documents and internal records where the classification has changed.

Remember
- Also consult with agencies on any information that relates to them as they will need to do their own assessment.
- If a complaint to the Ombudsman has changed the OIA response, update the information that was proactively released.

Due diligence assessment

Protections in section 48 of the OIA do not extend to the proactive publication of information - you need to undertake a careful assessment before releasing official information

A response to an OIA request already takes into account the withholding grounds in the OIA, but still needs to be assessed before releasing it more widely

Focus on the areas that may create legal risks: e.g. copyright, privacy, commercial in confidence, legally privileged, defamation (see the guidance in Cabinet Office circular *CO (18) 4 - Proactive Release of Cabinet Material: Updated Requirements*)

Proactively releasing responses to OIA requests

OFFICIAL INFORMATION – page 2

Assessment:

A response to an OIA request will have already taken into account the withholding grounds in the OIA. However, the protections in section 48 of the OIA do not extend to the proactive publication of information, even if the information has previously been released to a requester under the OIA. Before publishing the same information, the following questions should form part of your assessment process, in addition to any other considerations relevant to the types of information your agency manages:

	KEY QUESTION	WHAT TO CONSIDER
Suitability for publication	Is there likely to be public interest in the information released to the requester?	Consider whether there is wider interest in the topic, and its suitability for publication more generally. Consider whether it is appropriate to charge a requester for the information if it is likely to be proactively released.
Privacy	Is there a privacy interest in the information proposed for release?	Consider whether there is a need to redact information to protect personal privacy and/or whether the information should be released at all. Consult with all individuals/companies named on any documents proposed for release (even if it is not proposed to release their name). Refer to Section 6 and Part 4 of the Privacy Act 1993, the Office of the Privacy Commissioner Codes of practice that become law and other guidance including A quick tour of the privacy principles.
Contractual obligations	Is there a contractual interest in the information proposed for release?	Consider whether there is a need to redact information to protect contractual obligations and/or whether the information should be released at all.
Copyright	Is any of the material proposed for release subject to copyright?	If the material proposed for release is the creative work of others, their trademarks, or certain confidential business information, the owner of the information must give permission before it can be published. New Zealand Government Open Access and Licensing framework (NZGOAL) provides guidance for releasing copyright works and non-copyright material for re-use by others.
Defamation	Does the information proposed for release say or do something that may harm the reputation of another person, group, or organisation?	Ensure that the risks of defamation are understood and that material is thoroughly assessed for this risk when considering information for publication. Seek legal advice.
Other contextual information	Does any other information need to be released with the OIA response to place it in the proper context?	Consider linking the response to other related information already on your agency website, or proactively releasing additional information.

Sample wording for template letters:

Acknowledgement template
Our letter notifying you of our decision on your request will confirm if we intend to publish the letter (with your personal information removed) and any related documents on the [name of agency]'s website.

Consultation correspondence (amend based on whether the response is intended to be published or not)

Please note that we intend to publish our response to this official information request (with the requestor's personal information removed) on the [name of agency]'s website. OR

Please note that we do not intend to publish our response to this official information request.

Response template (amend based on whether the response is intended to be published or not)

Please note that we intend to publish this letter (with your personal information removed) [and enclosed documents] on the [name of agency]'s website. OR

Please note that we do not intend to publish our response to your official information request.

Recording decisions for withholding information:

Recording reasons helps to ensure that all relevant factors have been taken into account, the decision is soundly based, and to enable future verification of what was done and why. It should include:

- ✓ The name and position of the decision-maker.
- ✓ The decision made.
- ✓ The date of the decision.
- ✓ A reference to any legislative authority under which the decision was made.
- ✓ A reference to any relevant legislative, policy or procedural requirements for the decision making process, and the relevant steps taken by the decision maker in that respect.
- ✓ A reference to the evidence considered and the key facts taken into account.
- ✓ An explanation of why the decision was made.

See the Ombudsman's guidance on Good decision making.

Fora in 2020

23 November 2020 (provisional date)

OI Forum – agenda items TBC

21 October 2020 (provisional date)

OIA New Practitioners session

Introduction for new OIA practitioners –principles, training resources and networks for those new to this area of work

Here to help

If you need advice or assistance contact the Commission on OIAForum@publicservice.govt.nz

Or check out the online resources:
https://www.publicservice.govt.nz/our-work/official-information/

Te Kawa Mataaho
Public Service Commission

Thank You