



## Guidance for Agencies subject to the Official Information Act 1982

5 October 2023\*

1. The Royal Commission (and the information it receives and creates) is not subject to the Official Information Act 1982 (the **OIA**) until it reports (section 32 of the Inquiries Act 2013 (the **Inquiries Act**)). The Inquiry has a final report date of 30 September 2024.
2. However, material received from agencies which are subject to the OIA will still be “official information” in their hands and will become official information as part of the Inquiry records unless the Royal Commission makes non-publication orders in respect of it under section 15(1)(a) of the Inquiries Act.
3. Subject to the specific terms of any non-publication order, the effect will be to remove that material from the ambit of the OIA, whether that material is held in the agency’s hands or as part of the Inquiry records. However, it is not the intention of the Inquiry to remove material which is not created by agencies for the purposes of the Inquiry from the ambit of the OIA.

### Pre-existing information

4. During the course of the Inquiry, agencies subject to the OIA may receive OIA requests. Where those requests relate to pre-existing information which may also have been supplied to the Inquiry, the Inquiry expects those entities to deal with those requests in accordance with its normal processes (but to advise the Inquiry of the request). Similarly, the Inquiry would expect that it would be advised of any proposed proactive release of that pre-existing information which had been provided to the Inquiry.
5. If the request specifically asks for correspondence with the Inquiry, or to be appraised of all the pre-existing information supplied by a particular agency to the Inquiry, by requesting titles of reports, papers or other documentation, the Inquiry expects agencies to give effect to Minute 1 of the Inquiry restricting public access to that correspondence.

### Information prepared for the Inquiry

6. Where the request relates to information which is being specifically prepared for the purposes of the Inquiry, the Inquiry expects the relevant agency to give effect to Minute 1 of the Inquiry forbidding publication of that information pending further orders of the Inquiry.
7. Any such information request will need to be considered by the relevant agency in accordance with the OIA. The Ombudsman has given guidance on how agencies should approach such requests, stating:

*there is clearly a high public interest in ensuring that the public can have confidence in the findings of an inquiry. Premature release of certain information which an agency will need to produce to an inquiry, which is central for the inquiry to make its findings, has the potential to undermine the investigation being undertaken.*

<https://www.ombudsman.parliament.nz/resources/oia-and-inquiries-act-2013>

8. This guidance suggests that it is appropriate to consult with the Inquiry if such a request is received. Grounds for withholding may include section 6 (c) – maintenance of the law – and section 18(c)(i) – where an inquiry has made a procedural order, such as Minute 1, as it is permitted to do under section 15, where release of information would contravene that order.



9. In addition, the Inquiry is expecting to receive information which, for example, contains free and frank views, or is confidential and the Inquiry may consider release of that information before the Inquiry reports to be prejudicial to the Inquiry. Accordingly, the Inquiry has decided to make a non-publication order over that type of information (see Minute 1).

#### **Proactive release**

10. The Inquiry expects that it will be consulted in advance of a proactive release of any of the information referred to in paragraphs 5 above. Although the information referred to at paragraph 5 may technically be a request for pre-existing information, the Inquiry anticipates it would not want lists of reports, papers or other information supplied to the Inquiry being released to a requester without, at the least, consultation with the Inquiry. The possible prejudice is that the consideration of issues by the Inquiry will be pre-empted by the release of information relating to the type and ambit of information the Inquiry is requesting.

#### **Non-publication orders**

11. In deciding whether or not to make a non-publication order, the Royal Commission will have regard to the matters set out in section 15(2), which are:
- (a) the benefits of observing the principle of open justice; and
  - (b) the risk of prejudice to public confidence in the proceedings of the inquiry; and
  - (c) the need for the inquiry to ascertain the facts properly; and
  - (d) the extent to which public proceedings may prejudice the security, defence, or economic interests of New Zealand; and
  - (e) the privacy interests of any individual; and
  - (f) whether it would interfere with the administration of justice, including any person's right to a fair trial, if an order were not made under subsection (1); and
  - (g) any other countervailing interests.
12. In addition, paragraph 8 of the Terms of Reference contained in the Schedule to the Order establishing the Royal Commission requires it to restrict access to Inquiry information where it considers such steps are required in order to:
- protect the international relations of the Government of New Zealand:
  - protect the confidentiality of information provided to New Zealand on a basis of confidence by any other country or international organisation:
  - avoid prejudice to the maintenance of the law, including the prevention, investigation, and detection of offences:
  - ensure that current or future criminal, civil, disciplinary, or other proceedings are not prejudiced:
  - protect commercially sensitive information, including commercial information subject to an obligation of confidence:
  - protect information for any other reason that the inquiry considers appropriate.



13. The Inquiry has made an interim non-publication order in Minute 1 and will in due course consider whether to make further and final non-publication orders over:
- (a) information received from “organisations” where it considers that the information was specifically prepared for it and needs to be kept confidential;
  - (b) information in respect of which confidentiality has been requested and granted; and
  - (c) unredacted information in accordance with the procedure in paragraph 14.

**Redacted information**

14. The Royal Commission has been directed under its Terms of Reference to operate in a way that uses publicly available information where possible. To the extent that agencies have made information publicly available with redactions, the Inquiry may request non-redacted versions of such information, and in such a case would expect to put a qualified non-publication order over those versions only, preserving the status of that information as official information in the agency’s hands and clarifying that, after the Inquiry has reported and become subject to the OIA, requests for that information need to be made to the originating agency.

**Other information**

15. The Inquiry will also decide, before it reports, whether to make non-publication orders on information it receives from groups or individuals who are not subject to the OIA, thereby removing that information from the definition of “official information” once the Inquiry reports.

**Post reporting**

16. After the Inquiry reports, all information it holds which is not subject to a non-publication order or constitutes deliberations within the meaning of the Act will become official information and may be requested under the OIA (prior to the transfer of the Inquiry records to Archives under the Public Records Act in accordance with section 33 of the Act).

\* Amended as of 5 October 2023 to reflect the extension of the report delivery date pursuant to the Royal Commission of Inquiry (COVID-19 Lessons) Amendment Order 2023