



MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT
HIKINA WHAKATUTUKI

Official Information Act and Privacy Act Training



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Introduction

- MBIE Legal Team



"I've argued in front of every judge in this state. Often as a lawyer." – Lionel Hutz



Person 1 – Introductions

- Where to find us
- Get the group to introduce themselves, their experience of the OIA – maybe a funny story
- Encourage people to ask questions
- Point out toilets and other facilities

What is covered in this training?

- The purpose and principles of the OIA
- What constitutes an OIA request
- What to do when you receive an OIA or Privacy Act request
- MBIE process for approving, refusing and transferring requests
- When to seek advice
- Guidance and other resources



S2 (Interpretation)

Official information—

(a) Means any information held by—

- (i) A Department; or
- (ii) A Minister of the Crown in his official capacity; or
- (iii) An organisation; and

(b) Includes any information held outside New Zealand by any branch or post of—

- (i) A Department; or
- (ii) An organisation; and

...

(f) Does not include any information which is held by a Department, Minister of the Crown, or organisation solely as an agent or for the sole purpose of safe custody and which is so held on behalf of a person other than a Department or a Minister of the Crown in his official capacity or an organisation; and

...

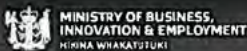
(i) Does not include information contained in any correspondence or communication which has taken place between the office of the Ombudsmen and any Department or Minister of the Crown or organisation and which relates to an investigation conducted by an Ombudsman under this Act or under the [Ombudsmen Act 1975](#), other than information that came into existence before the commencement of that investigation[[: and]]]

(j) Does not include information contained in any correspondence or communication that has taken place between the office of the Privacy Commissioner and any Department or Minister of the Crown or organisation and that relates to any investigation conducted by the Privacy Commissioner under the [Privacy Act 1993](#), other than information that came into existence before the commencement of that investigation]

[(k) ...

What is the purpose of the OIA?

- To make information more freely available
- Improved accountability
- Shift to a more open society
- To place obligations on public servants
- To protect official information to the extent consistent with the public interest and preservation of personal privacy



Person 1 - The Official Information Act is one of the main pieces of legislation that sets out the legal requirements for Government departments when dealing with information. It covers our obligations, the rights of New Zealanders and provides protection of information.

4 Purposes

The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—

- (a) To increase progressively the availability of official information to the people of New Zealand in order—
 - (i) To enable their more effective participation in the making and administration of laws and policies; and
 - (ii) To promote the accountability of Ministers of the Crown and officials,—and thereby to enhance respect for the law and to promote the good government of New Zealand;
- (b) To provide for proper access by each person to official information relating to that person;
- (c) To protect official information to the extent consistent with the public interest and the preservation of personal privacy.

Question: What is Official Information?

Which of the following are examples of official information?

- a) Emails
- b) Hand-drawn sketches of a work place
- c) Draft documents
- d) Handwritten notes taken during an internal meeting
- e) Phone conversations
- f) Your recollection of events in a meeting



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Person 1

Go through each example and get the audience to decide whether they think it is Official Information. The correct answer is that it is all Official Information.

What is Official Information?

- Any information held by the Ministry (including contractors and Committees), including the contents of your mind
- “information” is not confined to facts in documents



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(j) Does not include information contained in any correspondence or communication that has taken place between the office of the Privacy Commissioner and any Department or Minister of the Crown or organisation and that relates to any investigation conducted by the Privacy Commissioner under the Privacy Act 1993, other than information that came into existence before the commencement of that investigation]

[(k) ...

Keeping accurate records of official information

Under the Public Records Act 2005, Ministry officials are required to:

- Create and maintain full and accurate records of Ministry affairs
- Maintain public records in an accessible form

What does this mean for you day-to-day?



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It is important that you keep accurate records

It is important to document things even if they are 'contentious' for transparency and accountability

Remember when writing documents or sending emails that they are all subject to the OIA

You are not entitled to dispose of public records unless authorised by the Chief Archivist

Dom Post Test – How would this look if it ended up on the front page of the Dom Post?

Does the Privacy Act apply?

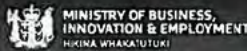
- Requests made by **natural persons** about *themselves* are to be dealt with under the Privacy Act 1993
- “natural persons” are real people and does not include companies

E.g. “I would like all the information the Ministry holds about me in relation to my visa application”

If a person makes a request for general information or information about someone else, then this is generally an OIA request. If the information is about themselves then it is a Privacy Act request. We talk about the Privacy Act later in the presentation.

Question: Which Act applies?

- Individual asks for their immigration file to check status
- Lawyer acting as nominated person on behalf of individual asks for tenancy tribunal information about individual
- Individual asks for information about their business



Individual asks for Immigration file to check status – PA

Lawyer acting as nominated person on behalf of individual asks for Tenancy Tribunal information about individual – PA

Individual ask for information about their business – OIA

Question: which Act applies?

- Individual asks for information about another individual
- Individual asks for their job application details, and copies of HR policies to determine why they were unsuccessful in job application



Individual asks for information about another individual – OIA

Individual asks for their job application details, and copies of HR policies to determine why they were unsuccessful in job application – Combinatino. PA for applicant file/OIA for HR policies

Refer to Privacy Requests and OIAs – Comparison of the request provisions Guide – found on Privacy Hub.

Procedure: Receiving an OIA/Privacy request for information

- Requests can be written or verbal
- They don't need to mention the OIA or the Privacy Act

If you receive a request for information:

1. Send the request to Ministerial Services immediately
2. Ministerial Services will set up a folder and OIA number
3. They will then send the OIA to the appropriate team (if you will not be responding)



If you receive a request from a member of the public, you need to think about whether it is a request under the OIA. The requester doesn't have to refer to the OIA – any request for information is covered. The request doesn't need to be in writing, however, if a verbal request is made, you can ask the requester to put it in writing.

Some easy requests can be answered by email or over the phone without the need for the formal OIA process. Media enquiries are also generally dealt with by the communication team, unless in some instances they are complex or difficult.

Question: What to do if you are unsure about the process?

If you are in doubt as to how to process your OIA request, what should you do?

- (a) Resign immediately
- (b) Take the rest of the week off
- (c) Ask your manager
- (d) Ask Ministerial Services
- (e) Ask the Legal Team



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The correct answer is either ask your Manager or ask Ministerial Services. While the Legal Team may be able to help with some degree with processes, we are not best placed to assist you with non-legal processing issues.

Is the requester entitled to make an OIA request?

The requester must be a:

- New Zealand citizen or permanent resident
- Body corporate incorporated in New Zealand
- Overseas body corporate with business in New Zealand



If the requester is not entitled, then seek further advice from Ministerial Services



The first step when deciding what to do with the request is to look at who the requester is. It also might help you to determine what they are after. People overseas are NOT entitled to Official information. [what about New Zealand citizens who are based overseas? Presumably the decision about whether or not people are entitled may sometimes need legal input?]

Privacy Act – any individual

12

Requests

[(1) Any person, being—

- (a) A New Zealand citizen; or
 - (b) A permanent resident of New Zealand; or
 - (c) A person who is in New Zealand; or
 - (d) A body corporate which is incorporated in New Zealand; or
 - (e) A body corporate which is incorporated outside New Zealand but which has a place of business in New Zealand,—
- may request a Department or Minister of the Crown or organisation to make available to him or it any specified official information.]

Even where the requestor is not entitled – still necessary to provide a response and explain the reason for refusing the request. Obligated to tell them of their right to seek a review by the ombudsman.

Question: Timeframe?

How long do you have to respond to an OIA request?

- (a) It depends on my workload
- (b) It depends when Ministerial Servicing gives it to me
- (c) As soon as reasonably practicable but no later than 20 working days from when it was received
- (d) It depends if I have any annual leave booked



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Timeframe

- As soon as reasonably practicable and no later than 20 working days
- Is urgency requested?
- Work backwards!
 - Minister's office = minimum 5 working days
 - Manager = minimum 2 working days
 - Legal Services = minimum 2 working days
 - Communications = minimum 2 working days
 - Peer review = minimum 2 working days



The second step is to work out your timeframes. The OIA requires us to respond to the requester as soon as reasonably practical and no later than 20 working days. Think about public holidays.

These timeframes are examples only and are not Ministry policy, and will depend on your Minister's office and your own team's operations.

Is urgency requested? The requester must give the reason why the request is urgent and we should take this into consideration when calculating timeframes. The OIA does not authorise the investigation of complaints by an Ombudsman about failure to accord urgency. However the requester still has a right to seek an Ombudsman investigation as to whether the information has been provided "as soon as reasonably practicable".

Work backwards.

15 Decisions on requests

(1) Subject to this Act, the Department or Minister of the Crown ... shall, as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received by that Department or Minister of the Crown or organisation,—

(a) Decide whether the request is to be granted and, if it is to be granted, in what manner and for what charge (if any); and

(b) Give or post to the person who made the request notice of the decision on the request.

MOIA'S assess immediately

Usually get 10 days as per Ministerial Correspondence but often reduced to allow

review and Minister's signing off
Contact Private Secretary if need extension
Remember if time limit is breached request is deemed refused

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Need more time?

- Extensions to time limits are possible only where:
 - There is a large quantity of information
 - Extensive consultation is needed
- You can extend for such a reasonable period as circumstances warrant
- Must communicate the decision to extend within 20 working days



If you foresee a problem in meeting a deadline you can extend the time period in these two situations. You can't extend the time period because you haven't managed your own time well.

The time period has to be reasonable, generally I don't recommend extending for more than a further 20 working days.

Nothing in the OIA prevents multiple extensions being made, providing any extensions are made within the original 20 working day time period.

15A Extension of time limits

(1) Where a request ... is made or transferred to a Department or Minister of the Crown or organisation, the permanent head of that Department or an officer or employee of that Department authorised by that permanent head or that Minister of the Crown or that organisation may extend the time limit set out in section 14 or section 15(1) of this Act in respect of the request if—

(a) The request is for a large quantity of official information or necessitates a search through a large quantity of information and meeting the original time limit would unreasonably interfere with the operations of the Department or the Minister of the Crown or the organisation; or

(b) Consultations necessary to make a decision on the request are such that a proper response to the request cannot reasonably be made within the original time limit.

(2) Any extension under subsection (1) of this section shall be for a reasonable period of time having regard to the circumstances.

What do I do if I want an extension?

- You must notify the requester in writing of any extension within the original 20 working day timeframe, specifying
 - The length of extension
 - The reason for it
 - The requester's right to complain to the Ombudsman
- Notify Ministerial Services of the new due date



If decide you have grounds for extending you:

- Notify the requester (usually by writing to them), and must tell them 3 things
- Use sample letter

s. 15A

(3) The extension shall be effected by giving or posting notice of the extension to the person who made the request within 20 working days after the day on which the request is received.

(4) The notice effecting the extension shall—

- (a) Specify the period of the extension; and
- (b) Give the reasons for the extension; and
- (c) State that the person who made the request for the official information has the right, under section 28(3) of this Act, to make a complaint to an Ombudsman about the extension; and
- (d) Contain such other information as is necessary.

Charging on requests

- You can decide whether to charge for processing a request
- Charges must be reasonable – See Ministry of Justice Charging Guidelines
- Can't charge for time and research involved in the decision whether to release or withhold



s. 15 Decisions on requests

(1A) Subject to section 24 of this Act, every Department or Minister of the Crown ... may charge for the supply of official information under this Act.

(2) Any charge fixed shall be reasonable and regard may be had to the cost of the labour and materials involved in making the information available to and to any costs incurred pursuant to a request of the applicant to make the information available urgently.

(3) The Department or Minister of the Crown or organisation may require that the whole or part of any charge be paid in advance.

(4) Where a request ... is made or transferred to a Department, the decision on that request shall be made by the permanent head of that Department or an officer or employee of that Department authorised by that permanent head ...

(5) Nothing in subsection (4) of this section prevents the permanent head of a Department or any officer or employee of a Department from consulting a Minister of the Crown or any other person in relation to the decision that the permanent head or officer or employee proposes to make ...

Let's recap

1. Establish whether the person is entitled to make an OIA or PA request.
2. Work backwards to establish your timeframes

....any questions so far....?

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What is the requester asking for?

- If the request is unclear or too broad, we have an obligation to assist the requester
- Contact the requester and encourage him/her to refine the request and assist him/her in doing so – don't go beyond what is reasonably necessary
- The duty of assistance also applies to persons who notify us that they wish to make a request



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Contact them early on in the process so you can determine the scope of the request. You should do this before starting to collate any of the information. The best method is usually over the phone as writing to them can be time consuming and eat into your 20 working days. Just make sure you keep accurate records of any phone conversations. It is also wise to follow up in writing with the newly defined scope to ensure that you have correctly understood them.

If scope of clarified within 7 days – new request

13 Assistance

It is the duty of every department, Minister of the Crown, and organisation to give reasonable assistance to a person, who—

- (a) wishes to make a request in accordance with section 12;
- or
- (b) in making a request under section 12, has not made that request in accordance with that section; or
- (c) has not made his request to the appropriate department or Minister of the Crown or organisation or local authority,

Should the Ministry handle this request?

- Transfer the request if:
 - Another agency holds the information
 - The information was authored by another agency
 - Another agency is more closely connected to the information

It may be that you transfer all or part of the request to another agency. Alternatively, you can always work with them when collating the information.



It may be that you transfer only part of the request to another agency. Alternatively, you can work with another agency when collating the information, e.g. Your Minister may receive an OIA request, but he has also received information/advice from the Ministry of Foreign Affairs on this issue. You can liaise with someone from MFAT and get them to send you all the relevant documents.

[Need to make sure that where two agencies are responding to the same request (or parts of the same request) that the two responses line up. Keep everyone informed, etc.]

14 Transfer of requests

Where—

(a) A request ... is made to a Department or Minister of the Crown or organisation; and

(b) The information to which the request relates—

(i) Is not held by the Department or Minister of the Crown or organisation but is believed by the person dealing with the request to be held by another Department or Minister of the Crown or organisation, or by a local authority; or

(ii) Is believed by the person dealing with the request to be more closely connected with the functions of another Department or Minister of the Crown or organisation, or of a local authority,—

the Department or Minister of the Crown ... shall promptly, and in any case not later than 10 working days after the day on which the request is received, transfer the request to the other Department or Minister of the Crown or organisation, or to that local authority, and inform the person making the request accordingly.

How do I transfer the request?

- Consult with the relevant agency before transferring to make sure they hold the information
- Notify the requester that it has been transferred
- You must do this promptly and no later than **10 working days** after receiving the request, unless you have extended your transfer time



You can extend your transfer time the same way you can extend your 20 working day timeframe, as explained previously. If the request is transferred in full, this is the end of the request for us. Paperwork is returned to Ministerial Services.

14 Transfer of requests

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- (a) A request ... is made to a Department or Minister of the Crown or organisation; and
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 - (i) Is not held by the Department or Minister of the Crown or organisation but is believed by the person dealing with the request to be held by another Department or Minister of the Crown or organisation, or by a local authority; or
 - (ii) Is believed by the person dealing with the request to be more closely connected with the functions of another Department or Minister of the Crown or organisation, or of a local authority,—

the Department or Minister of the Crown ... shall promptly, and in any case not later than 10 working days after the day on which the request is received, transfer the request to the other Department or Minister of the Crown or organisation, or to that local authority, and inform the person making the request accordingly.

Is the release likely to prompt public or political comment?

- Consult with our Communications Team and your manager if you think the release might prompt public or political comment.
- You may need to seek the Minister's views on these requests. You can usually prepare a brief or liaise with the Private Secretary on how best to do this.
- Briefing to the Minister should advise on how to manage risks



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You will need to make your Minister aware of some OIA requests. The Minister or the press secretary may want to review the request before it is released, you will need to factor this into your timeline.

I think we need to point out here the difference between an OIA to the Ministry, which we prepare and are responsible for, and an OIA to the Minister, which we prepare on his behalf and while we are responsible for providing good advice, we are not responsible for the final decisions on release.

As a general rule of thumb, the communications team should review all OIAs that:

- are from the opposition
- are from the press
- could end up on the front page of the Dom Post

Break

"I want to share something with you: The three little sentences that will get you through life. Number 1: Cover for me. Number 2: Oh, good idea, Boss! Number 3: It was like that when I got here." – Homer Simpson

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Let's recap

1. Establish whether the person is entitled to make an OIA request.
 2. Work out timeframe.
 3. Establish scope.
 4. Can we answer this request? Do we need to transfer all or part of it?
 5. Establish whether it is necessary to involve comms and/or inform the Minister
- ...any questions....?



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QUESTION: Grounds for refusing requests?

You should consider refusing a request if releasing it would be likely to:

- (a) Embarrass the Ministry
- (b) Prejudice our ability to maintain the law
- (c) Attract negative press
- (d) Breach legal privilege
- (e) Embarrass the Minister

The correct answer is (b) or (d). You cannot refuse a request because the information we are releasing is embarrassing or would show us in a negative light. This is why it is important to always have regard to the OIA when sending emails, drafting documents and advising Ministers.

Link back to the purpose of the OIA – encourage accountability, transparency, etc.

Grounds for refusing requests

The OIA sets out specific grounds for refusing requests:

- Section 18 contains administrative reasons why requests can be refused
- Section 6 contains conclusive reasons for withholding official information
- Section 9 contains other reasons for withholding official information



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We will go through the most common reasons for refusing requests and withholding information. However, you should familiarise yourself with these sections of the Act so you are aware of them when considering OIA requests.

Withholding personal information

- Part 4 of the Privacy Act provides the reasons we can withhold personal information
- You should familiarise yourself with these
- You cannot use grounds under the OIA to withhold personal information
- For further information see www.privacy.org.nz for the Privacy Commissioner

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Substantial collation and research

- You can refuse a request if it involves substantial collation and research
- When deciding, you must consider whether an extension of time or charging the requester would enable us to grant the request
- If you think you are going to use this ground, you must give the requester the opportunity to modify the request
- You can treat 2 requests from the same requester on the same subject matter made simultaneously or closely as 1 request

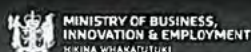


If a requester cannot refine the scope of their request or does not want to refine the scope of the request then we can consider refusing under this ground. It is important to work with the requester and try to assist them in refining the request before you use this ground.

We also can't just assume there is going to be a lot of information. We need to do some preliminary work to establish that this is the case. For example, a search of Mako might indicate there are 2000 documents.

Other administrative reasons for refusing requests

- The document alleged to contain the information does not exist or cannot be found – s 18(e)
- The information requested is not held by the Minister, department or organisation and the personal dealing with the request believes it is not held by any agency – s 18(g)
- The information will soon be publically available – s 18(d)



Sometimes people ask for information that we don't have or the Government doesn't have. Often information will be held by the industry and it is not our job to do a person's research for them. However, it's good to be helpful and direct people to the right place, if we know what this is.

Other administrative reasons for refusing requests

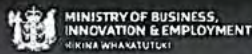
- The Minister, department or organisation does not confirm or deny the existence or non-existence of the requested information
- The request is frivolous or vexatious or the information requested is trivial



These are my favourite sections of the Act. I have never yet had to use them, but if anyone wants to use one of these sections or has an example of when they have used these sections, please let me know.

Identifying the appropriate reasons for withholding information

1. Determine what precisely is the prejudice or harm which is likely to result if the information was disclosed
2. Identify the specific withholding ground that provides protection from that harm or prejudice



You need to identify the reason why the information needs to be withheld. Think about what the risk is if the information is released, or what would be the consequences of release.

In deciding which withholding ground may be appropriate in the circumstances, you should consider the nature of the information and how it came into our possession.

Public interest

- You must always consider the public interest when deciding whether to withhold information under section 9 OIA grounds
- Is there a public interest in disclosure?
 - If not, do not release
 - If so, release if the public interest in disclosure outweighs the need to withhold the information



Is the need to withhold outweighed by the public interest in disclosure

If the public interest in disclosure is stronger the information must be released. If not then there is good reason to withhold

Examples:

Divide into groups of 3-4 and go through each example. The aim is to:

- Think about the reasons for withholding?
- What are the consequences of the release?
- What harm are you trying to prevent by withholding this information?
- Does this fit within the section of the OIA?

Scenario:

We have received reports from an anonymous complainant that there is a commercial building in Wellington that may be highly dangerous and likely to collapse in even the slightest earthquake. Our Building Standards team is currently considering what to do next. The building in question is multi-story and tenanted with shops and residents.

Someone has asked us for all the information that we hold on that building. Do we give it to them?

Proactive Releases

- Information is not being released under the OIA therefore no s48 protection from liability that may result from release
- Do a thorough risk assessment on all content to be released, for example breach of contract, defamation, breach of privacy.
- Do you need to consult on any information relating to another agency/third party to make that assessment?
- Do you need to consult/notify Minister?

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Feeling Stuck?



Please note that the black box above is not a redaction. This part of the slide is blank.

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When to seek legal advice

The legal team can:

- Help you to determine the scope and any documents you are unsure fall in or out of scope
- Check whether you have grounds to withhold information **based on the reasons you give us**
- Help you with any other legal issues you have with the OIA

We cannot:

- Check over the whole OIA for you to make sure there is nothing else that needs to be withheld. (This should be done within your team.)
- Give advice without any context



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The legal team is here to help you with any legal issues or questions you have while doing your OIA. Feel free to come to us early in the process if you have any initial questions or concerns or ask any questions as you go along. It is better to approach us early, then end up with lots of problems at the end.

You are the technical experts for your area and will be in the best position to know the consequences of the release of any information. We cannot tell you what should be withheld. We can review the OIA to make sure that you have legal grounds to withhold any information that you propose to withhold.

Disclosing information

- We must make disclosure in the form requested unless this would:
 - Be administratively inefficient
 - Contravene a legal obligation
 - Be prejudicial to private interests and there are no public interests to consider
- If the form requested is not adhered to, the Ministry is to give the reasons and if requested, grounds for that decision.

Often, requestors don't specify the form in which they want the information. Could release on CD, email, or in hard copy. There are reasons for choosing each option

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Making deletions (redactions)

- Redactions must be clearly marked and proportionate to what has been removed
- Irrelevant material can also be redacted and should be marked as “out of scope”.
- Releases should be on OIA paper, and accompanying letters should follow MBIE OIA templates
- With regards to the information being released, you should save the redacted copy and a clean copy in the OIA folder. Also make sure you save a copy of information that is being withheld in full, for reference.
- If you need advice on redacting information in OIAs you can contact Ministerial Services



[Think we need to emphasise the importance of someone else being able to go back to the OIA in the future and see a) what has been withheld (in full or in part) and b) what has been released. Otherwise people tend not to understand the importance of the filing process. Also – what do Records have to say about this? Are they happy for it all to be done electronically?]

Responding to the request

- If you are refusing a request:
 - Give the reason for refusal and quote the appropriate section of the OIA
 - if the requester has asked, give the grounds in support of the reason for refusal
 - Advise the requester of their right to complain to the Ombudsman

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Example of refusal

- I have decided to refuse your request under section 18(e) of the Official Information Act 1982, as the document you have requested does not exist or cannot be found.
- This is due to the age of the information you have requested.
- You have the right under section 28(3) of the Act to make a complaint to the Ombudsman about my decision to refuse your request.



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Consequences of giving an inappropriate response

- The Office of the Ombudsman may investigate complaints regarding:
 - Decisions to refuse requests
 - Charges imposed
 - Conditions of use
 - Extensions of time limits
- Ombudsman reports are publicly available
- There is a duty on the Minister and Ministry to observe the recommendations of the Ombudsman

[Maybe you could outline here what happens if someone does complain? I.e. the Ombudsman then asks us for comment, may ask us to release to him ALL information within the scope of the request (and we cannot withhold anything from the Ombudsman), this takes a lot of time, etc.]

Final recap...

1. Decide what information (if any) to withhold, or whether to refuse the request in part or in full.
2. Prepare your response, including redactions.
3. Review!! Peer review, legal, manager, communications (if necessary)...



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Sources of information and guidance

- 1 The Act – via Brookers' database – or: www.legislation.govt.nz
- 2 Intranet – Policies, Procedures & Templates
- 3 Ombudsman's Guidelines: www.ombudsman.govt.nz
- 4 Cabinet Office Manual
- 5 Ministry of Justice website – Charging guidelines
- 6 State Service Commission guidelines on consulting and transferring:
www.ssc.govt.nz (search "official information act")
- 7 Free and Frank, Making the Official Information Act 1982 work better by Nicola White
- 8 MBIE's Communications, Legal & Ministerial Services teams