

Hon Chris Hipkins  
Minister of State Services

Strengthening Proactive Release  
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Author: State Services Commission

This is one of a suite of documents released by the Hon Chris Hipkins, Minister of State Services that has informed the Government's proactive release of information policy.

In-confidence

Office of the Minister of State Services

Chair, Cabinet

## **STRENGTHENING PROACTIVE RELEASE REQUIREMENTS**

### **Proposal**

- 1 This paper proposes Cabinet agrees that Cabinet papers, associated minutes and any attachments or appendices to the Cabinet material must be released proactively and published online, with the approval of the relevant portfolio Minister, within 30 business days of final decisions being made by Cabinet, unless there is good reason not to publish all or part of the material or to delay the release beyond 30 business days.

### **Executive Summary**

- 2 The Government is committed to improving practices around the proactive release of information. Democracies thrive when citizens trust and participate in their government. Proactive release of official information is one of the elements that can assist in building trust and confidence in government, its decision makers, and its institutions.
- 3 The Cabinet Manual includes a general expectation that Cabinet material (Cabinet and Cabinet Committee papers and minutes) on significant policy decisions should be released proactively once decisions have been made. We can build on the current Cabinet Manual expectation by not limiting the releases to significant policy decisions. I propose the release of all Cabinet material once final decisions have been made subject to an assessment of the information. For privacy reasons, and because any associated remuneration packages are already publicly reported, I propose the exclusion of Appointments and Honours Cabinet material from the policy.
- 4 Timeliness is a vital element in keeping the public informed and engaged in government matters. The paper proposes that the information in scope of this policy be released within 30 business days, unless there is a good reason not to publish all or part of the material or to delay the release beyond 30 business days.
- 5 Ministers may also choose to proactively release related key advice papers that sought agreement from the Minister to recommendations on the matters that have now been decided by Cabinet. This will provide contextual information and analysis that underpinned the Cabinet material.
- 6 Before any Cabinet material or key advice papers are proactively released, the normal assessments for releasing official information must have occurred. This will be supplemented by a due diligence process to consider any potential liability, civil or criminal, that might arise from the publication of the material.
- 7 I recommend this policy apply to Cabinet Committee papers, and Cabinet papers sent direct to Cabinet, that are lodged from 1 January 2019. A report back to Cabinet on the policy and its effectiveness is proposed by 1 December 2019.
- 8 A draft of the supporting Cabinet Office Circular is attached.

### **Trust in Government**

- 9 All New Zealanders deserve a transparent, open democracy that is free from corruption and abuse of power and works for them. New Zealanders also need to have confidence

that there are sound democratic processes that can be used to hold successive governments to account and a parliamentary process that they can participate in.

- 10 New Zealand is accustomed to deliberately improving integrity, openness and transparency in government. Being high in world rankings does not mean, however, that New Zealand has reached the pinnacle of open government or that the Government is meeting all New Zealanders' needs.

### **Open government through proactive release**

- 11 I have made it one of my priorities to establish a process for the proactive release of more government information. The release of Cabinet material is a first step in this process. At a later date we could expand our proactive releases to include more types of material.
- 12 There are no global indices on the volume of proactive releases of government material. This reflects a number of difficulties in measurement. There are also no global indices on the policy and practice of proactive release. Without global indices, it is difficult to determine New Zealand's international position. While New Zealand's proactive release practices compare favourably with other jurisdictions, we must nevertheless be aware of the risk that New Zealand might fall behind as other countries modernise their regimes (refer to Appendix 1).
- 13 Proactive release is predicated on the principle of availability. The key purposes of proactive release are to increase the availability of official information, enable more effective public participation and promote the accountability of Ministers and officials<sup>1</sup>. This must always be balanced with protecting official information to the extent consistent with the public interest, the preservation of personal privacy and other interests such as national security.
- 14 Proactive release may have the effect of reducing the number of OIA requests received by Ministers or agencies. Other benefits of proactive release can include:
  - 14.1 a decrease in broad, wide-ranging and repeat requests on an issue;
  - 14.2 an increase in targeted, specific requests for information, which make responses easier to prepare; and
  - 14.3 an enhanced New Zealand reputation for being transparent and open.

### **Scope of policy**

#### ***Cabinet material***

- 15 Ministers have authority to approve the proactive release of Cabinet material within their own portfolios.
- 16 The 2017 Cabinet Manual includes the new general expectation that Cabinet material on significant policy decisions should be released proactively once decisions have been made. As the incoming Government, we endorsed the 2017 Cabinet Manual.
- 17 Most Cabinet decisions could be described as significant, but not all are policy decisions. We have the opportunity to build on the Cabinet Manual by agreeing that all Cabinet material, where final decisions have been made, will be in scope for consideration for release. This approach does not predetermine which decisions are of interest to the public.
- 18 Cabinet material on which final decisions have been made means all the papers that have been considered by Cabinet or a Cabinet committee, any attachments or

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<sup>1</sup> Holding the Government to account is a core purpose of the Public Records Act 2005.

appendices to those papers and the associated minutes.<sup>2</sup> It also includes any minutes of decisions resulting from consideration of oral items at Cabinet.

- 19 Where there is a series of Cabinet decisions to be taken on a single matter, Ministers may elect to release all the papers at the point where the last paper in the series has been considered by Cabinet, rather than releasing individual papers along the way. Where a decision has been delegated by Cabinet to a Minister, the Minister may elect to release all the Cabinet material once the final decision has been taken by the Minister.
- 20 I propose that Cabinet Appointments and Honours (APH) papers and minutes be excluded from this policy for reasons of privacy and because remuneration packages are disclosed through annual reporting.

### **Release of key advice papers**

- 21 I propose that the Minister be the decision maker for the release of any key advice papers provided to the Minister by a department or agency within the Minister's portfolio. This will allow Ministers to consider the whole package when making a decision. In the case of joint papers, the agreement of joint Ministers is required.
- 22 The release of key advice may assist the public to understand the decision making process. Key advice papers are only those that are:
  - 22.1 addressed to the Minister taking the item to Cabinet; and
  - 22.2 seek agreement from the Minister to recommendations on the matters that have now been decided by Cabinet.
- 23 Key advice does not include papers that contain only noting recommendations, second opinion advice, background information, all OIAs received, or advice to the Minister from sources other than the lead agency. The option is always available to Ministers to release more information such as other analysis or contextual information.
- 24 Ministers should consult with chief executives about proposals to release key advice papers to ensure relevant considerations and matters have been identified.

### **Timeline for release and exceptions**

- 25 Timeliness is a vital element in keeping the public informed and engaged in government matters. I recommend the timeline for releases should be within 30 business days of final decisions being made by Cabinet. I expect there will be occasions where Ministers will choose to release Cabinet material earlier than the 30 business days.
- 26 There will be occasions where there is good reason not to release the Cabinet material within the 30 days, for example:
  - 26.1 where a decision is made not to publish all or part of the material (for example, matters to do with national security or international implications, or commercial, or trade or travel sensitivities); or
  - 26.2 where a decision is made to delay the release beyond 30 business days (for example, for the reasons noted in paragraph 19 above, to allow a Minister to return from overseas travel, if a public announcement is planned after the 30 days, or to delay until a Bill is introduced to the House of Representatives).
- 27 It is possible that from time to time material in scope of this policy may be requested under the OIA, and be due a response, before it has been proactively released. Where the Minister already has a clear plan to proactively release the information requested

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<sup>2</sup> The Cabinet Office summary and the Cabinet committee and Cabinet agendas are excluded from this policy as they are not part of the Cabinet paper.

within the 30 business days default timeline, and there is a high certainty that this will occur, the Ombudsman's advice is that on a case-by-case basis:

- 27.1 section 18(d) of the OIA may justify refusing the request on the grounds that the same information is soon to be publicly available; or
- 27.2 if the requester is notified within the OIA's maximum statutory time limit for responding that the Minister has decided to grant the request, then the section 28(5) requirement in the OIA to release information without undue delay may be satisfied if the information is released to the requester at the same time it is published proactively.

### **Meaning of 30 business days**

- 28 For the purposes of this category of proactive release, I recommend a business day means any day of the week other than—
  - 28.1 Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, Labour Day, the Sovereign's birthday, and Waitangi Day;
  - 28.2 if Waitangi Day or Anzac Day falls on a Saturday or a Sunday, the following Monday; and
  - 28.3 a day in the period commencing 25 December in any year and ending 20 January in the following year.
- 29 The proposed December/January period is five days longer than in the OIA. This is because Ministers' availability over this period is limited.
- 30 I propose that the counting of the 30 business days commences from the date of the Cabinet meeting at which the final decisions are made.

### **Requirements for proactive release**

- 31 All material proposed for proactive release must be treated with care and subject to a considered, reliable, robust, and thorough review process.
- 32 The proactive release policy will mean that a greater volume of material will be being considered for proactive release. The principles and process that are to be used to assess information for proactive release are, in the first instance, those that are used for OIA releases and are already well understood.
- 33 The following matters should also be considered before Ministers give approval to proactively release and publish Cabinet material and key advice papers online:
  - 33.1 whether the document contains any information that would have been withheld, if the information had been requested under the OIA;
  - 33.2 the application of the principles in the Privacy Act 1993;
  - 33.3 consideration of national security. The application of the Protective Security Requirements (PSR) information and personnel requirements to ensure information is handled according to the PSR, the agency's protective security standards (although these may change if the paper is subsequently declassified), and the application of the New Zealand Government Security Classification system;
  - 33.4 whether there are good reasons to delay the proactive release of the information;
  - 33.5 whether the document contains any information that must be withheld under the terms of any other legislation;
  - 33.6 whether, in the circumstances, online publication is the best means of public release.

- 34 Proactive release of material is not covered by the OIA. This means that section 48 of the OIA, which protects Ministers and agencies from civil or criminal sanctions when releasing official information in good faith, is not applicable. As the protections in section 48 of the OIA do not apply to proactively released material, Ministers' offices, departments or agencies must also undertake an assessment to consider any potential liability, civil or criminal, that might result from the proactive release of Cabinet material and key advice papers before the Minister approves the proactive release Cabinet material. Matters to be considered include:
- 34.1 defamation;
  - 34.2 privacy of natural persons;
  - 34.3 interests of organisations;
  - 34.4 breach of copyright;
  - 34.5 whether the Attorney-General has waived privilege over any legally privileged material;
  - 34.6 disclosure of commercially sensitive information;
  - 34.7 breach of contract;
  - 34.8 whether a breach of any law or statute will occur if the information were released; and
  - 34.9 whether a breach that would constitute contempt of court.
- 35 If there is good reason to do so, a summary of the contents of the Cabinet material and key advice can be published as an alternative to releasing the Cabinet material.

### **Targeted engagement on the OIA**

- 36 The Minister of Justice intends to carry out targeted engagement to inform a decision on whether to progress a formal review of the OIA. Any formal review could consider whether protections from liability should be applied to proactive releases. The targeted engagement process will commence after the Privacy Bill is reported back to the House by the Justice Committee in November this year.

### **Requirement to indicate whether or when a paper is to be proactively released**

- 37 All papers for Cabinet and Cabinet Committees (except APH) should have a proactive release section which states whether or not the Minister proposes to release the material within 30 business days of decisions being made by Cabinet.
- 38 Where a Minister decides not to proactively release Cabinet material, or to extend the timeframe for the proactive release, the paper should note the decision, set out the reasons, and, in the case of an extended timeframe, indicate when the material will be released. An extended timeframe can be a date or aligned to a particular event occurring.

### **Policy commencement**

- 39 I recommend this policy apply to Cabinet Committee papers, and Cabinet papers sent direct to Cabinet, that are lodged from 1 January 2019. A report back to Cabinet on the policy and its effectiveness is proposed for December 2019. This will give Ministers, Ministers' offices, departments and agencies time to make any changes to their business practices. This date also provides time for the State Services Commission to develop a fit-for-purpose response calculator given the different calculation required for this policy as compared to the OIA.

## **Content, presentation and quality assurance of material released**

- 40 It is the publisher's responsibility to follow the Government's standards for publishing official information online and to ensure the quality, accuracy, and enduring accessibility of the material. Cabinet material must follow the agreed template to ensure consistency. All releases are to be accompanied by a standardised coversheet.

## **Location of the official information**

- 41 I recommend that the papers to be published online be made available through the department or agency website related to the portfolio of the lead Minister.

## **Cabinet Office Circular to support the policy**

- 42 I recommend that Cabinet agree the attached Cabinet Office Circular for publication, subject to final editing.

## **Risks and mitigations**

### *Legal liability*

- 43 Proactive disclosure of official information can create a range of legal risks and liability under various statutes could arise, depending on the context. It may not always be clear what information should be withheld to minimise legal risk. As noted earlier, the protections in section 48 of the OIA will not extend to the information that is proactively released under this policy. The mitigation for this is the robust review process discussed in paragraphs 31-35 above.

### *Effect of policy on free and frank advice*

- 44 There is a risk that increased proactive release could inhibit the provision of free and frank advice, resulting in agencies drafting papers with a view to public release rather than providing advice which is free and frank, and allows Ministers to take decisions based on the best available evidence and appreciation of all the options and issues. This could undermine the quality of advice produced in the policy development process, and thereby the quality of the decision ultimately reached.

- 45 The likelihood and impact of this risk is mitigated as the policy does not propose that:

- 45.1 information should be released that would not be released were it to be requested under the OIA; or
- 45.2 exploratory advice, 'blue skies' thinking or advice generated in the early and formative stages of a policy development process and intended to ensure the free and uninhibited exchange of ideas that is necessary for the development of robust policy advice should be released.

- 46 The Ombudsman's OIA guides, including *Free and frank opinions* and *The OIA and the public policy making process*, should be used by Minister's offices, departments and agencies.

### *Matters not being put before Cabinet or an increase in oral items*

- 47 There is a risk of creating a perverse incentive not to bring matters to Cabinet, or to bring matters as oral items rather than providing a paper.

- 48 The Cabinet Office Circular explicitly states that the policy does not affect the requirements set out in the Cabinet Manual regarding Cabinet decision-making. As noted above, the policy will also apply to any minutes of decisions resulting from consideration of oral items, and any papers tabled in support of an oral item.

### *Papers amended before release*

- 49 Other risks include request for papers to be amended or revised before release. By way of mitigation, the Cabinet Office Circular notes that the policy applies to the final version of the paper that was lodged in CabNet and considered at Cabinet.

### *Classification "elevation"*

- 50 There is a risk of classification "elevation" (i.e. papers being given a higher classification than is required, out of a concern about the potential risk of proactive release of that information). The Cabinet Office Circular reinforces the expectation that papers are drafted, handled and released in accordance with the Protective Security Requirements and the New Zealand Government Security Classification system.

### **Financial implications**

- 51 Costing the impact of this policy is difficult due to the number and complexity of papers generated, the maturity of proactive release practice, the size of government organisations and the policy and procedures organisations have in place, including delegation practice. Also, many departments and agencies have changed or are in the process of changing business practices to make more official information proactively available. Consideration at the drafting stage on what information may or may not be proactively released will assist agencies to spread possible additional costs. The benefits of implementing the policy may include a decrease in broad, wide-ranging, or repeat requests on an issue, and an increase in targeted, specific requests for information. This will make responses easier to prepare, and enhance New Zealand's reputation for being transparent and open.
- 52 However, I have attempted to quantify the additional costs of implementing this policy. This analysis, which is based on the 2016/17 Public Service Workforce Data and CabNet data, is indicative only, given the number of variables not costed (and noted in paragraph 51 above) and the number of assumptions.
- 53 The table below shows indicative costs to the system as a whole and in relation to three departments that were responsible for preparing a high, medium, and low number of submissions during 2016/17. The costings contain assumptions about average salary and processing hours involved in implementing the policy.<sup>3</sup>

#### ***Indicative costs***

<b>Who will bear the cost</b> <i>Indicative costs are \$ millions and exclude overheads</i>	<b>Number of releases</b>	<b>Annual cost of Cabinet material only</b>	<b>Annual cost of Cabinet material plus an average of 4 key advice papers</b>
The system	1700*	0.384	1.152
Ministry of Business, Innovation and Employment	344	0.078	0.233
The Treasury	83	0.019	0.056
Department of Conservation	17	0.004	0.012

\* This is the rounded number of Cabinet minutes issued in 2016/17 excluding Appointment and Honours submissions that are out of scope for this policy.

<sup>3</sup> The manager salary average of \$130,000 is for second tier, third tier and the other manager category with chief executives excluded. This is a rate of \$63.00 per hour. The 'other staff' involved average salary of \$68,000 was assumed to include authors of papers, Ministerial servicing team, communications people (including if press releases were prepared), web publication areas, and staff in Ministers' offices. This is a rate of \$33.00 per hour. Ministerial time in making the decision to release material was not costed. \$226 was the amount used per paper in the release.



- 54 In the first instance, I recommend that additional costs be absorbed within agency baselines.

### **Central point of access for the proactive releases**

- 55 A central point of access to the material released would help the public find the material they are interested in. This is a longer term aim. The State Services Commission has undertaken some initial work on this. The next step will include looking at the option of leveraging off the work being undertaken by the Department of Internal Affairs on a single government portal.

### **Proactive release policy and the Speaker**

- 56 From time to time the Speaker of the House of Representatives may have a Cabinet submission. Because the Speaker is not a Minister, the Leader of the House presents Cabinet papers on behalf of the Speaker. I recommend we invite the Speaker of the House of Representatives to consider for release any submissions the Leader of the House takes to Cabinet on the Speaker's behalf that fit within this policy.
- 57 In the event of a central point of access being developed, any material that the Speaker of the House of Representatives chooses to release would remain on the Parliament website in order to maintain the separation of powers between the executive and Parliament.

### **Review mechanism and monitoring**

- 58 I recommend that the policy and the Cabinet Office Circular be reviewed by the State Services Commission, with input from agencies, and the findings reported back to the Cabinet Government Administration and Expenditure Review Committee by 1 December 2019. The review will include determining whether:
- 58.1 the objectives of the policy are being met;
  - 58.2 changes are required to improve the effectiveness and clarity of the policy and the supporting procedures; and
  - 58.3 the policy should be broadened in any way.
- 59 Following this review, I expect an ongoing monitoring regime and reporting of proactive release statistics to be formalised by the State Services Commission.

### **Consultation**

- 60 The following departments have been consulted on the proposals: the Ministry of Business, Innovation and Employment, the Department of Conservation, the Department of Corrections, Crown Law Office, the Ministry for Culture and Heritage, the Ministry of Defence, the Ministry of Education, the Education Review Office, the Ministry for the Environment, the Ministry of Foreign Affairs and Trade, the Government Communications Security Bureau, the Ministry of Health, the Inland Revenue Department, the Department of Internal Affairs, the Ministry of Justice, Land Information New Zealand, Te Puni Kōkiri, the New Zealand Customs Service, the New Zealand Security Intelligence Service, Oranga Tamariki—Ministry for Children, the Ministry for Pacific Peoples, the Ministry for Primary Industries, the Department of the Prime Minister and Cabinet, the Serious Fraud Office, the Ministry of Social Development, Statistics New Zealand, the Ministry of Transport, The Treasury, Te Kāhui Whakamana Rua Tekau mā Iwa—Pike River Recovery Agency, the Ministry for Women; the New Zealand Defence Force, the New Zealand Police, and the Parliamentary Counsel Office. The Social Investment Agency was also consulted.

- 61 The Office of the Clerk of the House of Representatives and the Parliamentary Service were consulted.
- 62 The Office of the Ombudsman was consulted on paragraph 27.

### **Human Rights**

- 63 There are no implications for the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993.

### **Legislative Implications**

- 64 There are no legislative implications arising from this policy.

### **Regulatory impact analysis**

- 65 A regulatory impact analysis has not been provided, as this paper deals with changes to the internal administrative and governance arrangements of the Government, and has no or only minor impacts on parties outside government.

### **Gender implications**

- 66 A gender analysis has not been undertaken as the proposals in this paper do not seek to distinguish between genders.

### **Disability perspective**

- 67 Some people have difficulty using the internet. The New Zealand Government Web Accessibility Standard should be taken into account by the publisher. If the content is in formats other than HTML, commonly used formats should be selected and made as accessible as possible. Publishers may need to provide an accessible alternative of some of the information.

### **Publicity**

- 68 There will be a public announcement of the proactive release policy. The proactive release of the Cabinet material and associated papers will be within the 30 business days of the Cabinet decision.

## Recommendations

- 1 **agree** that Cabinet papers, associated minutes and any attachments or appendices to the Cabinet material must be released proactively and published online, with the approval of the relevant portfolio Minister, within 30 business days of final decisions being made by Cabinet, unless there is good reason not to publish all or part of the material, or to delay the release beyond 30 business days;
- 2 **agree** that the policy excludes Cabinet Appointments and Honours material;
- 3 **agree** that the “business day” is a day of the week other than—
  - 3.1 Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, Labour Day, the Sovereign’s birthday, and Waitangi Day;
  - 3.2 if Waitangi Day or Anzac Day falls on a Saturday or a Sunday, the following Monday; and
  - 3.3 a day in the period commencing 25 December in any year and ending 20 January in the following year.
- 4 **agree** that the counting of the 30 business days commences from the date of the Cabinet meeting at which final decisions are made;
- 5 **note** that the relevant portfolio Minister can also decide to release related key advice papers at the same time;
- 6 **agree** that the definition of key advice papers is only those papers that are:
  - 6.1 addressed to the Minister taking the item to Cabinet; and
  - 6.2 seeking agreement from the Minister to recommendations that have subsequently been decided by Cabinet;
- 7 **note** the policy does not propose that:
  - 7.1 information should be released that would not be released if requested under the OIA; or
  - 7.2 exploratory advice, ‘blue skies’ thinking or advice generated in the early and formative stages of a policy development process and intended to ensure the free and uninhibited exchange of ideas that is necessary for the development of robust policy advice should be released;
- 8 **agree** that the proactive release policy apply to Cabinet Committee papers, and Cabinet papers sent direct to Cabinet, that are lodged from 1 January 2019;
- 9 **note** that Ministers’ offices, departments, and agencies will support Ministers to prepare the information release, including performing due diligence on the material;
- 10 **note** that this proactive release policy is a first step that could be extended to other material at a later date;
- 11 **note** that the Minister of Justice intends to carry out targeted engagement later this year to inform a decision on whether to progress a formal review of the Official Information Act 1982 and any formal review could consider whether protections from liability should be applied to proactive releases;
- 12 **agree** that the information that is proactively released be released on departmental or agency websites;
- 13 **invite** the Speaker of the House of Representatives to consider for release any submissions the Leader of the House takes to Cabinet on the Speaker’s behalf that fit within this policy;

- 14 **note** that the State Services Commission is undertaking work on a possible centralised platform for the release of the information;
- 15 **agree** that any increased costs as a result of this policy be absorbed in departmental or agency baselines;
- 16 **agree** the attached draft of a new Cabinet Office Circular for publication, subject to final editing;
- 17 **note** that the Cabinet Office will make any changes required to the Cabinet paper template and Cabinet Office summaries as a result of the new proactive release requirements;
- 18 **direct** the State Services Commission to undertake a review of the proactive release policy and report the findings to the Cabinet Government Administration and Expenditure Review Committee by 1 December 2019; and
- 19 **note** that this Cabinet paper, the Cabinet minute, and associated papers will be released on the State Services Commission website.

Authorised for lodgement.

Hon Minister Chris Hipkins  
**Minister of State Services**

Date:

## Appendix 1 – Examples of proactive release in other countries

Country	Comment
Nordic countries	Generally seem to be exploring proactive release of Government business. For example in May 2017, the Finnish Government held its first open-to-the-public Cabinet meeting. This one-off event more widely reflects their Act on the Openness of Government Activities (1999) which outlines that all government meetings are to be open.
Croatia	Has an online directory of proactively released information.
Mexico	Has created a searchable database for all information requests and responses, allowing officials to track requests and identify information that should be a candidate for proactive release.
Thailand	Has taken the same approach as Mexico.
Bangladesh	The Cabinet has included, in the performance agreements for ministries, specific requirements about proactive publishing of information.
United Kingdom	Public authorities are required to adopt a scheme for the publication of information by that authority, as well as the concept of disclosure logs that provide online access to information released in response to specific requests. Disclosure logs can then be made available to a wider audience.
Australia	Agencies (departments and prescribed authorities, as specified under the Freedom of Information Act 1982) are required to publish the information used to assist the agency in making decisions affecting members of the public. However, Cabinet documents are excluded from this requirement. Public authorities are required to adopt a scheme for the publication of information by that authority, as well as the concept of disclosure logs that provide online access to information released in response to specific requests. Disclosure logs can then be made available to a wider audience.
Canada	Canada are working on changes (BILL C-58) to amend the Canadian Access to Information Act and the Privacy Act and to make consequential amendments to other Acts. The Bill creates a new Part providing for the proactive publication of information or materials related to the Senate, the House of Commons, parliamentary entities, ministers' offices, government institutions and institutions that support superior courts. The information to be proactively released includes expenses, contracts, briefing materials to incoming Ministers, and reclassifications of positions in government institutions. Many of the documents that will be proactively disclosed under the proposed legislation are already being voluntarily disclosed. Having these requirements in law will go further than the New Zealand system. However, the information and material does not go into the areas this Cabinet paper is seeking to have proactively released.



# Cabinet Office

CO Circular (XX)

## Circular

XXXX

**Intended for**

- Ministers
- All Chief Executives
- All Senior Private Secretaries
- All Private Secretaries
- All officials involved with preparing and/or processing Cabinet papers

## Proactive Release of Cabinet Material: Updated Requirements

### Key points

- Cabinet has agreed that Cabinet papers, and any attachments or appendices to those papers and associated minutes must be released proactively and published online, with the approval of the relevant portfolio Minister, within 30 business days of final decisions being made by Cabinet, unless there is good reason not to publish all or part of the material, or to delay the release beyond 30 business days.
- Cabinet Appointments and Honours (APH) papers and minutes are excluded from this policy.
- Cabinet papers should state whether or not the Minister intends to proactively release the paper in whole or in part, or delay the release, and the proposed timeframe for the release.
- If the material will not be proactively released, the Cabinet paper should set out the reasons for that decision.
- Ministers may also choose to proactively release related key advice papers provided to the Minister by departments or agencies. Ministers should consult with the Chief Executive of the department or agency before key advice papers are proactively released.
- A due diligence process must be undertaken by the Minister's office, department or agency before Cabinet material or key advice papers are proactively released.
- It is the publisher's responsibility to confirm that the quality assurance steps have been undertaken before Cabinet material is proactively released and published online.
- This policy applies to Cabinet Committee papers, and Cabinet papers sent direct to Cabinet, that are lodged from 1 January 2019.

### Introduction

- 1 The Government has committed to improving practices around proactive release of information. Democracies thrive when citizens trust and participate in their government. Proactive release of information promotes good government and transparency and fosters public trust and confidence in agencies.
- 2 This circular sets out the requirements and procedures for the proactive release of Cabinet material. It updates and replaces previous advice related to the proactive release of Cabinet material.

- 3 General guidance about the proactive release of Cabinet material is provided in the Cabinet Manual (paragraph 8.17) and Cabinet minute xx. This circular sets out further detail on the processes and responsibilities that follow a Minister's decision to proactively release Cabinet material and for it to be published online.
- 4 "Cabinet material on which final decisions have been made" means all the papers that have been considered by Cabinet or a Cabinet committee, and any attachment or appendices to those papers, and the associated minutes. It includes any minutes resulting from the consideration of oral items at Cabinet. Cabinet material excluded from the policy is APH material for reasons of privacy and because any related remuneration packages are publicly reported.
- 5 The counting of the 30 business days commences on the day of the Cabinet meeting at which final decisions are made.
- 6 "Attachments and appendices" means information or documents attached to the Cabinet paper that provides further detail in support of the paper under consideration. It excludes the Cabinet Office summary of the paper and the Cabinet committee and Cabinet agendas.
- 7 "Publisher" means the person in an agency or a Minister's office who is responsible for administering the proactive release and publication of the Cabinet material online.
- 8 "Key advice paper" means those papers that are addressed to the Minister taking the item to Cabinet and seek agreement from the Minister to recommendations on the matters that are now being decided by Cabinet.
- 9 "A business day" means any day of the week other than—
- 9.1 Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, Labour Day, the Sovereign's birthday, and Waitangi Day;
  - 9.2 if Waitangi Day or Anzac Day falls on a Saturday or a Sunday, the following Monday; and
  - 9.3 a day in the period commencing 25 December in any year and ending 20 January in the following year.
- 10 Regional anniversary days are counted as business days.
- 11 This Circular relates applies to Cabinet Committee papers, and Cabinet papers sent direct to Cabinet, that are lodged from 1 January 2019. It does not include Cabinet material of a previous administration. The process for publicly releasing Cabinet material of a previous administration is set out in paragraphs 8.133 and 8.134 of the Cabinet Manual.
- 12 This policy does not affect the requirements set out in the Cabinet Manual regarding Cabinet decision making.

### Preparing for proactive release

- 13 The possibility of proactive release occurring must not undermine the quality of advice produced and therefore the quality of the decision ultimately reached by Ministers.

- 14 Information, where possible, should be drafted so where necessary material can easily be withheld. Specific guidelines for the presentation of legal advice is provided in the Cabinet Manual paragraphs 4.66 - 4.67.
- 15 The Ombudsman's OIA guides, including *Free and frank opinions* and *The OIA and the public policy making process*, should be used by Minister's offices, departments and agencies.

### **Requirement to indicate whether or when a paper is to be proactively released**

- 16 Papers for consideration by Cabinet (excluding APH papers) must set out in a Proactive Release section of the Cabinet paper what material will be proactively released, taking into account the *Requirements for proactive release* below.
- 17 Where a Minister decides not to proactively release Cabinet material, or to extend the timeframe for proactive release, the paper should note the decision, set out the reasons, and, in the case of an extended timeframe, indicate when the material will be proactively released. The extended timeframe can be a date or related to a particular event occurring.

### **Requirements for proactive release**

- 18 Cabinet has agreed that Cabinet material must be released proactively and published online within 30 business days of final decisions being made by Cabinet, unless there is good reason not to publish all or part of the material, or to delay the release beyond 30 business days, for example:
  - 18.1 where a decision is made not to publish all or part of the material (for example, matters to do with national security or international implications, or commercial, or trade or travel sensitivities); or
  - 18.2 where a decision is made to delay the release beyond 30 business days (for example, to allow a Minister to return from overseas travel, if a public announcement is planned after the 30 days, or to delay until a Bill is introduced to the House of Representatives).
- 19 Ministers can choose to release Cabinet material earlier than the 30 business days.
- 20 It is possible that from time to time material in scope of this policy may be requested under the OIA, and be due a response, before it has been proactively released. Where the Minister already has a clear plan to proactively release the information requested within the 30 business days default timeline, and there is a high certainty that this will occur, the Ombudsman's advice is that on a case-by-case basis:
  - 20.1 section 18(d) of the OIA may justify refusing the request on the grounds that the same information is soon to be publicly available; or
  - 20.2 if the requester is notified within the OIA's maximum statutory time limit for responding that the Minister has decided to grant the request, then the section 28(5) requirement in the OIA to release information without undue delay may be satisfied if the information is released to the requester at the same time it is published proactively.
- 21 Ministers have authority to approve the proactive release of Cabinet material within their own portfolios. In the case of joint papers, the agreement of joint Ministers is required.



- 22 Ministers may also choose to proactively release with the Cabinet material related key advice papers provided to the Minister by their department or other agency. Ministers should consult with chief executives about proposals to release key advice papers, to ensure relevant considerations and matters have been identified.

**Due diligence**

- 23 All material proposed for proactive release must be treated with care and subject to a considered, reliable, robust, and thorough review process. The following matters should be considered by the person or agency authoring or reviewing the material before Ministers give approval to proactively release and publish Cabinet material and key advice papers online:
- 23.1 whether the document contains any information that would have been withheld if the information had been requested under the Official Information Act (OIA);
  - 23.2 the application of the principles in the Privacy Act 1993;
  - 23.3 consideration of national security. The application of the Protective Security Requirements (PSR) information and personnel requirements to ensure information is handled according to the PSR, the agency's protective security standards (although these may change if the paper is subsequently declassified), and the application of the New Zealand Government Security Classification system;
  - 23.4 whether the document contains any information that must be withheld under the terms of any other legislation;
  - 23.5 whether there is any potential liability, civil or criminal, that might result from the proactive release of Cabinet material and key advice papers. Matters to be considered include:
    - 23.5.1 defamation. If the information proposed for release says or does something that may potentially harm the reputation of another person, group, or organisation seek legal advice;
    - 23.5.2 privacy of natural persons: If personal information is contained in the material, consider whether the information should be released at all and, if released, whether there is a need to redact the information. Consult with all individuals named in any information proposed to be released. Guidance from the Office of the Ombudsman and the Privacy Commissioner should be used when considering release of personal information;
    - 23.5.3 interests of organisations: If information about an organisation is contained in the material, consider whether the information should be released at all and, if released, whether there is a need to redact information. Guidance from the Office of the Ombudsman should be used when considering release of information about organisations;
    - 23.5.4 breach of copyright. If the information proposed for release is the creative work of others, their trademarks, or certain confidential business information, the owner of the information must give permission before it can be published;

- 23.5.5 whether the Attorney-General has waived privilege over any legally privileged material;
  - 23.5.6 the disclosure of commercially sensitive information. Consider the type of information at issue and how it came to be in the possession of the Government;
  - 23.5.7 breach of contract. Consider whether there is a contractual interest in the information proposed for release and whether there is a need to redact information to protect contractual obligations and /or whether the information should be released at all;
  - 23.5.8 whether breach of any law or statute will occur if the information were released. Consider all laws or statutes that apply to the information; and
  - 23.5.9 whether a breach would constitute contempt of court.
- 23.6 whether there are good reasons to delay the proactive release of the information, for example where there are sensitivities around timing, where a particular action needs to occur prior to publication, or in the case of an extended policy process where release of Cabinet material may be premature while advice remains under active consideration and further decisions are pending; and
- 23.7 whether, in the circumstances, online publication is the best means of public release.
- 24 If there is good reason to do so, a summary of the contents of the Cabinet material and key advice can be published as an alternative to releasing the Cabinet material.

### **Content and presentation**

- 25 It is the publisher's responsibility to ensure that only the final versions of Cabinet material are proactively released and published online:
- 25.1 Papers: the final version of a paper is the one approved by the Minister for lodgement on CabNet or in hard copy with the Cabinet Office, or for tabling at the meeting, and which has been considered by a Cabinet committee or Cabinet;
  - 25.2 Minutes: the final version of a minute is the one published by the Cabinet Office on CabNet or distributed in hard copy following a Cabinet or Cabinet committee meeting. Cabinet committee minutes should not be released until they have been confirmed by Cabinet.
- 26 The Cabinet Office summary and the Cabinet committee and Cabinet agendas are not part of the paper and should be removed before the Cabinet material is proactively released.
- 27 Where possible, Cabinet papers, relevant minutes and any key advice papers should be proactively released together so that readers have context for the decisions made by Cabinet. Electronic copies of Cabinet material can be downloaded from CabNet for the purposes of proactive release. The watermark on these copies should be retained.
- 28 Where information is redacted, reasons should be stated.
- 29 Each release must be accompanied by a coversheet that contains, at a minimum, the information shown in the appendix. The exact layout of the coversheet will depend on each

agency's website and the material being released. As a protection against misuse of information, copyright statements should be included with the content of each paper published.

- 30 Ministers may choose to issue a press release on the official website of the New Zealand Government linking to the release on the agency website.
- 31 Depending on their administrative arrangements with departments or agencies, Ministers' offices may choose to review the finalised content before publication.

### Quality assurance

- 32 It is the publisher's responsibility to confirm the following actions have been undertaken before Cabinet material is proactively released and published online:
  - 32.1 the Minister's office, department or agency has conducted a due diligence process, as described in paragraph 23 above;
  - 32.2 the Minister has approved the material for proactive release and publication online;
  - 32.3 it is the correct and final version of the paper approved by the Minister for lodgement on CabNet that is being published, subject to any redaction that may be necessary;
  - 32.4 the Cabinet committee minute has been confirmed by Cabinet;
  - 32.5 the title and other reference information is accurate;
  - 32.6 the related Cabinet material (paper and minute and any appendices and attachments) is included; and
  - 32.7 a coversheet for the material has been provided.
- 33 All material published should be in a text searchable version. If a key advice paper contains important handwritten contextual information, a PDF version of the paper may also be published, or the contextual information can be included in the coversheet that is released with the official information.
- 34 The New Zealand Government Web Accessibility Standard should be taken into account by the publisher. If the content is in formats other than HTML, commonly used formats should be selected and made as accessible as possible. Publishers may need to provide an accessible alternative of some of the information.
- 35 Where any of the information included in the material has already been released, the publisher can choose to link to the previously released material balancing this against ease of accessibility and usability.

### Recordkeeping

- 36 A record of what has been released and reasons for withholding any information must be kept to ensure that all relevant factors have been taken into account and to enable future verification of what was done and why.

## Publication

- 37 Departments and agencies must publish proactively released Cabinet material and any related key advice on a website maintained by or on behalf of the department or agency, or provide a link to the information if it is being published on another department's or agency's website.

## Amendment to published material

- 38 Consideration can be given to updating published material if subsequently the material is released in another way e.g. where more published material is released as sensitivities have reduced.

## Review of security classification

- 39 Once Cabinet material is published online, the security classification of the original document may no longer apply. Unless some information has been withheld from the version proactively released, departments or agencies should review the security classification of the original version stored on their document.

## Complaints

- 40 If a department or agency receives a complaint about Cabinet material or key advice papers that have been proactively released, the relevant Minister must be advised and consulted about any response.

## Further advice

- 41 The State Services Commission is available to provide further advice on the implementation of the policy on the proactive release of Cabinet material and key advice papers and publishing online.
- 42 The Cabinet Office is available to provide further advice as required in relation to specific Cabinet material.

Contact details are set out below.

**Appendix: Example of a coversheet**

*The exact layout of the coversheet will depend on each agency's website and the material being released.*

[Name of Minister and Portfolio]

[Name of package]

[Date of issue]

This/these documents have been proactively released.

*[Date, title, author e.g. Office of XX Minister, Cabinet Office for minutes, agency for key advice]*

[Explanation of material redacted e.g. some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act). Where this is the case, the relevant sections of the Act that would apply have been identified. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.]

**Key to Redaction Codes:**

*[Insert Official Information Act section and the explanation for that section]*

*Insert a Copyright statement*

*For Cabinet material and any public service departmental advice use this copyright statement*

[© Crown Copyright, Creative Commons Attribution 4.0 International \(CC BY 4.0\)](#)

*For key advice and other papers from agencies other than public service departments you will need to select the appropriate copyright statement for this information*

## Development of the proactive release policy

<b>Proposal</b>	February 2018	Five options on which material to be in scope for releasing discussed at GOV Cabinet committee.
	August 2018	One proposal - Cabinet and Cabinet Committee papers and minutes. Excludes appointments and honours papers, mainly for privacy reasons.
	<b>Why this shift?</b>	The discussion at GOV provided a steer on Ministers' views so that a single proposal could be developed. The single proposal was refined following cross-party consultation.
<b>Key advice</b>	February 2018	Key advice to be included in the policy.
	August 2018	Ministers can choose to release key advice.
	<b>Why this shift?</b>	There was a concern that the volume of papers to be considered for release would generate too much work. The new proposal reduces the administrative burden while providing a consistent process to be followed if Ministers want to also release the key advice.
<b>Backdating</b>	February 2018	Backdated to 26 October 2017.
	August 2018	No backdating.
	<b>Why this shift?</b>	This new proposal allows the policy to be implemented without overwhelming Ministers and officials with work. Individuals can use the OIA to request Cabinet material that is prior to the commencement date.
<b>Financial impact</b>	February 2018	No financial impact information available.
	August 2018	Indicative costings provided.
	<b>Why this shift?</b>	Costing the proposal was difficult due to the many variables and assumptions at play. While the information shows the financial impact is not excessive, it will vary by agency. The review of the policy in a year can evaluate the financial impact.
<b>Default timeline</b>	February 2018	Either within 30 working days or 60 working days. Working days was based on the OIA.
	August 2018	Within 30 business days and includes an extra five days over the Christmas / New Year period when compared to the OIA.
	<b>Why this shift?</b>	30 business days means the public is more likely to get timely information on Cabinet decisions. 30 business days may allow for responses to some OIA requests to occur through a proactive release ie. s.18 – This allows for declining an OIA request as the same information will soon be publicly available. s.28 (5) - Within the OIA 20 working days a requestor needs to be advised the request will be granted. The information is then provided to the requester at the same time it is published proactively.
<b>Free and frank advice diluted</b>	February 2018	SSC guidance on free and frank advice available.
	August 2018	Ombudsman's guides <i>Free and frank opinions</i> & <i>The OIA and the public policy making process</i> published.
	<b>Why this shift?</b>	For good decision making to occur free and frank, blue skies and exploratory advice must be provided. There is now a suite of information available so that officials are clear about advice that can be withheld. This is reinforced in the proposed Cabinet Office Circular that will support the policy.
<b>No Ministerial protections from civil and criminal liability</b>	February 2018	An increase in the volume of Cabinet material to be released requires that a robust review process is in place.
	August 2018	A robust review process is available in the draft Cabinet Office Circular. Targeted engagement to inform a decision on whether to progress a formal review of the OIA will occur.
	<b>Why this shift?</b>	Minister Little wants to consider a range of views before deciding whether to progress a formal OIA review.
<b>Commencement date</b>	February 2018	29 March 2018.
	Aug/Sept 2018	CBC 1 October 2018. This Cabinet – papers lodged from 1 January 2019.
	<b>Why this shift?</b>	The commencement date needs to be confirmed once Cabinet has taken the final decisions. This is to ensure there is enough lead in time so that processes are in place and agency websites are ready.
<b>Centralisation of releases</b>	February 2018	Use agency websites for releases so the policy can get underway as soon as possible.
	August 2018	Use agency websites for releases so the policy can get underway as soon as possible.
	<b>No shift</b>	DIA's work on a whole of government portal will explore how centralisation can best be achieved.