



20 February 2026

Johniel Bocacao

By email: fyi-request-33209-06dc59ba@requests.fyi.org.nz

Dear Johniel

The OIA and algorithm-based decision-making

I refer to your correspondence, received via FYI.org.nz, as well as to our meeting in January 2025.

As we discussed, you identified that various forms of algorithm-based mechanisms (whether ‘artificial intelligence’ or otherwise) are rapidly emerging technologies that almost certainly will become more frequently relied on by the New Zealand government to assist or to automate decision-making.

You therefore have asked how the increased reliance by government agencies on automated decision-making will affect good administration and oversight mechanisms, including New Zealand’s official information regime. Your particular concerns include:

- how the use of automated decision-making processes may affect a person’s rights to access decision-making rules;
- to what extent people’s rights to access decision-making rules and reasons for decisions extend to automated or AI-assisted decision-making;
- to what extent these rights, requiring decision-makers to explain what factors were considered and weighed and why decisions were taken, may extend to algorithm-based decision-making.

Status of the Official Information regime generally

Successive Ombudsmen have expressed the view that New Zealand’s official information regime, comprised of the OIA (applying to central government agencies) and the Local Government Official Information and Meetings Act 1987 (LGOIMA, which applies to local government agencies), should, as a matter of public policy, apply as broadly as possible. Similarly, the Legislative Design and Advisory Committee’s 2021 guidance observes that:¹

All public bodies should be subject to the Ombudsmen Act 1975, the Public Audit Act 2001, the Public Records Act 2005, and the Official Information Act 1982 (or the Local Government Official Information and Meetings Act 1987).

¹ Legislative Design and Advisory Committee, *Legislation Guidelines*, 2021 Edition, available here: <https://www.ldac.org.nz/guidelines/legislation-guidelines-2021-edition>

The Acts discussed in this section are key mechanisms by which government bodies are held accountable for their activities. They should apply to all new bodies and existing bodies unless there are compelling reasons for them not to.

The courts have long recognised the OIA and LGOIMA as being ‘constitutional’ in nature.² In addition, the OIA and LGOIMA are vehicles by which New Zealanders may exercise their fundamental freedom to seek and receive information, as enshrined in section 14 of the New Zealand Bill of Rights Act 1990. It follows that the application of the OIA or LGOIMA, as constitutional measures which reflect fundamental freedoms, should only be curtailed where there is clear justification to do so.

Any adoption or use of automated decision-making, artificial intelligence (AI), or similar technologies should be done in a way that is consistent with these principles, thereby allowing for proper accountability for, and transparency of, central and local government decision-making. This includes giving due respect to the freestanding rights of individuals affected by decisions to seek the rules, etc, in accordance with which decisions are made (located in section 22 of the OIA and section 22 of the LGOIMA), and reasons for decisions that affect them in their personal capacity (located in section 23 of the OIA and section 23 of the LGOIMA).

Section 22 of the Official Information Act

Section 22 of the OIA provide a special set of rules which apply when a request seeks documents containing the rules and guidelines that agencies use to make decisions that affect people personally.³ Provided that the information is located in a ‘document’,⁴ contains internal rules for decision-making, and relates to decisions that may affect people, section 22 provides a mechanism for people to seek and receive that information. In making a report containing a draft of what ultimately became the OIA, the Committee on Official Information observed that:⁵

This clause relates to what has been called ‘informal administrative law’ or ‘internal law’—the body of rules and criteria which is applied by agencies and statutory officers in making decisions affecting the rights, privileges, or liabilities of individuals. It includes the principles and guidelines in accordance with which statutory or administrative discretions are exercised.

Some of this ‘law’, like the case law built up by Courts and judicial tribunals, is based on precedents established in the course of making decisions. Some consists of departmental interpretations on points which have not been covered by judicial decisions. Some consists of policy decisions or directions issued by Ministers or senior officials. It may be contained in manuals, circulars, or desk or other files. In short, it

² *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 and *Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180, respectively.

³ Section 22 of the OIA is reflected in section 22 of LGOIMA.

⁴ Section 2(1) of the OIA defines ‘document’ as including information recorded or stored on a computer or other device.

⁵ *Committee on Official Information, Towards Open Government: Supplementary Report*, 1981, available at: <https://www.ombudsman.parliament.nz/resources/towards-open-government-danks-report>

covers material known to and used by officers or employees in making decisions affecting individual citizens.

As government agencies explore the use of AI or other algorithm-based decision-making, they should be mindful that affected parties have a right, under section 22 of the OIA, to seek and receive documents containing the rules that guide decisions that affect them. This may, in practice, require agencies to turn their mind to the need to:

- have a clear record of what parameters or instructions they have given to an AI/automated decision-making process;
- be able to produce, on demand, any documents containing such rules or instructions to a party who is affected by that decision in their personal capacity.

Agencies also should be mindful that any inability to properly explain a decision after the fact, including a failure to keep evidence of what decision-making rules were applied at the time, may lead to that decision being [criticised by an Ombudsman on administrative grounds](#).

Section 23 of the OIA

Section 23 of the OIA provides a special set of rules which apply where a person has been affected by a decision or recommendation of an agency, and that person seeks the reasons for that decision or recommendation.⁶ Providing they make the request within a reasonable time, section 23 provides that person with a right to access such reasons. Section 23 will apply where:

- an agency has made a *'decision or recommendation'*;
- that decision is made *'in respect of'* the requester (and not a class of persons generally);
- the decision affects the requester in their *'personal capacity'*, in that it affects their rights and interests directly;⁷ and
- the requester asks the agency, within a *'reasonable time'*, why that decision was made.

Where a request is properly made under section 23, it obliges the agency to create a document containing:

- the **findings on material issues of fact**. *'Material issues of fact'* are the facts that support the decision, based on the consideration of all relevant evidence. If a fact is relied upon in making a decision, it must be set out. If a matter is considered, then the findings of fact in relation to it must be set out;
- a **reference to the information on which the findings were based**, subject to certain exceptions. This obliges the agency (unless one of the exceptions applies) to provide a **reference** to the information on which the findings are based. This means the agency must point to the information it relied on in forming its views as a means to demonstrate to the affected person that its findings were based on evidence;

⁶ Section 23 of the OIA is reflected in section 23 of the LGOIMA.

⁷ Committee on Official Information, *Towards Open Government: Supplementary Report*, at 77.

- the **reasons for the decision or recommendation**, being the actual reasons for the decision taken at the time. It is not an opportunity to re-write history with the benefit of hindsight, but an obligation on the agency to explain what it thought at the time the decision was actually taken. A section 23 statement must go further than stating conclusions as an agency must give the real reasons for those conclusions. Agencies should include any relevant background or context to the decision-making process, including legislation, policies or procedures, so that the requester can fully understand the reasons why the decision was taken.

Consequently, in considering how to incorporate AI assisted or algorithm-based decision-making, agencies should bear in mind the rights affected parties will have to request the above kinds of information. This will be particularly relevant in any number of cases, including where:

- An AI is used to review large volumes of information to identify and isolate material facts from other information. In such cases, the agency should:
 - have a record of what the findings on material issues of fact are, so that they can be set out on request. This may, in essence, require the AI to record the material issues of fact that have been identified from a range of information;
 - have a record of what information the AI considered when identifying the material issues of fact, so that the agency can then provide a reference to that information when required to do so on request.
- An AI is used to make operational decisions (including automated decision-making) or is otherwise used in to assist (human) decision-makers in their decision-making. In either case, the agency should have a record of the contemporaneous, 'real' reasoning for its decisions, whether made by an AI or human (including a decision maker who relied on AI assistance). Ultimately, the requester is entitled to know why a decision that affects them personally was taken, which may require the agency to explain the extent to which the AI had input into that process and how that influenced the decision ultimately taken. At a minimum, this would likely include:
 - where a human made the operational decision with assistance by AI, reference to the AI and what it is doing (including reference to any parameters it has for its actions), and an explanation of the part the AI played in the decision-making process; and
 - where the AI has made an operational decision (automated decision-making), the reasons for its decision, including:
 - › the actual reasons for the decision;
 - › its findings on the material issues of fact; and
 - › a reference to what information it considered.

Public Records Act 2005

Section 17(1) of the Public Records Act 2005 (PRA) requires agencies to create and maintain '*full and accurate records of its affairs, in accordance with normal, prudent business practice*', which

includes full and accurate records of any matter contracted out to an independent contractor. Section 17(2) and (3) of the PRA require public offices and local authorities to maintain certain records in an accessible form so that they may be used for subsequent reference.

Section 18 of the PRA prohibits the disposal of public records except with the authority of the Chief Archivist, given in accordance with the provisions of the PRA.

In considering how to incorporate AI-assisted or algorithm-based decision-making, public sector agencies should turn their mind to their obligations under the PRA. The Chief Archivist has issued guidance to help public offices and local authorities create and maintain full, accurate and accessible records when adopting and using AI.⁸

Good administration and the Ombudsmen Act

The Ombudsmen Act 1975 permits an Ombudsman to investigate any act, decision, omission or recommendation, on receipt of a complaint or of his or her own motion,⁹ relating to a ‘*matter of administration*’¹⁰ where it affects a person or body of persons in their personal capacity. The Supreme Court of Canada has observed:¹¹

The phrase ‘a matter of administration’ encompasses everything done by governmental authorities in the implementation of government policy, regardless of whether the implementation of those policies involves matters of proprietary, commercial or business concern. Only the activities of the legislature and the courts are excluded from the Ombudsman’s scrutiny

In the Supreme Court of Alberta, Canada, Chief Justice Milvain observed:¹²

...the basic purpose of an Ombudsman is provision of a ‘watchdog’ designed to look into the entire workings of administrative cases ... [the Ombudsman] can bring the lamp of scrutiny to otherwise dark places even over the resistance of those who would draw the blinds. If [the Ombudsman’s] scrutiny and reservations are well founded, corrective measures can be taken in due democratic process, if not no harm can be done in looking at that which is good.

Where an investigation is undertaken, the Ombudsman has extensive powers and a broad discretion to investigate in any manner the Ombudsman thinks fit, subject to requirements of natural justice.¹³ The Ombudsman can, among other things, compel any person to provide the

⁸ Chief Archivist, *Artificial intelligence and public and local authority records*, available at: <https://www.archives.govt.nz/manage-information/how-to-manage-your-information/implementation/artificial-intelligence-and-public-records>

⁹ Section 13(3) of the Ombudsmen Act.

¹⁰ Section 13 of the Ombudsmen Act.

¹¹ *British Columbia Development Corporation and another v Friedman* [1984] 2 SCR 447.

¹² *Re Ombudsman Act (1970)*, 72 W.W.R. 176 (Alta. S.C.), per Milvain C.J., at pp. 192-93.

¹³ Section 18 of the Ombudsmen Act.

Ombudsman with any information, documents, papers or things that relate to the investigation even if the person is otherwise bound by secrecy or confidentiality obligations.¹⁴

After investigating, the Ombudsman's role is to form an opinion on whether the agency has behaved in a manner which is, among other things, unreasonable or which appears contrary to law.¹⁵ The Act also empowers the Ombudsman to consider whether the agency has behaved in an *'unjust, oppressive, or improperly discriminatory'* manner, or *'in accordance with a rule of law or any legislation or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory'*.¹⁶ An Ombudsman might also conclude that an agency's decision was simply *'wrong'*.¹⁷

In addition, the Ombudsman is empowered to consider an agency's exercise of a discretionary power and to form the view that, in exercising that discretion, the agency did so *'for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations'*, or simply that, in making and communicating its decision, the agency should have given the reasons for its decision.¹⁸

Consequently, in considering the adoption and use of AI and automated decision making, government agencies should be mindful of the grounds upon which their decision-making may be scrutinised by an Ombudsman. The findings an Ombudsman may make, in particular, reflect his or her expectations that an agency generally should understand and, where it is required to do so by an Ombudsman, be able to explain its previous decision-making. In the context of AI-assisted decision-making, this may include an expectation that agencies can provide evidence to the Ombudsman that:

- only relevant factors were considered (and, equally importantly, that irrelevant factors were not considered), before decisions were made;
- once relevant factors were identified, those factors were appropriately considered and—where relevant—appropriately verified, weighed, and/or balanced against competing considerations, in making the decision;
 - this may include the need to provide an affected party an adequate opportunity to comment on any adverse or potentially prejudicial information of which they were not previously aware, and which is being relied upon during the decision-making process;
- the decision appears, once the material facts are identified and assessed, to be one which was reasonably open to the decision-maker to make in the circumstances, and was not subject to bias, discrimination on improper or unlawful grounds,¹⁹ or predetermination;

¹⁴ Section 19(1) of the Ombudsmen Act.

¹⁵ Section 22(1)(a) and (b) of the Ombudsmen Act.

¹⁶ Section 22(1)(b) of the Ombudsmen Act.

¹⁷ Section 22(1)(d) of the Ombudsmen Act.

¹⁸ Section 22(2) of the Ombudsmen Act.

¹⁹ Including the prohibited grounds of discrimination set out in section 19(1) of the New Zealand Bill of Rights Act 1990 and section 21 of the Human Rights Act 1993.

- any decision made as an exercise of a decision-maker's discretion was not made subject to any input that effectively fettered that discretion;
- the decision, once made, was communicated to the affected person(s) in such a way that they could adequately understand the decision, including the basis for the decision, and—to the appropriate extent—reasons were given to the affected party.

If an agency has incomplete record keeping or cannot, for any reason, sufficiently explain to an Ombudsman's satisfaction what it did or why, the Ombudsman may not be persuaded that its decision was administratively sound. The onus is on the agency to demonstrate that its decision making—including any elements of AI decision-making or AI-assisted decision-making that were used in making that decision—was reasonable and proportionate, sufficiently documented, justified on the facts, and not subject to elements of maladministration.

I trust that this response helps inform your thinking on how the OIA and automated decision-making may interact.

Yours sincerely

A handwritten signature in black ink that reads "Gareth Derby". The signature is written in a cursive, slightly slanted style.

Gareth Derby
Principal Advisor Strategic Advice