

Reference: 20230072

17 March 2023

Wiremu Thomson
[REDACTED]

Dear Wiremu

Thank you for your Official Information Act 1982 (OIA) request, received on 17 February 2023. You requested:

- 1. While I appreciate the response to my previous question ("2. Can the Treasury stop spending Crown funds if it believes the spending is unlawful?) was in many ways more useful than the answer I would have gotten, could you please also provide an answer to the question I asked which was asked in a generic way and without reference to any specific project?*

Your first question is very broad and seeks to elicit an opinion or explanation from The Treasury as to the basis upon which it stops spending funds – in all funding situations.

The primary purpose of the OIA is to allow requesters to seek information 'held' by agencies. An agency is not obliged to form an opinion or create information to answer an official information request. The OIA draws a distinction between questions which seek information that is 'held' and questions which seek to elicit an opinion or explanation. For information to be 'held' means that the information must be in existence.

We have therefore refused your above request under section 18(e) of the OIA, as no document exists and we would be required to create information in order to respond. Creation of such documentation would require the application of complex skill, judgement and/or interpretation.

At a very general level, though, we advise that the Crown's authority to spend funds is determined by statute and in that context, its ability to stop spending funds is determined by the type of funding being provided, who or what entity is being funded, and any terms and conditions applicable to the provision of such funding (if any).

As an example, contractual funding arrangements would ordinarily include key deliverables; acknowledgements/warranties that each party has the authority to enter into and perform the contract, and will comply with relevant legislation and the laws of New Zealand; and a dispute resolution and/or termination process.

Each party to a contract is bound contractually to meet the terms and conditions set out in a funding contract. Remedies available to each party for breach of contract by another party to the contract are generally set out in the contract itself.

Any ability to terminate Crown funding would depend on the particular circumstances and what legal mechanisms were available to the Crown - whether they be statutory, legal (e.g. tort and the common law) and/or contractual. Whatever the appropriate legal mechanism, the Crown would not have the authority to stop providing funding simply on an unproven 'belief' that spending is unlawful.

2. Your previous response indicated that "the provision (or not) of Crown funding is limited to the conditions and matters outlined in the Funding Agreement". Is there no implicit requirement that the parties are acting lawfully; or for there to be a requirement must the Crown add this explicitly to every contract e.g. '(a) it must be a covered stadium ... (d) both parties must act lawfully (including but not limited to having proper legal authority)'?

3. Is the Treasury satisfied given the public money they are putting in that the conditions of the Funding Agreement will be met, given doubts about the lawfulness of the Council's Te Kaha decision, and thus doubts about the validity of the construction contract and whether it will be completed?

As set out above, an agency is not obliged to form an opinion or create information to answer an official information request. We have therefore refused your requests 2 and 3, under section 18(e) of the OIA on the basis that no documents exist, and in order to respond, we would need to create information (and, firstly, reach an opinion). The Treasury is not obliged to form such an opinion.

4. What actions (aside from responding to OIA requests) has the Secretary to the Treasury taken in response to these concerns (the Treasury first becoming aware of them on the 20th of September, and more recently on the 31st of January) and what were the results of these actions (and subsequent actions and results, etc.)?

5. What actions (aside from responding to OIA requests) has the Treasury taken in response to these concerns (the Treasury first becoming aware of them on the 20th of September, and more recently on the 31st of January) and what were the results of these actions (and subsequent actions and results, etc.)

The Treasury received your correspondence on these matters on 20 September 2022 and 31 January 2023. Responses were provided to you in accordance with the OIA on 16 October 2022 and 13 February 2023.

Reasonable efforts have been made to locate a document which records actions taken in response to your correspondence but no such document has been found.

We have therefore refused your request under section 18(e) of the OIA as no document has been found to exist and, accordingly, we would be required to create information in order to respond. In order to create the information, the Treasury would be required to reach an opinion on your concerns.

The Treasury is not obliged to form such an opinion.

Please note that this letter (with your personal details removed) and enclosed documents may be published on the Treasury website.

This reply addresses the information you requested. You have the right to ask the Ombudsman to investigate and review my decision.

Yours sincerely

David Taylor
Manager National Infrastructure Unit