



Briefing Note: Ministerial OIA practices – Written Protocol

To:	Hon Chris Hipkins		
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Purpose of Report

The purpose of this paper is for you to:

Note that it is recommended best practice by the Ombudsman to have a written protocol in place on how a Ministry and Ministers will operate when responding to Official Information Act 1982 (OIA) requests.

Agree to implement the annexed *Protocol on how the Ministry and Ministers will operate in relation to responding to Official Information Act (OIA) requests* (the Protocol)

Agree / Disagree

Agree that this Briefing will be proactively released.

Agree / Disagree



Emily Fabling
Deputy Secretary
Strategy, Planning and Governance

08/04/2021



Hon Chris Hipkins
Minister of Education

21/4/21

Background

1. In her 2015 investigation into the OIA practices of central government agencies, *Not a game of hide and seek*¹, Chief Ombudsman Beverley Wakem recommended that:

16. Agencies should ensure their interpretation of the 'no surprises' principle contained in any OIA policy is not characterised as seeking a clearance or approval by their Minister on an agency's proposed response to any OIA requests

32. Agencies should publish their OIA policies including how they interpret the 'no surprises' principle and record how they apply this to individual requests.

33. My Office should develop and publish a model protocol² on agencies' consultations and briefings on OIA requests with Ministers' offices, and monitor its application. The development of this protocol should be done in consultation with the SSC, Cabinet Office, Department of Prime Minister and Cabinet and the Ministry of Justice.

2. In his December 2017 follow up Report, *OIA compliance and practice in the Ministry of Education*, Chief Ombudsman Peter Boshier identified the following action point for the Ministry:

Review practice for dealing with OIA requests that involve the Minister in line with guidance from the Office of the Ombudsman; develop a protocol with the Minister on how such requests will be handled.

3. The Ministry used the opportunity presented by the 2016/17 own motion investigation to ensure that our practices for dealing with Ministers' offices around OIA requests was consistent with the guidance issued by the Ombudsman. This has included operating separate processes for consultation, noting and informing our Ministers of OIA responses. These protocols for engaging with our Ministers on OIA requests have, to date, been unwritten.
4. In 2019, the Chief Ombudsman initiated a follow-up investigation into agencies' implementation of the action points arising from *Not a Game of Hide and Seek*. During the follow-up investigation, the Ombudsman has queried why the Ministry does not have a written protocol on engaging with our Ministers on OIA requests. To address this, the Ministry has, in consultation with your office, developed a draft written protocol.
5. The draft Protocol (**Annex One**) has been developed based on the Ombudsman's model protocol and adapted to our specific context.
6. We have shared a draft copy of the Protocol with your office who have endorsed its provision to you for your approval.

¹ Report on an investigation into the practices adopted by central government agencies for the purpose of compliance with the Official Information Act 1982, December 2015, available at: [OIA Report - Not a game of hide and seek | Ombudsman New Zealand](#)

² The model protocol was published in 2017 and is available here: [Model protocol on dealing with OIA requests involving Ministers](#)

Key Risks and Benefits

7. The Protocol will ensure statutory obligations are consistently met by both yourself and the Ministry. Capturing the agreed operational process in writing also ensures that all involved in responding to an OIA request are clear as to their respective roles and responsibilities.
8. Implementation of the Protocol also aligns with Ombudsman expectations that such documentation is in place. The Ministry is currently awaiting the Ombudsman's preliminary findings of the 2019 follow up investigation into our OIA practices. It is anticipated that the Ombudsman's preliminary findings will include a recommendation that the Ministry develop and implement a written protocol with relevant Ministers. Agreeing and implementing the Protocol ahead of this removes the need for this to form part of the Ombudsman's final recommendations.

Next Steps

9. We **recommend** that you agree to implement the Protocol.
10. Upon your approval, the Protocol will also be used as a basis for engagement with Associate Education Ministers' offices.

Proactive Release

11. We recommend that this Briefing Note is proactively released as per your expectation that information be released as soon as possible. Any information which may need to be withheld will be done so in line with the provisions of the Official Information Act 1982.

Annexes

Annex One: Protocol on how the Ministry and Ministers will operate in relation to responding to Official Information Act (OIA) requests

Proactively Released



Protocol on how the Ministry and Ministers will operate in relation to responding to Official Information Act (OIA) requests

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2. Background and purpose

- 2.1 It is recommended best practice by the Ombudsman to have a protocol in place on how a Ministry and Ministers will operate in relation to responding to OIA requests. The development of this protocol was also a recommendation of the Ombudsman's own motion investigation into the Ministry in 2019-21.
- 2.2 A copy of this protocol is available to all staff on the Government, Executive and Ministerial Services page on Te Tāhuhu.
- 2.3 This protocol is effective from xxxx 2021.
- 2.4 The purpose of this protocol is to set out how the Ministry of Education (the Ministry) and the Minister of Education (the Minister)¹ will engage on *OIA requests involving the Minister* made to the Ministry of Education.
- 2.5 *OIA requests involving the Minister* are requests made to the Ministry where there is the potential for the Minister to be affected by release of the requested information because:
- it relates to their functions or activities as a Minister; or
 - they may be required to prepare for the possibility of public or political commentary.

¹ References to the Minister of Education should be read as including the Associate Minister(s) of Education, where applicable

3. Context and principles

- 3.1 A principle of availability underpins the OIA and means that official information must be made available on request unless there is good reason, in terms of the Act, for withholding it.²
- 3.2 The Ministry is responsible for making decisions on OIA requests it receives, unless those requests are required to be transferred to the Minister (or other appropriate organisations) in accordance with [section 14](#) of the OIA.
- 3.3 The Ministry recognises that the Minister may need to make, be involved in, or know about decisions on *OIA requests involving the Minister*.
- 3.4 The Ministry will work with the office of the Minister to identify *OIA requests involving the Minister* and decide the appropriate mechanism for dealing with them:
- transfer;
 - consultation; or
 - noting under the no surprises convention.
- 3.5 We acknowledge that this is a decision to be made on the facts of each case, and in accordance with the law, and not pursuant to any general policy or directive.
- 3.6 We will apply this protocol in a way that does not interfere with our statutory obligations to make and communicate decisions on requests for official information as soon as reasonably practicable and within 20 working days³ (subject to extension only where necessary),⁴ and to release official information without undue delay.⁵

4. Transfer

- 4.1 The Ministry will transfer all or part of an OIA request to the Minister when that is required under [section 14](#) of the OIA—that is:
- when the requested information is not held by the Ministry but is believed by the person dealing with the request to be held by the Minister; or
 - when the requested information is believed by the person dealing with the request to be more closely connected with the functions of the Minister.
- 4.2 In the absence of these circumstances, transfer is not permitted and responsibility for deciding on the request rests with the Ministry.
- 4.3 The need for transfer will be determined on the facts of the particular case, with regard to the specific information at issue and the functions of the Minister and in consultation with the Minister's Office.

² See [s 5](#) OIA.

³ See [s 15\(1\)](#) OIA.

⁴ See [s 15A](#) OIA.

⁵ See [s 28\(5\)](#) OIA.

4.4 The Minister will likewise transfer all or part of an OIA request to the Ministry when that is required under [section 14](#) of the OIA.

5. Consultation

5.1 The Ministry will work with the Minister's Office to identify requests requiring consultation with the Minister.

5.2 Consultation may be required with the Minister where, for example:

- they supplied or generated the information;
- it is about, or relates to, their functions or activities (for example, Cabinet material); or
- release could affect their functions or activities or legitimate interests.

5.3 The Ministry will provide the Minister's Office with all information necessary for informed consultation, including the request, the information at issue, and the decision the Ministry proposes to take. The Ministry will allow a minimum 5 working days for consultation to take place, unless the circumstances of the particular request demand a shorter period of time.

5.4 The Minister's Office will respond to all consultations as expeditiously as possible. The Minister's office will let the Ministry know if more time is required so that the Ministry can consider whether it is necessary to extend the maximum 20 working days for making a decision on the request.

5.5 The Minister's Office will provide appropriate input in response to Ministry requests for consultation. Appropriate input means comments and suggestions regarding:

- the proper application of the withholding grounds and the public interest test;
- the release of additional information, including additional explanatory material to place the information that is being released in its proper context;
- the proactive release of the same information to others, provided there is no undue delay in providing that information to the requester.

5.6 The Ministry will consider the input of the Minister's office on an OIA request in good faith and with an open mind, before deciding whether that input provides a reasonable basis for changing its proposed decision on the request. The Ministry may proceed to make a decision on an OIA request if the Minister does not respond to the consultation, or advise that further time is required.

5.7 On being consulted, the Minister may take the view that information that the Ministry considers should be released, should not be released. The views of the Minister will be carefully considered but are not determinative, and an assessment needs to be made by the Ministry as to whether any of the withholding provisions apply.

6. Noting under the no surprises convention

6.1 The Ministry will work with the Minister's Office to identify decisions requiring noting under the 'no surprises convention'⁶. Noting may be required where the requested information does not require consultation with the Minister, but is:

- sensitive or controversial in nature;
- relates to a matter of significance within their portfolio responsibilities;
- where the Minister has been previously briefed on the matter to ensure they are kept up-to-date; or
- may become the subject of public debate.

6.2 The Ministry will provide the Minister's office with its proposed response within five working days of the intended response date. Where the demands of the request require a shorter noting period this will be relayed to the Minister's office.

6.3 The noting process will not delay the release of the information to the requestor. If the response is ready to go from the Ministry within the five day period, the Ministry will let the Minister's Office know when this is likely to happen, and the Ministry will then send the response to the requestor.

7. Record keeping

7.1 The Ministry and Minister's Office will keep full and accurate records of interactions in relation to OIA requests, in accordance with normal prudent business practice, as required by [section 17\(1\)](#) of the Public Records Act 2005.

8. Disputes

8.1 Where disputes arise between the parties regarding the proper application of the OIA or this protocol, these should be referred to the Group Manager, Government, Executive and Ministerial Services (GEMS) in the first instance.

9. Assistance

9.1 The Office of the Ombudsman offers an advisory service on the operation of the OIA. They can be contacted by email info@ombudsman.parliament.nz or freephone 0800 802 602. The Office should be contacted as early as possible to ensure it can answer any queries without delaying the response to a request for official information.

⁶ Cabinet Manual section 3.22(a): *In their relationship with Ministers, officials should be guided by the "no surprises" principle. As a general rule, they should inform Ministers promptly of matters of significance within their portfolio responsibilities, particularly where these matters may be controversial or may become the subject of public debate.*