

Minister did not hold information on who wrote or compiled tobacco policy notes

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| Legislation | Official Information Act 1982, ss 18(g) and 28(6) |
| Agency | Associate Minister of Health |
| Ombudsman | Peter Boshier |
| Case number(s) | 009742 |
| Date | September 2024 |

Associate Minister of Health refused a request for information about who wrote or compiled notes the Minister provided to officials on tobacco policy – there was a basis for the Minister to refuse the request under section 18(g) of the OIA as the information was ‘not held’ – Chief Ombudsman notified Chief Archivist about lack of records – the Associate Minister’s failure to provide reasons for the decision to refuse the OIA request was contrary to law

Background

In February 2024, the Associate Minister of Health received a request for ‘who’ wrote or compiled notes on tobacco policy, which were subsequently provided by the Associate Minister to officials.

In March 2024, the Associate Minister’s office responded to the requester, refusing the request, but did not specifically refer to a withholding ground under the Official Information Act 1982 (OIA). The requester was advised that the matter had already been addressed in the Associate Minister’s response to written and oral parliamentary questions, available on Parliament’s website (and relevant hyperlinks were provided).

The requester complained to the Chief Ombudsman about the Associate Minister’s decision on their request for who wrote or compiled the notes.

Investigation

Following the commencement of the Ombudsman’s investigation, the Associate Minister acknowledged that the responses to written and oral parliamentary questions did not in fact

address the request. The Associate Minister also clarified that the request was refused under section 18(g) of the OIA, as the Associate Minister did not know ‘who’ wrote or collated the notes.

Section 18(g) of the OIA provides that a request may be refused if:

- the information requested is ‘not held’ by the Minister; and
- the Minister has no grounds for believing the information is held by or more closely connected with another agency subject to the OIA.¹

Before refusing a request under section 18(g), a Minister should make reasonable efforts to try to locate the information. A reasonable search should be thorough and follow all obvious lines of inquiry. If the information is not held, there is a reason to refuse the request under the OIA.

When refusing a request under section 18(g), a Minister should be able to explain:

- the steps taken to try to locate the information; and/or
- the reasons why the information is not held.

In the case of unwritten information, ‘held’ means that it is known to people within the agency or minister’s office (meaning that it is clear, certain or established), and able to be recalled.

The Associate Minister confirmed that the notes on tobacco policy were not written or collated by ministerial staff. The Associate Minister had confirmed with her ministerial staff that none of them had placed the notes on her desk. The Associate Minister also stated that she only ever received a hard copy of the document that had been placed on her desk, and she did not receive it by any other means (eg, email). The Associate Minister also advised that her staff told her they did not know who had authored the notes.

Regarding the possible origin of the document, the Associate Minister advised that she believed the notes were created by copying and pasting from a variety of sources over a significant period of time, prior to the formation of the Coalition Government. She believed that the likely source of the notes was a political party staff member or a volunteer. The information was subsequently used for ministerial purposes, so it is considered to be official information as defined by the Act.²

On balance, the Ombudsman was satisfied that the Associate Minister had made reasonable efforts to try to determine ‘who’ wrote or compiled the notes. However, the Ombudsman expressed concern about the lack of records or documentation in the Associate Minister’s office to confirm the provenance of the notes on tobacco policy.

With regard to the Associate Minister’s original decision as communicated to the requester, the Ombudsman also observed that it did not make reference to any OIA withholding ground. Section 19(a)(i) of the OIA requires that, where a request is refused, the agency or minister

¹ Or the Local Government Official Information and Meetings Act 1987.

² Official information does not include information held in a Ministers capacity as a member of a political party, unless the information is subsequently used for official Ministerial purposes.

must give *'the reason for its refusal'*. This means that they must refer to the particular section relied on under the OIA to refuse the request.

Outcome

The Ombudsman formed the opinion that the Associate Minister was entitled to refuse the request for 'who' wrote or compiled the notes provided by the Associate Minister to officials on tobacco policy, under section 18(g) of the OIA. This was on the basis that the information was 'not held' by the Associate Minister.

However, in light of the lack of records or documentation in the Associate Minister's office about the origins of the notes, the Ombudsman also decided to take the additional step of notifying the Chief Archivist of this matter.³

The Ombudsman also formed the opinion that the Associate Minister's failure to make reference to any OIA withholding ground in the original decision on the request, as required by section 19, was *'contrary to law'*.

The Ombudsman recommended that the Associate Minister review the handling of the request and take steps to address the identified deficiencies in the way the request was dealt with.

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³ See section 28(6) of the OIA.