# Shared Redaction Guidance

*The guidance has been updated in response to the High Court's decision in H v Attorney-General [2024]*

30 October 2024

**Purpose**

This document provides guidance to agencies for releasing personal information requested by individuals who have been in care and arises from work done to engage with and respond to the Royal Commission of Inquiry into Historic Abuse in Care.

Individuals may receive information from multiple agencies and the approach should be as consistent as possible. This ensures ease of understanding and supports manaakitanga.

The goal is to improve a person's access to their own information, while supporting consistency and clarity if information has been redacted. This guidance also supports different agencies learning from each other to improve the process of fulfilling a person's requests.

**Using this resource**

This resource is supplementary to and does not replace guidance provided by the Office of the Privacy Commissioner, the Office of the Ombudsman, or in other frameworks. Nor is it intended to replace legal advice. It provides general advice on the policy and approach for assessing files but is not comprehensive, nor is it intended to be prescriptive for all agencies. It does provide guidance for some specific scenarios encountered by agencies that hold information about people who are seeking their personal information.

**What is the requester asking for?**

When an individual makes a request that is unclear, or is for all information held about them, it can be helpful to talk to them about what they actually want. It may also be helpful to provide the requester with context about what information is held and any reasonably and anticipated administrative challenges that might result from reviewing the information. This can give the requester a realistic understanding of what their request involves, which can help manage expectations.

People often ask for all the information an agency holds about them, and in such cases talking to the requester can build a clearer picture of what they mean by 'all information' and what is important to them. Understanding what is being asked for, why they're asking for it, and what the requester is trying to achieve with the information can help identify what information is needed to respond to the request, and ultimately can result in a more satisfactory response for the requester. However, if the requester is certain they want all their information, the agency should work to meet this request.

**Which Act applies in each situation?**

The two Acts most relevant to information requests by care experienced people are the Privacy Act 2020 and the Official Information Act 1982. Other sectors may have additional Acts or regulations to follow, such as the Health Information Privacy Code 2020.

Information specifically about the person making the request is personal information that must be considered under the Privacy Act. Information that is only about other people and not the requester must be considered under the Official Information Act (providing the agency is subject to that Act). Where information is about both the requestor and someone else, this is still personal information about the requester and will therefore need to be considered under the Privacy Act. In circumstances where it is difficult to determine whether information is official information or personal information due to how inextricably mixed it is, it may be necessary to consider both Acts.

**Collating the information**

Agencies record and structure files differently – even within their own organisation. There might not be a single file that neatly corresponds to the nature of a specific request. For example, when someone requests their own information or file, the relevant records held by the agency can be in a file that includes a lot of information that is not relevant or is information about other people.

When the person making the request has specific information in mind or questions they want answered, it may be appropriate to consult with the requester about what they are wanting and whether they want all records from the available files. This gives the requester an opportunity to explain what they need while affording them an opportunity to exclude adding unnecessary or irrelevant material that does not address the reason for the request. In these cases, the requester may agree to narrow their request only to the most relevant documents or information are included in the information release.

For example, a person seeking to understand the narrative of their history and why things happened to them might agree to narrow a broad request for ‘all’ information on their file only to documents containing information about their time in a particular placement. On the other hand, another person might appreciate the transparency of every page being accounted for and included, including information that does not obviously appear relevant to their wish for understanding. Being able to cater to either approach will be important.

There may be instances where agencies need to consider the scope of a request without input from the requester (for instance, where the requester is not able to be contacted). In such circumstances it would generally be best practice for the agency to inform the requester of how they have interpreted the request, including what assumptions they have made about the intent of the request and what search terms or caveats they have applied when collating information or determining the scope of the request. This will help ensure that the requester is aware the agency has actually considered the scope of the request and has determined that certain information falls outside it. This also gives the requester the opportunity to contact the agency to confirm whether they want the information the agency has excluded.

**When there is no information**

Agencies are obligated to advise requesters of the reason for refusing a request, including where this is because no information is held. If no information is held about the requester, the agency should consider giving them an explanation as to why this is and, when possible, where else they

could go to try to find their information. If it is believed that the information the requester is looking for is held by another agency, agencies are obliged to transfer the request to that other agency.[1]

When information has been recorded as lost or destroyed, the person making the request should be made aware of this and, as far as is possible, provided with an explanation as to what happened to the information. In addition to providing a helpful explanation that the information cannot be found, the agency can also include the legal reason for refusal .[2]

**Explaining why information is withheld or redacted**

When a document or file is released with redactions the first question asked is often why the information has been removed or withheld.

The agency needs to give the requester a legal withholding ground when redacting information. Including plain English explanations in the accompanying letter or on the same page can help the requester understand the redactions in the release, as well as reassure them that the information is either not about them or is redacted for a good reason.

The purpose of these plain English explanations is to provide enough information to make redactions clear and understandable to the person making the request. If redactions are all made using the same withholding grounds and are explained in the letter, it could be that no further explanations are needed. If the agency is using more than one withholding ground, it's useful to include further explanations within the documents along with the legal withholding grounds.

The language used should be user-friendly and in plain English, while clearly explaining why any redactions have been made. There is no specific wording to use but it should be relevant to the legal withholding grounds used and the reason the information has been redacted. Some examples are below:

s 9(2)(a) Official Information Act 1982 – Private to someone else

s 53(b)(i) Privacy Act 2020 – Private to someone else.

This can be customised as needed, e.g., 'Private to your older sibling' or similar.

s 53(c) Privacy Act 2020 – Protecting the identity of the person who raised concerns.

s 9(2)(h) Official Information Act 1982 – Legal Professional Privilege – covers any legal advice that may be discovered and on file.

**When to redact**

In considering whether to redact any of the requested information, agencies should decide on a case-by-case basis against the potential withholding grounds, taking into account the nature of the information, the individuals involved, the current circumstances and the potential risk of harm to any individual.

**Personal information (privacy)**

[1] Section 43 of the Privacy Act 2020 or section 14 of the Official Information Act 1982
[2] Section 18(g) Official Information Act 1982 or section 53(a) Privacy Act 2020

When encountering information that relates to parties other than the requester the agency should consider:

- Would the requester consider this information to be about them? For example, information about parenting ability may be about both the child and the parent.
- To what extent is the information relevant to any abuse suffered by the requester, which may therefore be particularly important for them to access?
- How sensitive is the information to those other parties?
- What is the potential risk of harm to any individual if the information is released to the person requesting it?

For information about the requester being assessed under the Privacy Act, the agency should consider whether providing the information would be an *unwarranted* disclosure of another person's personal information.[3]

For information about the requester being assessed under the Official Information Act, the agency should consider whether it is *necessary* to withhold the information to protect other people's privacy, and, even if it is, whether the public interest outweighs the privacy interests of those other people.[4] Examples of public interest factors that may be relevant include accountability of agencies for decisions that were made, and transparency to enable a person to understand what happened to them in care.[5]

This is very much a case-by-case situation, but common categories of information include:

a) Information known by the requester. This includes cases where there is evidence that the information is already known – such as the profession or place of employment of a third party – and can extend to more sensitive information. In these cases, when someone has been willing to discuss matters in the presence of the requester, it implies that they may not consider that disclosing this information infringed on their privacy. If we reasonably believe the information is known to the requester, redaction may not be necessary to protect the privacy of the other person.

b) Information that is not known to the requester but would be unlikely to impact on another person's privacy if it were released. For example, their involvement with agencies that can be expected from the context of the situation, such as a requester's parents being visited by social services. These visits are part of the standard procedures directly related to the requester's role in the agency's records. Withholding this can be unnecessary, although the details within the record of the visit may be private to the parents and may need to be withheld. Generally, releasing information about a professional working with a family is unlikely to cause harm to that person's privacy as they're acting in their professional capacity

[3] See further guidance on this topic from the Office of the Privacy Commissioner, *Unwarranted disclosure of another person's affairs,* available at: https://www.privacy.org.nz/privacy-act-2020/privacy-principles/6/unwarranted-disclosure-of-another-persons-affairs/

[4] See further guidance on this topic from the Office of the Ombudsman, *Privacy: A guide to section 9(2)(a) of the OIA and section 7(2)(a) of the LGOIMA*, 5 November 2020, available at: https://www.ombudsman.parliament.nz/resources/privacy-guide-section-92a-oia-and-section-72a-lgoima

[5] See further guidance on this topic from Office of the Ombudsman, *Public interest: A guide to the public interest test*, 22 April 2019, available at: https://www.ombudsman.parliament.nz/resources/public-interest-guide-public-interest-test

although if there is a risk of harassment or undue pressure being placed on that professional, then this information might need to be withheld.

c) Information not known to the requester and sensitive. This information might be relevant to the requester but still of such a sensitive nature that releasing it would be an unwarranted disclosure of the affairs of another individual. In these cases, redaction is likely to be necessary if the third party's privacy interest outweighs the requester's right to the information. Examples include a parent's counselling information or personal history that affected their ability to parent.

**What if the personal information is about someone who has died?**

While the Privacy Act and the Official Information Act do enable agencies to withhold information where it is necessary to protect the privacy of a deceased individual or would be an unwarranted disclosure of their affairs, the right of individuals to request information about themselves is strong. The passage of time, and the fact the third parties are deceased may tilt the balance towards disclosure, however the considerations required by each Act need to be approached sensibly, thoughtfully, and on a case-by-case basis considering the nature of the information and the full context of the request.

**Seeking views of third parties on the need to withhold their private information:**

It **may** be appropriate to consult a third party to seek their views on their private information being released to the requestor. Due to the legal and practical complexities involved, the use of this option is likely to be limited to very particular circumstances, for example where whānau or family members approach the agency together.

Each agency may have their own guidance around how and when they would consider consulting a third party. The Ombudsman also provides guidance for government agencies on navigating this situation when assessing a request under the Official Information Act.[6] If in doubt, agencies should consult their internal guidance and seek legal advice if needed.

Any plan to consult would need to give careful consideration to factors including, but not limited to:

- the practicality of making contact with the 3rd party
- how much time and effort would be involved in seeking comment from a third party , and whether this could cause a delay in the requester receiving part or all of their information
- whether the requester has given permission for the agency to discuss the details of their request with the 3rd party.
- whether, to the best of its knowledge, seeking comment from a third party could cause hurt or distress to the individual or individuals concerned.
- how the agency can be confident that any comment from a third party has been freely given

In cases where this is possible, an agency would need to provide enough information to the third party to enable them to give meaningful comments on any anticipated harm from release.

[6] Office of the Ombudsman, Consulting third parties, 28 April 2019, available at: https://www.ombudsman.parliament.nz/resources/consulting-third-parties

**Notifiers or informants**

A notifier is a person who has provided information to an agency about concerns they have for the wellbeing of a child or young person.

When considering whether the identities of notifiers or informants need to be protected through redaction, relevant factors include whether there is any implicit or explicit confidentially. If the notifier explicitly asked for confidentially at the time of notifying, who did they intend protection from and is this still relevant today?

Another consideration is whether releasing this information could harm the notifier's, or the general public's, willingness to notify in the future. There has been recognition in the courts, by the Ombudsmen, and by successive Privacy Commissioners, that disclosing the identities of informants may create a 'chilling effect' that would be likely to detrimentally impact the maintenance of the law, by inhibiting would-be informants from approaching the authorities in future out of fear of their identities being disclosed to third parties on request.[7]

Police and individuals with similar roles and responsibilities are willing and able to keep notifying without anonymity. Others, such as family members, friends, or neighbours, may choose not to notify authorities of concerns if they believe they could be identified and suffer repercussions. When considering redacting the identity of the notifier, the following questions should be considered:

- Was there an implied or explicit promise of confidentially?
- Do the reasons for confidentiality still apply?
- What is the likely impact on the notifier if they are identified to the requester?
- What is the likelihood that other parties in a similar position to the notifier would be inhibited from coming forward in future if this information is disclosed to the requester?

**Legally privileged information**

In most circumstances, legally privileged information cannot be released.

Legal privilege takes two broad forms. In summary, solicitor-client privilege covers communications between lawyers and their clients which are intended to be confidential and made in the course of requesting, obtaining, or giving professional legal services. For our purposes, clients are likely to include department managers, social workers, health care providers, and school boards etc, and lawyers are likely to include in-house and external lawyers providing advice to an agency. Solicitor-client privilege can include communications where clients are seeking advice from their lawyers, as well as receiving advice from them.

Litigation privilege covers documents made, received, compiled or prepared for the primary purpose of preparing for a court proceeding or an apprehended proceeding. This can include discussions with lawyers about an upcoming court case. It can also include discussions between non-legal staff -

[7] Section 53(c) of the Privacy Act or section 6(c) of the Official Information Act. These withholding grounds are generally only be used by public agencies who are maintaining the law. See further guidance on this topic from the Office of the Privacy Commissioner, *Prejudice the maintenance of the law,* available at https://www.privacy.org.nz/privacy-act-2020/privacy-principles/6/prejudice-the-maintenance-of-the-law/

for example a social worker and their manager - about an upcoming court case in certain circumstances.

Legal privilege is governed by strict technical rules with minimal scope for interpretation. For agencies subject to the Official Information Act, the need to protect legally privileged information may be outweighed by a particularly strong public interest.[8] The decision to waive legal privilege for Crown documents can only be made by the Attorney-General. As such, Crown agencies **must** contact their legal advisors if they think that this might appropriate.

Where there is uncertainty around whether a document is legally privileged, reference should be made to internal guidance or further legal advice can be sought.

**Other legislation and rules that may limit the release of information:**

Other situations where additional legislation and rules apply include, but are not limited to, Adoption information, Family Group Conferences, specific orders made by a court that prohibit or impose restrictions on the release of the information[9], and matters before the Coroner.

**Alternative forms of release:**

There may be cases where an identified harm can be avoided or mitigated through the use of an alternative form of release – including providing the requester an oral briefing, allowing the requester to inspect the information, or providing excerpts or a summary of the information.[10]

A summary can be particularly useful in cases where the redactions make the remaining information difficult to understand or follow. In these cases, it can be helpful to provide the redacted version alongside the summary for transparency. Summaries can also be used when the original information is too sensitive to release, but a summarised version is able be given to the person making the request. It's important to make sure any summary:

- is clear and understandable in the context of the individual;
- doesn't change the meaning of the information;
- doesn't contain the information which had to be redacted;
- doesn't otherwise risk harm to any individual; and
- doesn't contain any legally privileged information or information which can't be released because of other legislation.

Where there is uncertainty around which alternative forms of release are appropriate for staff to use, reference should be made to internal guidance or further legal advice can be sought.

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[8] See further guidance on this topic from the Office of the Ombudsman, *Legal professional privilege: A guide to section 9(2)(h) of the OIA and section 7(2)(g) of the LGOIMA*, 30 March 2019, available at https://www.ombudsman.parliament.nz/resources/legal-professional-privilege-guide-section-92h-oia-and-section-72g-lgoima

[9] The guidance about 'court documents' has been updated in response to the High Court's decision in *H v Attorney-General [2024]*. See more information about this decision and ways to identify whether a specific court order has been made here: https://www.abuseinquiryresponse.govt.nz/assets/Uploads/Guidance/Risk-assessment-for-agencies/2024-10-30-Guidance-Risk-assessment-for-court-documents.docx

[10] Section 56 of the Privacy Act 2020 or section 16 of the Official Information Act 1982