

## Dealing with OIA requests involving Ministers

A guide to transfer, consultation, and the notification of decisions on OIA requests

*This guide provides advice for agencies dealing with Official Information Act (OIA) requests where Ministers might need to be involved.*

*It explains when it is lawful and reasonable for an agency to:*

- *transfer a request to a Minister;*
- *consult a Minister on a request; or*
- *notify a Minister of a decision the agency has taken on a request.*

*It has practical resources including:*

- *a flow chart for dealing with requests involving Ministers;*
- *a step-by-step worksheet for dealing with requests involving Ministers; and*
- *case studies of actual complaints considered by the Ombudsman.*

*This guide focuses on issues particular to the interface between Ministers and agencies. General guidance on transfers and consultation is available in [The OIA for Ministers and agencies](#).*

*We have also developed a [model protocol](#) that Ministers and agencies can adapt and use to guide their interactions on OIA requests.*

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## Purpose of this guide

This guide provides advice on how to identify and manage OIA requests involving Ministers.

These are requests where there is the potential for Ministers to be affected by release of the information because:

- it relates to their functions or activities as Ministers; or
- they may be required to prepare for the possibility of public or political commentary.

The OIA places separate decision-making responsibility on Ministers and the agencies they are accountable for. Agencies that receive OIA requests are responsible for deciding on them, unless that responsibility is formally transferred to the Minister.

However, Ministers can have [legitimate interests in OIA requests received by agencies](#). There are [mechanisms](#) under the OIA for managing those interests in a way that enables both Ministers and agencies to comply with the law.

This guide discusses those mechanisms. It is intended for all agencies subject to the OIA, but parts of it may be more relevant to departments.<sup>1</sup>

## Why Ministers may have a legitimate interest in OIA requests received by agencies

### Accountability

The convention of individual ministerial responsibility means that Ministers bear the ultimate responsibility for the actions of their department(s). This includes answering to Parliament, in the form of explanation or defence, for those actions. The Cabinet Manual states:<sup>2</sup>

*Ministers are accountable to the House for ensuring that the departments for which they are responsible carry out their functions properly and efficiently. On occasion, a Minister may be required to account for the actions of a department when errors are made, even when the Minister had no knowledge of, or involvement in, the actions concerned.*

Given that accountability for departmental actions rests with the Minister, they may have a legitimate interest in information that is requested from their department. The Minister may

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<sup>1</sup> 'Agencies' is a catch-all term used in this guide to cover all the departments and organisations that are subject to the OIA. 'Departments' are the core public service departments and ministries listed in Part 1 of [Schedule 1](#) of the Ombudsmen Act 1975.

<sup>2</sup> Cabinet Office. *Cabinet Manual 2017* at paragraph 3.27.

need to prepare for the possibility that release of official information will result in public or political commentary to which they will be expected to respond.

Ministerial responsibility also arises with respect to other types of agencies subject to the OIA. For instance, Ministers are responsible to the House for overseeing and managing the Crown's interests in, and relationships with, the **Crown entities** in their portfolios.<sup>3</sup> Ministers are also responsible for the functions given to them by the State-Owned Enterprises Act 1986 or the rules of a **state-owned enterprise**.<sup>4</sup>

### The Danks Committee on ministerial responsibility

The committee that recommended the enactment of the OIA said this about ministerial responsibility:<sup>5</sup>

*A Minister is and remains answerable in a way no one else can be...A Minister is liable to be questioned in Parliament about the administration of [their] department and [they] must respond to criticism. In short, [they] must defend [themselves] in a public forum. A Minister takes responsibility if not always, as in a well-known remark, blame.*

## Proper processing

The OIA isn't just about releasing official information. It's also about **protecting** official information 'to the extent consistent with the public interest'.<sup>6</sup> Some of the reasons for withholding official information are directed at protecting **government** interests—for example, those related to the international relations of the Government of New Zealand, or the protection of constitutional conventions, or the Crown's commercial activities or negotiations.<sup>7</sup> Ministers, who collectively direct the executive branch of government, may have a different and equally valid perspective to an agency on an OIA request. The proper processing of a request—through adequate consideration of the potential withholding grounds and assessment of the balance of the public interest in release—may therefore require some degree of ministerial involvement.

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<sup>3</sup> Above [note 2](#), at paragraph 3.29.

<sup>4</sup> Above [note 2](#), at paragraph 3.46.

<sup>5</sup> Committee on Official Information. *Towards Open Government: Supplementary Report*. (July 1981) at 10. The Committee considered that the final power to determine release or withholding of official information should lie with Ministers. Therefore, when the OIA was first enacted, individual Ministers had the power to veto an Ombudsman's recommendation. Following amendment of the OIA in 1987, that power is now vested in the Cabinet as a whole, though it has never been exercised in this form.

<sup>6</sup> See s 4(c) OIA.

<sup>7</sup> See ss 6(a), 6(b), 9(2)(f), 9(2)(i) and 9(2)(j) OIA.

## Identifying OIA requests involving Ministers

The table below lists factors that may be helpful in identifying OIA requests involving Ministers.

<b>The subject of the information</b>	<ul style="list-style-type: none"> <li>Does the information relate to the Minister's functions or activities, for example, government policy or decision making processes, or the exercise of a statutory power or function by a Minister?</li> </ul>
<b>The impact of release</b>	<ul style="list-style-type: none"> <li>Could release of the information impact on the Minister's functions or activities, including the orderly and effective conduct of government policy or decision making processes, and relationships and negotiations with other political parties?</li> </ul>
<b>Who generated the information</b>	<ul style="list-style-type: none"> <li>Did the Minister generate the information, or was it generated on their behalf (for example, Cabinet papers, ministerial correspondence, or answers to parliamentary questions)?</li> </ul>
<b>The nature of the information</b>	<ul style="list-style-type: none"> <li>Is the information sensitive or controversial, and therefore likely to attract public or political commentary to which the Minister may be required to respond?</li> </ul>
<b>The likelihood of publicity</b>	<ul style="list-style-type: none"> <li>Is the information likely to be published in the news media<sup>8</sup> or debated in the House, raising the possibility that the Minister may be required to respond? This is likely to include requests that are made by MPs and parliamentary research units, and members of the news media.</li> </ul>

## Notifying the Minister of the request

It is reasonable for agencies to notify a Minister of any OIA request involving their interests. The purpose of doing so is to enable discussion to take place about the appropriate mechanism for addressing the Minister's interests, if necessary (see [Mechanisms for dealing with OIA requests involving Ministers](#)). However, it is also important to satisfy the fundamental timeliness requirement of the OIA that decisions on requests are made and communicated '*as soon as reasonably practicable*'.<sup>9</sup>

<sup>8</sup> Following the definition in [s 68\(5\) of the Evidence Act 2006](#), 'news media' is media for the dissemination to the public or a section of the public of news and observations on news. Following the judgment of the High Court in *Slater v Blomfield* [2014] NZHC 2221, this can include a blogger who regularly disseminates news (ie, new information about recent events or events of interest to the public), or observations on news, to a significant body of the public.

<sup>9</sup> See s 15(1) OIA.

Requests may be notified in writing (for example, through the agency's weekly report to the Minister), or in person (for example, through regular relationship meetings with ministerial staff). Ministers and agencies should agree on open and transparent criteria for when requests will be notified to the Minister. Agencies should consider publishing these criteria on their websites in the interests of transparency.

## Mechanisms for dealing with OIA requests involving Ministers

There are three mechanisms for dealing with OIA requests involving Ministers. The following diagram summarises their key differences, and more detailed explanation follows.

There is also a quick [flow chart](#) and summary [work sheet](#) at the end of this guide, which take you through the process of deciding which mechanism to use.

	Who makes the decision whether to grant the request	When to do it	Extension?	Relevant law or guidance
<b>Transfer</b>	Minister makes decision	An obligation—must be done when information is more closely connected with the Minister’s functions	Can extend timeframe for transfer; no need for the agency to extend timeframe for decision as responsibility for decision making has shifted to the Minister	Section 14 OIA
<b>Consultation</b>	Agency makes decision Minister has input	At the agency’s discretion when it is reasonably necessary	Extension of timeframe for purpose of consultation permitted	Sections 15(5) and 15A OIA
<b>Notification of the decision</b>	Agency makes decision Minister has no input	At the agency’s discretion when it is reasonably necessary	Extension of timeframe for the purpose of notification not permitted	‘No surprises’ principle— paragraph 3.22(a) Cabinet Manual

## Transfer

Transfer is the mechanism for shifting responsibility for decision making on an OIA request to another agency, in this context, the Minister. The purpose of this mechanism is to ensure that the decision on release or withholding is made by the person or agency best placed to make that call.

### What the Act says

Section 14 of the OIA says an agency **must** transfer (all or part of) a request if the information to which it relates:

- is not held by the agency, but is believed by the person dealing with the request to be held by another agency; or
- is believed by the person dealing with the request to be more closely connected with the functions of another agency.

This is not a discretion, but an **obligation** in the event that either or both of these scenarios apply. The first scenario tends to be straightforward and uncontroversial. It is easily assessed on the facts of the case—*‘we don’t hold it, but the Minister does, so transfer’*. This guide focuses on the second scenario.

### Is the information more closely connected with the Minister’s functions?

In order to decide whether information is more closely connected with a Minister’s functions, agencies should consider:

- the specific information at issue; and
- the functions of Ministers.

The decision whether or not to transfer should be made in consultation with the Minister’s office, and records of the consultation should be kept.

If the agency decides the information is not more closely connected with the Minister’s functions, it must retain responsibility for deciding on the request. However, it can consider other mechanisms for addressing the Minister’s interests, like [consultation](#) or [notification of the decision](#).

### The specific information at issue

The obligation to transfer rests on an assessment of *‘the information to which the request relates’*,<sup>10</sup> not the identity of the requester, the degree of controversy or sensitivity, or any other factor.

It is therefore a judgment to be made in each case depending on the **specific information at issue**. The OIA does not support a blanket policy of transferring all requests from a particular

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<sup>10</sup> See s 14(b) OIA.



source, for example, media requests (see case [169156](#)), or all requests about a particular subject (see case [W51428](#)).

The need for transfer depends on the belief of the person dealing with the request. While this is a subjective test, there should be a **reasonable basis** for the belief that information is more closely connected with a Minister's functions.

### The functions of Ministers

Guidance on the functions of Ministers can be drawn from the Cabinet Manual. Paragraph 2.22 of the Cabinet Manual states that Ministers:

- take significant decisions and determine government policy collectively, through the Cabinet decision making process;
- exercise statutory functions and powers under legislation within their portfolios, within the collective Cabinet decision making context;
- determine both the policy direction and the priorities for their departments; and
- have a political role in maintaining government stability, which requires maintaining close working relationships with all other parties as issues arise.

Paragraph 3.7 of the Cabinet Manual states:

*Ministers decide both the direction of and the priorities for their departments. They are generally not involved in their departments' day-to-day operations. In general terms, Ministers are responsible for determining and promoting policy, defending policy decisions, and answering in the House on both policy and operational matters.*

In contrast, officials are responsible for:

- a. supporting Ministers in carrying out their ministerial functions;*
- b. serving the aims and objectives of Ministers by developing and implementing policy and strategy; and*
- c. implementing the decisions of the government of the day.*

Section 32 of the State Sector Act 1988 provides that chief executives of departments are responsible to the appropriate Minister for:

- the stewardship of the department, including its medium and long-term sustainability, organisational health, capability, and capacity to offer free and frank advice to successive governments;
- the stewardship of departmental assets and liabilities;
- the legislation administered by the department;

- performing functions and duties and exercising powers imposed on the chief executive or department by legislation or government policy;
- the tendering of free and frank advice to Ministers;
- the integrity and conduct of employees; and
- the efficient and economical delivery of goods or services provided by the department.

Section 33 of that Act further provides that in relation to decisions on individual employees, chief executives must act independently.

Section 34 of the Public Finance Act 1989 provides that chief executives of departments are responsible for the financial management and performance of their departments.

The different functions of Ministers and departments are summarised in the table below.

Minister's functions	Department's functions
Determining and deciding policy through the Cabinet decision making process (see <a href="#">Policy making and implementation</a> below)	Developing policy and strategy and providing advice to Ministers on which policies to adopt  Implementing already-determined policies (see <a href="#">Policy making and implementation</a> below)
Exercising functions and powers given to the Minister by statute (unless delegated by the Minister)	Exercising functions and powers given to the department or chief executive by legislation or government policy, or delegated by the Minister
Maintaining government stability, including relationships with other political parties	Overall stewardship and day-to-day operations of the department, including: <ul style="list-style-type: none"> <li>• financial management and performance of the department; and</li> <li>• appointing, managing, or disciplining staff</li> </ul>

### Policy making and implementation

The above guidance suggests that a distinction can be drawn between policy making, which is the preserve of the Minister, and policy implementation, which is the role of the department. (Note, this is a rough distinction only. Policy advice and implementation is an iterative process. It is possible that further advice will be sought during the implementation phase).

Accordingly, if information relates to a live issue or policy that is making its way through the executive government decision making process, and release of that information could prejudice the Minister's or Cabinet's decision making function, including relationships and negotiations with other political parties, then transfer to the Minister may be required (see case [W51841](#)). Such information may include Cabinet papers and ministerial briefings, as well as internal agency documents that are closely connected to the advice to Cabinet or the Minister.

This idea was summarised well in *Free and Frank: Making the Official Information Act 1982 work better*:<sup>11</sup>

*In general terms, for policy issues working their way through the Cabinet decision-making system, core constitutional and state sector principles would suggest that the minister should be the final decision-maker. This responsibility is obvious for Cabinet papers, which the minister signs and 'owns' even if the department has prepared the paper. Each one is the minister's paper and the factors relevant to its potential release are likely to be concerned with its status in and around the process of Cabinet decision-making and political negotiation... Those arguments are likely to be equally true for documents or information created as part of the process immediately before or after the Cabinet paper or closely connected with it. To the extent that the papers are part of a policy process that ministers are directing and that is feeding into the Cabinet system, ministers can legitimately be seen as best placed to make the necessary judgments about release.*

### How to do the transfer

General guidance about transferring requests (including template transfer letters) is available in our guide [The OIA for Ministers and agencies](#). However, there are some particular points to note when transferring requests to a Minister.

Requesters can be suspicious of an agency's motives in transferring a request to a Minister. Often they have made a conscious choice to make their request to the agency because they specifically want the information held by the agency, not the Minister. If agencies take the time up-front to explain why it is necessary to transfer, and try to minimise any perceived disadvantage to the requester arising from the transfer, then a requester is less likely to complain to the Ombudsman.

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<sup>11</sup> White, N. *Free and Frank: Making the Official Information Act 1982 work better*. Wellington: Institute of Policy Studies (2007) at 265-6.

## **Do it early, and within the statutory time frame**

The OIA requires transfers to be done promptly and within 10 working days (unless extended). Once a request is transferred, the working day count for responding to it starts afresh from the day after the transfer is received. Therefore transfer means a requester will face a delay of up to an additional 10 working days (or longer if an extension is made). To try and minimise any disadvantage to the requester, agencies should put in place policies and procedures that enable the early identification of requests requiring transfer to the Minister's office, especially requests that have been made on an urgent basis for valid reasons.

## **Transfer the information along with the request**

Requesters may be concerned that the transfer of their request will change or narrow the scope of the information at issue. To address this concern, agencies should identify all relevant information they hold and transfer that information to the Minister along with the request (at least to the extent that it is different from the information the Minister will hold). Agencies should explain to the requester when making the transfer that all relevant information held by the agency has been transferred along with the request, or that the information held by the agency is the same as the information held by the Minister.

## **Consultation**

Consultation is the mechanism that allows an agency to seek the Minister's input before making a decision on a request.

### **What the Act says**

The agency that receives a request must make the decision on it unless it is [transferred](#) in accordance with section 14 of the OIA.<sup>12</sup> The Act is explicit about this when it comes to departments.<sup>13</sup>

However, it is lawful for an agency to consult others before making a decision on a request.<sup>14</sup> Again, when it comes to departments, the OIA makes it explicit that they are permitted to consult Ministers or others before making the decision on a request for official information.<sup>15</sup>

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<sup>12</sup> See s 15(1) OIA.

<sup>13</sup> See s 15(4) of the OIA, which says that where a request is made or transferred to a department, the decision on that request must be made by the chief executive or their authorised delegate, unless it is transferred to another agency in accordance with s 14.

<sup>14</sup> This is implicit in s 15A of the OIA, which permits extension of the maximum statutory time frame for response, if consultations necessary to make a proper decision on the request cannot reasonably be made within that time frame.

<sup>15</sup> See s 15(5) of the OIA which says that nothing in s 15(4) prevents a department from consulting a Minister or any other person on the decision it proposes to make on an official information request.

## Consultation is a discretion

Unlike transfer, consultation is a **discretion** not an obligation, and like any discretion it must be exercised reasonably. Consultation is appropriate when an agency **needs the Minister's input** in order to make a proper decision on a request. This is a judgment to be made in the circumstances of each case. It will not be reasonable to consult a Minister on all OIA requests—or all OIA requests from a particular source, or on a particular subject—according to a blanket policy (see case [167229](#) below). This may be unnecessary, and undermine the ability of the OIA to provide timely access to official information.

## When to consider consulting a Minister

It is reasonable to consult a Minister when an agency is contemplating release of official information that could reasonably be expected to be of concern to the Minister because, for example:

- they supplied the information;
- it is about their functions or activities; or
- release could affect their functions or activities or legitimate interests.

Consultation may not be necessary where an agency has already reached a clear view that the requested information should be withheld.

## How to consult a Minister

Agencies should put in place clear and efficient processes for ministerial consultation.

One method is to provide the Minister with the request, the information at issue, and the decision the agency proposes to take. The Minister's office can then be afforded a reasonable period of time within which to provide [appropriate input](#) in relation to the proposed decision, after which the agency may proceed to make a decision. It should be made clear to all involved that the agency may proceed to make a decision if no input is received within the agreed period.

Consultation arrangements should be configured in such a way that the agency is generally able to meet its requirement to make and communicate the decision on a request within the maximum 20 working days. Accordingly, agencies should endeavour to provide the necessary information to the Minister's office well before the maximum 20 working days expire (preferably before the 10<sup>th</sup> to 15<sup>th</sup> working day).

Agencies are permitted to extend the maximum 20 working day time frame for making and communicating the decision on a request in order to complete necessary consultations. However, extensions should be the exception not the rule.

## What is appropriate ministerial input?

In the absence of a transfer, the final decision on a request for official information rests with the agency. As the authors of *Freedom of Information in New Zealand* note, ‘*administrative law principles require that a decision-maker must exercise the [OIA’s] duty to decide **free from dictation or other improper influence from other persons***’ (emphasis added).<sup>16</sup>

Appropriate ministerial input is aimed at helping the agency to make a **proper** decision on the request for official information. It includes comments and suggestions regarding:

- the proper application of the withholding grounds and the public interest test;
- the release of additional information that the agency may not be aware of, including explanatory material to place the information that is being released in its proper context; and
- the proactive release of the same information to others, provided there is no undue delay in providing that information to the requester (see case [173562](#) below).

Inappropriate input can include raising irrelevant considerations (like political embarrassment) or asking or instructing others to:

- withhold official information without any proper statutory basis (for example, just because a document is a ‘*draft*’);
- delay the release of official information without any proper statutory basis; or
- act in some other way that is known to be contrary to the requirements of the OIA (for example, releasing information to others before releasing it to the requester).<sup>17</sup>

## How to deal with ministerial input

Ministerial consultation on an OIA request is just like any consultation process. According to clearly established legal principles,<sup>18</sup> consultation is the statement of a proposal not yet fully decided on. It involves listening to what others have to say, considering their responses, and then deciding what will be done. Consultation is not ‘*negotiation*’, which implies that the parties must eventually reach agreement. Consultation can occur without those being consulted agreeing with the outcome.

In this context, therefore, an agency must consider the Minister’s input 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. If there is a disagreement between the agency and the Minister about the proposed decision, this should be handled at a suitably

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<sup>16</sup> Eagles, I, Taggart, M, and Liddell, G. *Freedom of Information in New Zealand*. Oxford: Oxford University Press, 1992 at 79.

<sup>17</sup> This may constitute ‘*undue delay*’ in release of official information, which is deemed to be a refusal of the request under section 28(5)—see case [173562](#).

<sup>18</sup> See *Wellington International Airport v Air New Zealand* [1993] 1 NZLR 671 at 675.

senior level on both sides, but the decision ultimately rests with the agency.

Disagreement may be a flag to consider whether the request is in fact required to be [transferred](#) to the Minister, on the basis that the requested information is more closely connected with their functions. However, disagreement is not, in itself, a reason to transfer. The person dealing with the request must have a genuine and reasonable belief that the information is more closely connected with the Minister's functions before transfer can legitimately occur.

Ministers and agencies should keep full and accurate records of consultations in relation to OIA requests, in accordance with normal prudent business practice, as required by [section 17\(1\)](#) of the Public Records Act 2005.

## Notification of the decision

Notification means letting the Minister know about the decision an agency has taken on a request and will be communicating to the requester. The purpose of notifying **decisions** is to enable the Minister to prepare for the possibility of public or political commentary. This is part of the effective operation of the convention of [individual ministerial responsibility](#).

### What the Act says

The practice of notification is not provided for in the OIA. It has evolved out of the 'no surprises' principle. The 'no surprises' principle means that agencies:<sup>19</sup>

*...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.*

While not expressly provided for in the OIA, notification is permissible provided it **does not interfere** with an agency's ability to comply with its statutory obligations:

- to make the decision on a request for official information itself,<sup>20</sup> 'free from dictation or other improper influence';<sup>21</sup>
- to communicate that decision to the requester 'as soon as reasonably practicable' and no later than 20 working days after the request was received (unless extended);<sup>22</sup> and
- to release official information without 'undue delay'.<sup>23</sup>

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<sup>19</sup> Above [note 2](#) at paragraph 3.16(a).

<sup>20</sup> See ss 15(1) and 15(4) OIA.

<sup>21</sup> Above [note 15](#), at 79.

<sup>22</sup> See s 15(1) OIA.

<sup>23</sup> See s 28(5) OIA.

## When to notify

Ministers and agencies should agree on open and transparent criteria for when decisions will be notified to the Minister. Agencies should consider publishing these criteria on their websites in the interests of transparency.

It is reasonable for agencies to notify the Minister of any decisions to release or withhold official information, where there is a possibility that the Minister will need to prepare for the possibility of public or political commentary. This may include decisions in relation to official information that is:

- sensitive or controversial in nature; and/or
- likely to be published in the [news media](#) or debated in the House.

## How to notify

Decisions may be notified by providing the Minister with a copy of the decision and (if necessary) the information at issue.

Decisions are notified in this way for the Minister's **information only**, so that they may prepare for the possibility of public or political commentary. Agencies should make it clear when notifying decisions that the information is provided for the Minister's information only. If the Minister's input is needed, agencies should consider [consultation](#). If the Minister needs to make the decision on a request, agencies should consider [transfer](#).

Notification of decisions is **not** about seeking clearance, approval or sign-off from the Minister. In the absence of a transfer, the decision on a request for official information is the agency's to make,<sup>24</sup> 'free from dictation or other improper influence'.<sup>25</sup> The Ombudsman has previously commented that:<sup>26</sup>

*Seeking clearance or approval from a Minister on responses to requests for official information is an abdication of the agency's responsibilities and accountabilities under the OIA and would be in breach of section 15(4) [of the OIA].*

Where possible, decisions should be notified to the Minister at the same time as they are communicated to the requester. This is consistent with the statutory obligation to make and communicate the decision on the request as soon as reasonably practicable, and to release the information without undue delay.

In some cases a short period of advance notice, where the Minister is notified just before release, may be required to enable the Minister to be properly briefed so that they are able to respond appropriately to enquiries and legitimate scrutiny. However, the blanket application of

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<sup>24</sup> See ss 15(1) and 15(4) OIA.

<sup>25</sup> Above [note 15](#).

<sup>26</sup> Chief Ombudsman Dame Beverley A Wakem. [Not a game of hide and seek: 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) at 113.



a standard 3–5 working day period of notice is likely to be considered unreasonable by an Ombudsman, unless it can be justified in the particular circumstances by an agency. Agencies should keep adequate records and be prepared to justify the need for, and period of, advance notice in each case.

In [case 570702 below](#), the Ombudsman highlighted that agencies cannot take a blanket approach to ministerial notifications. In this case, the Police did not demonstrate that a 72-hour notice period was necessary in order for the Minister to prepare for enquiries and scrutiny. The Ombudsman formed the final opinion that Police failed to give notice of its decision on the request to the requester as soon as reasonably practicable.

Agencies should note that extensions are only permitted for [consultation](#), not for the notification of decisions.

It is also worth noting that there is nothing to prevent agencies from keeping the relevant Minister updated throughout the processing of the request as to the nature of the information at issue and the likely decision to be taken. This should minimise the possibility of delay at the end of the process.

## What kinds of complaints can the Ombudsman investigate?

The following types of Ombudsman investigations are particularly relevant in this context.

Under the OIA, the Ombudsman can investigate complaints about:

- decisions to extend the statutory timeframe for response to enable necessary consultations to be completed;<sup>27</sup>
- delays in making and communicating the decision on a request for official information (not doing it *'as soon as reasonably practicable'* or not doing it within the statutory or extended time frame);<sup>28</sup> and
- *'undue delay'* in releasing official information.<sup>29</sup>

Under the Ombudsmen Act, the Ombudsman can investigate administrative acts or omissions related to the general processing of a request for official information, including the transfer of an official information request. This is provided the agency in question is subject to the OA.<sup>30</sup>

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<sup>27</sup> See s 28(2) OIA.

<sup>28</sup> See s 28(4) OIA.

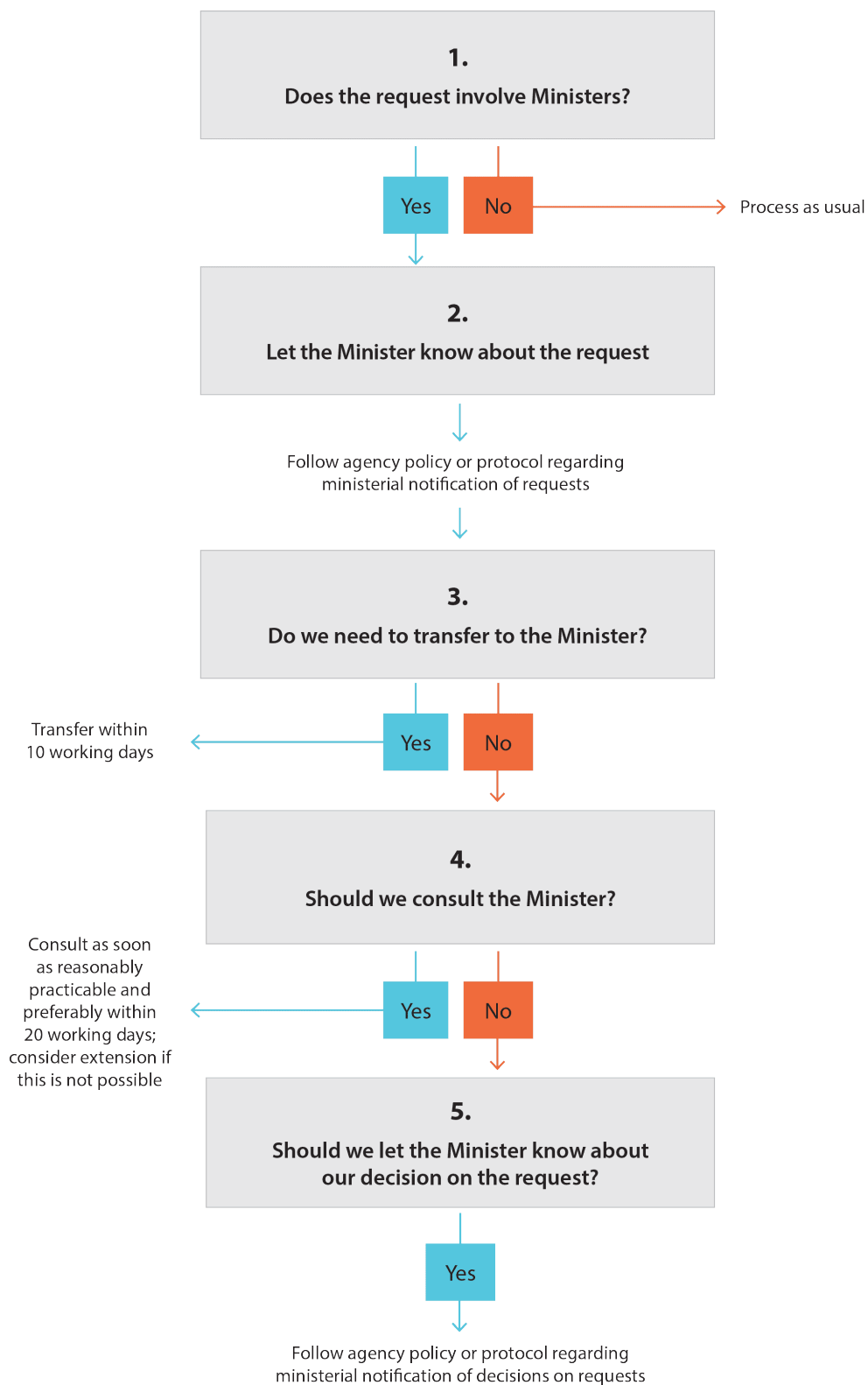
<sup>29</sup> See s 28(5) OIA.

<sup>30</sup> See [Schedule 1](#) of the OA for a list of the agencies subject to that Act. Ministers are not subject to the OA.

## Further guidance

General guidance on consultation and transfer of OIA requests, as well as template transfer letters, are available in our guide [The OIA for Ministers and agencies](#). You can also contact our staff with any queries about the transfer, consultation or notification of OIA decisions involving Ministers, by email [info@ombudsman.parliament.nz](mailto:info@ombudsman.parliament.nz) or freephone 0800 802 602. Do so as early as possible to ensure we can answer your queries without delaying your response to a request for official information.

## Appendix 1. Flow chart



## Appendix 2. Step-by-step work sheet

<p><b>1. Does the request involve a Minister's interests?</b></p> <p>Relevant part of guide: <a href="#">Identifying OIA requests involving Ministers</a></p>	<ul style="list-style-type: none"> <li>• Decide whether the request involves a Minister's interests.</li> <li>• Consider whether the requested information: <ul style="list-style-type: none"> <li>- relates to the Minister's functions or activities;</li> <li>- could impact on the Minister's functions or activities;</li> <li>- was generated by or on behalf of the Minister;</li> <li>- is sensitive or controversial; or</li> <li>- is likely to be published in the <a href="#">news media</a> or debated in the House.</li> </ul> </li> <li>• If the request involves a Minister's interests, go to step 2.</li> </ul>
<p><b>2. Let the Minister know about the request</b></p> <p>Relevant part of guide: <a href="#">Notifying the Minister of the request</a></p>	<ul style="list-style-type: none"> <li>• Let the Minister know about the request, in accordance with the agency's policies or protocols for doing so.</li> <li>• The purpose of doing this is to enable discussion to take place about the appropriate mechanism for addressing the Minister's interests, if necessary: transfer, consultation or notification of the decision.</li> </ul>
<p><b>3. Do we need to transfer to the Minister?</b></p> <p>Relevant part of guide: <a href="#">Transfer</a></p>	<ul style="list-style-type: none"> <li>• Consider the specific information at issue and the <a href="#">functions of Ministers</a>, and discuss with the Minister's office.</li> <li>• Decide whether the information at issue is more closely connected with the Minister's functions.</li> <li>• If it is, transfer the request. Do it early (and within 10 working days), and include a copy of the information held by the agency if it is different to the information held by the Minister.</li> <li>• If it isn't, retain the request, and go to step 4.</li> </ul>

<p><b>4. Should we consult the Minister?</b></p> <p>Relevant part of guide: <a href="#">Consultation</a></p>	<ul style="list-style-type: none"> <li>• Consider whether the agency needs the Minister’s input before making a decision on the request.</li> <li>• Is the agency contemplating release of official information that could reasonably be expected to be of concern to the Minister because, for example: <ul style="list-style-type: none"> <li>- they supplied the information;</li> <li>- it is about their functions or activities; or</li> <li>- release could affect their functions, activities or legitimate interests.</li> </ul> </li> <li>• If the agency does need the Minister’s input before making a decision on the request, consult the Minister as soon as reasonably practicable and within 20 working days.</li> <li>• If the agency doesn’t need the Minister’s input before making a decision on the request, go to step 5.</li> </ul>
<p><b>5. Should we let the Minister know about our decision on the request?</b></p> <p>Relevant part of guide: <a href="#">Notification of the decision</a></p>	<ul style="list-style-type: none"> <li>• Consider whether the agency needs to let the Minister know about the decision.</li> <li>• The purpose of doing this is to enable the Minister to prepare for the possibility of public or political commentary.</li> <li>• This may be necessary where the information is: <ul style="list-style-type: none"> <li>- sensitive or controversial; or</li> <li>- likely to be published in the <a href="#">news media</a> or debated in the House.</li> </ul> </li> <li>• Provide a copy of the decision and (if necessary) the information at issue.</li> <li>• This should be done at the same time as the decision is communicated to the requester, except where it is necessary, in the circumstances of the particular case, to provide a short period of advance notice to enable the Minister to be properly briefed just before release to the requester, so they are able to respond appropriately to enquiries and legitimate scrutiny. In any such case record the reasons why advance notice is necessary, and the period of advance notice agreed.</li> <li>• Ministers can be kept updated throughout the processing of the request as to the nature of the information at issue and likely decision to be taken.</li> </ul>

## Appendix 3. Case studies

These case studies are published under the authority of the [Ombudsmen Rules 1989](#). They set out an Ombudsman’s view on the facts of a particular case. They should not be taken as establishing any legal precedent that would bind an Ombudsman in future.

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Case number	Year	Subject
570702		<p><a href="#">Ministerial notifications and the obligation to communicate decisions ‘as soon as reasonably practicable’</a></p> <p><i>Blanket policy to allow 3-day period for High Organisational Impact ministerial notifications not consistent with statutory obligation to respond as soon as reasonably practicable – Three day period for the minister to be adequately prepared for enquiries unnecessary in the particular case</i></p>
169156	2004	<p><a href="#">Unreasonable transfer to Minister</a></p> <p><i>Requested information not more closely connected with the Minister’s functions—Blanket policy to transfer all media requests to Minister unlawful</i></p>
W51428	2004	<p><a href="#">Unreasonable transfer to Minister</a></p> <p><i>Requested information not more closely connected with the Minister’s functions—Blanket policy to transfer all OIA requests on a particular subject to the Minister unlawful</i></p>
W51841	2004	<p><a href="#">Reasonable transfer to Minister</a></p> <p><i>Information relating to ongoing executive government decision making and legislative process more closely connected with the Minister’s functions</i></p>
167229	2003	<p><a href="#">Consultation and notification</a></p> <p><i>Blanket policy to consult Minister on all OIA requests unlawful—Ministerial ‘clearance’ or ‘approval’ of agency OIA requests not permitted</i></p>
173562	2006	<p><a href="#">Release to others before the requester</a></p> <p><i>Release of information to others before the requester constituted undue delay</i></p>

#### Case 570702 (2022) – Ministerial notifications

The requester asked for information about Police’s ‘consent to assume online identity’ process, after the issue had been the subject of media reporting. Police communicated its decision to the requester on the 20<sup>th</sup> working day after receiving it. However, the date on the response letter was day four of the 20-working day period.

The Ombudsman established that Police had been in a position to communicate its decision to the requester on day 16 of the 20-working day period. However, the Minister was notified of the request in accordance with a standard ‘72-hour ‘no surprises’ Ministerial notification period’ for all requests marked as High Organisational Impact. Police then communicated its decision to the requester on day 20, having received no comment from the Minister’s office.

The Ombudsman accepted that ministerial notification may have been appropriate in this case. However, as the Minister would not have needed to spend significant time to be properly briefed on the matter, the 72-hour notification period was not necessary. The Ombudsman highlighted that agencies should assess what period of notification is appropriate on the facts in each particular case, rather than apply a blanket approach to all notifications.

Ministerial notification is acceptable providing it does not interfere with an agency’s ability to comply with the statutory obligation to make and communicate a decision on the request ‘as soon as reasonably practicable’.

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### Case 169156 (2004)—Unreasonable transfer to Minister

A communications consultant requested information about certain private individuals and organisations from the Ministry of Education. He sought information ‘held by [the chief executive] or officials’ about those individuals and organisations, and correspondence between ‘[the chief executive] and officials’ and those individuals and organisations, including information about contracts between the Ministry and those organisations. The request was transferred to the Minister of Education on the basis that the information was more closely connected with his functions, and the requester complained to the Ombudsman. The Ombudsman investigated the complaint under the Ombudsmen Act 1975 (OA).<sup>31</sup>

In the course of the Ombudsman’s investigation, the Ministry explained that:

*Ministerial Unit practice, based on a past directive from the Minister’s office, has been to transfer all [OIA] requests made by members of the media to the Minister’s office.*

The Ombudsman stated the fact that an official information request has been made by a member of the media does not, in itself, provide grounds to transfer that request under section 14 of the OIA. The Ombudsman considered the wording of the request, and concluded there was no reasonable basis for the Ministry’s view that the information was more closely connected with the Minister’s functions. The Ministry confirmed that it had revised its processes for transferring requests to the Minister in line with the Ombudsman’s opinion. This case prompted the Ombudsman to comment in our annual report for 2003/04 that ‘...blanket policy decisions of this kind cannot be justified in terms

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<sup>31</sup> The Ombudsman has no function to investigate complaints about the transfer of requests for official information under the OIA. However, such complaints may be investigated under the OA, provided the agency is subject to that Act. See [What kinds of complaints can the Ombudsman investigate?](#)

*of the OIA. The Act obliges an agency to consider each case separately on its own merits’.*

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### Case W51428 (2004)—Unreasonable transfer to Minister

A requester sought information about a training centre in receivership from the Tertiary Education Commission. The request was transferred to the Associate Minister of Education in order to *‘gain the appropriate and necessary authorisations’*. The requester complained to the Ombudsman, who investigated the complaint under the OA.<sup>32</sup> The Ombudsman sought a copy of the information at issue, and a report explaining the reasons for the transfer. He noted that the OIA cannot support any notion of transferring official information requests in order to *‘gain the appropriate and necessary authorisations’* from a Minister.

The Commission advised that, at the time of the request, there was a large amount of interest in and discussion about the training centre, both within the tertiary education sector and the media. The complainant’s request was one of a number that had been received by the Commission and the Associate Minister. Given the sensitivity of the issue at the time, the Commission advised the Ombudsman that the Associate Minister wanted to ensure all requests for information were dealt with consistently. His office had therefore instructed that all OIA requests about the training centre which were received by the Commission around the time of the receivership should be transferred to him.

The Ombudsman noted that section 14 of the OIA does not allow requests to be transferred under a blanket policy simply because the requests are for similar information or information on a particular matter. Nor does it allow a request to be transferred just because the information requested is politically sensitive, or because it is one of a number of broadly-similar requests requiring coordination.

Section 14 requires an agency to consider each request for official information separately and on its own merits, identifying the **specific information requested** and making a decision on the particular request. The Ombudsman also noted that it took the Associate Minister 49 working days to respond to the request, despite there being no concerns about release of the information. The transfer of this request pursuant to a blanket policy had therefore resulted in the response being unnecessarily delayed.

The Commission then explained to the Ombudsman that it was in dispute with the training centre about money owing, and the Crown was therefore also concerned not to prejudice its position in respect of any future legal action for the recovery of that money. Given the potential risk to the Crown, the Associate Minister was of the view that he should manage the release of the information that had been requested.

The Ombudsman noted that a Minister’s functions include overseeing and managing the Crown’s interest in Crown entities within their portfolio. He agreed that information may

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<sup>32</sup> See above note 32.



be more closely connected with a Minister's functions where release could be expected to prejudice the Crown's interest in a Crown entity like the Commission. However, the information at issue in this case related strictly to the operational functions of the Commission. He was unable to see how this kind of operational information raised issues of *'possible risk to the Crown'*.

The Ombudsman formed the opinion that the transfer in this case was unreasonable, and recommended that the Commission amend its practice. The Commission confirmed that the necessary steps had been taken to amend its practice of transferring requests to the Minister. You can read the full case note on our website.<sup>33</sup>

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### Case W51841 (2004)—Reasonable transfer to Minister

A requester sought copies of all reports, memos, advice and other policy work produced by the Ministry of Justice arising out of Cabinet's decision in principle that neutral laws on relationships whether married, de facto or same sex, should be applied across the board (CAB Min (01) 27/14).

The request was transferred to the Associate Minister of Justice (who had been delegated responsibility for performing functions that would otherwise have been performed by the Minister), and the requester complained to the Ombudsman. The requester accepted that ministerial briefings might justifiably have been transferred, but could not see how internal Ministry documents would be more closely connected with the functions of the Associate Minister.

The Chief Ombudsman considered the functions of Ministers and departments. He commented that information relating to *'policy decisions'* will be more closely connected with the functions of a Minister, and information relating to *'policy advice and implementation'* will be more closely connected with the functions of a department. While in theory, this division appears clear, in practice, it may be more difficult to draw.

In general, however, the recipient of a request should transfer that request to a Minister if the information at issue relates to the Minister's (or Cabinet's) decision making function, and release of the information could prejudice the Minister's ability to perform that function. Where no possible prejudice to a Minister's decision making function could result, the recipient of the request should retain responsibility for deciding it. The question, therefore, was whether one could reasonably conclude that release of the information at issue in this case would impair the Associate Minister's decision making process.

The Chief Ombudsman then considered the information at issue, which included briefings and Cabinet papers seeking Ministerial or Cabinet decisions on policy direction. While Cabinet decisions on policy had been made at several stages in the development of

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<sup>33</sup> Search for 'W51428' using our online library [Liberty](#).

the legislation, those decisions were not severable from the overall, ongoing policy and legislative process. At the time of the request, the Ministry could reasonably conclude that release of the information would prejudice the ability of the government to reach internal agreement and obtain coalition party support for the legislation. As decision maker and public advocate for the legislation, the Associate Minister was in the best position to decide on the request.

The Chief Ombudsman did not accept that ministerial briefings could have been separated from internal Ministry documents for the purposes of the transfer. Internal work formed the basis of the Ministerial briefings, and had the end goal of obtaining Ministerial and Cabinet decisions on policy direction.

In the Chief Ombudsman's opinion, the Ministry's decision to transfer the request to the Associate Minister was reasonable in all the circumstances. You can read the full case note on our website.<sup>34</sup>

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### Case 167229 etc (2003)—Consultation and notification

An opposition researcher made a number of complaints about delays by Te Puni Kōkiri (TPK) in responding to requests for official information. During the Ombudsman's investigation of these complaints, it became clear that the delays were in part caused by an instruction that all OIA requests received by TPK should be referred to the Minister of Maori Affairs for his '*information and clearance*'. The Chief Executive confirmed:

*[T]hat this is a procedure which the Ministry has followed for several years. Initially, it was in the case of highly political or sensitive requests that were being made, but then it became the practice to forward on all responses.*

The Ombudsman wrote to the Minister of Maori Affairs to explain that this practice is not contemplated by the OIA. The need for a department to consult with other parties is acknowledged by the Act (section 15(5)) in order that it may make a fully informed decision on the request. However consultations should be conducted promptly, and within the timelines set by the Act, to avoid unnecessary delays in responding to a request.

Moreover, section 15(4) of the OIA requires the final decision on the request to be made by the department unless the request is transferred in accordance with the Act. The '*clearance*' process of the kind referred to by the Ministry did not accord with section 15(4).

A practice whereby every OIA request received by the Ministry is referred to the Minister cannot be justified in terms of the Act. It is sometimes appropriate for individual requests to be the subject of consultation with the relevant Minister, but the need for consultation should be decided on a '*case by case*' basis, rather than pursuant to a

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<sup>34</sup> Search for 'W51841' using our online library [Liberty](#).

general policy.

In response, the Minister agreed to amend the practice and advised that TPK would now only be required to inform the Minister of all requests received. He would not need to see the information in each case.

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### Case 173562 (2006)—Release to others before the requester

An MP requested information from the Minister for Economic Development relating to a conference. She received the information relevant to her request on the same day as a newspaper. Believing this would have required the information to be couriered to the newspaper the day before it was provided to her, she complained to the Ombudsman.

The Chief Ombudsman notified the Minister of the MP's complaint and asked him to explain what had happened. The Minister explained that the information was released to the newspaper because of considerable public interest in the conference. He confirmed it had been couriered to the newspaper the day before it was hand-delivered to the MP.

The Chief Ombudsman noted that official information must be released without '*undue delay*'. Section 28(5) of the OIA provides that '*undue delay*' in releasing official information is deemed to be a refusal of the request. The Chief Ombudsman formed the opinion that the delay in this case was '*undue*'. The information was ready and able to be dispatched to a courier the day before it was provided to the MP. It appeared the Minister had delayed releasing the information to the requester so that she would receive it at the same time as the newspaper.

The OIA does not allow agencies to delay the release of official information on these grounds. While a delay of one day might seem trivial, any acceptance that the OIA permitted such delays would inevitably lead to longer delays. The Chief Ombudsman could see no justification for the delay and the MP's complaint was upheld.

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