

Requests for Briefings to the Incoming Minister

Legislation	Official Information Act 1982 (OIA), s 18(d)
Agency	Privacy Commissioner / Ministry of Transport
Ombudsman	Peter Boshier
Case number(s)	466794 / 467630
Date	February 2018

Summary

Following the September 2017 election, requesters sought access to the Briefings to the Incoming Minister (BIMs) from the Privacy Commissioner and the Ministry of Transport. Both requests were refused on the basis that the information would soon be publicly available (section 18(d) of the OIA).

The Chief Ombudsman formed the opinion that section 18(d) of the OIA applied. At the time of the refusals, the release of the information was reasonably certain and imminent. In addition, the period of time between the decisions to refuse the requests and the release of the BIMs (nine working days for the Privacy Commissioner, 14 working days for the Ministry) met the definition of *'soon'*.

Background

1. One requester sought the BIM from the Privacy Commissioner on 14 November 2017. The request was refused the same day. A second requester sought the BIM from the Ministry of Transport on 30 October 2017; the request was refused on 17 November 2017.
2. Both refusals cited section 18(d) of the OIA, stating the BIMs would be published *'soon'*.
3. The requesters complained to the Chief Ombudsman about the refusal decisions. They argued that in both cases there was no certainty that the information would be released, as the intended dates of release were not provided, and there did not appear to be any administrative difficulties in providing the information at that time.

4. As an independent crown entity, the Office of the Privacy Commissioner publicly released the BIM on its website on 24 November 2017. The BIMs from the Ministry of Transport were released publicly on 7 December 2017, as part of a coordinated release of a number of BIMs for public sector agencies and crown entities on the Beehive website.

Investigation

5. Section 18(d) of the OIA states that a request may be refused if *'the information requested is or will soon be publicly available'*.
6. This Office's guidance on the administrative reasons for refusal¹ includes the following comment on the meaning of *'soon'*:

*As to what is meant by 'soon' in the context of section 18(d), this is a question of fact to be determined in the circumstances of the case. The section presupposes, however, an element of **certainty** about when the information will become publicly available. In these circumstances, it is **good practice** to provide the requester with a specific date of release or to explain the perceived difficulty in meeting the request immediately (emphasis added).*

7. The Chief Ombudsman formed the provisional opinion that, although it is good practice for an agency to provide a requester with a date of release of the information, this is not a requirement of the legislation. The absence of a confirmed date did not mean that section 18(d) did not apply, simply that other factors that point to the likelihood of impending publication must be assessed.
8. Despite not being able to provide a specific date of release at the time the requests were refused, it appeared that the agencies could be confident that the information would be released, and that this would occur imminently. This was supported by the fact that the BIMs were released nine (Privacy Commissioner) and 14 (Ministry of Transport) working days after the dates of refusal.
9. In response, the requester of the Ministry of Transport's BIMs referred to parts of this Office's guidance on administrative reasons for refusing an OIA request. He pointed out that the examples given in the guidance concerned the administrative impracticalities of early release of a report that is being printed or a speech that is about to be given.
10. The requester stated he believed there were no administrative impracticalities in this case; and also raised concerns that the BIMs' release was delayed longer than it needed to be, given that the Ministry should have been aware that the information would be requested, and ready to make a call on release or withholding.

¹ Office of the Ombudsman. *Administrative reasons for refusal*. Retrieved on 24 January 2018 from http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/1945/original/part_2a_administrative_reasons_for_refusing_official_information_requests.pdf?1495064662

Outcome

11. The Chief Ombudsman formed the final opinion that section 18(d) applied in these cases, clarifying that the guidelines were just that, and that the part of the guidance referred to by the requester provided *examples* of situations where the ground may apply. This did not mean that section 18(d) could not apply in other situations. The legislation says that requests may be refused if the information will ‘soon’ be publicly available, and the timeframe by which the information was released in these cases was ‘soon’.
12. The delay, in the case of the Ministry of Transport, was occasioned by a desire to coordinate the publication of all briefings to incoming Ministers. This was not unreasonable, provided it did not unduly delay release of the briefings, which, in the Chief Ombudsman’s opinion, it did not. A coordinated release may have been beneficial in allowing the public to see the full suite of advice received by the incoming Government, and to compare and contrast advice in related areas or by related agencies (such as the various transport agencies).
13. The delay would also have enabled incoming Ministers to familiarise themselves with the content of the briefings (which were written for them after all), before they were released to the public. While the Ministry would have been very familiar with the briefing, and able to form its own view on release early on, it was entirely proper that the intended recipient of the briefing was first consulted before the final decision on release was made and implemented.
14. Having formed the final opinion that the agencies were justified in refusing the requests under section 18(d) of the OIA on the basis that the BIMs would soon be publicly available, the Chief Ombudsman concluded his investigation.