



## Chief Ombudsman’s final opinion under the Official Information Act

<b>Legislation</b>	Official Information Act 1982, s 18(f) (see appendix for full text) Public Records Act 2005
<b>Agency</b>	Hon Shane Jones, Hon Simeon Brown and Hon Chris Bishop
<b>Request for Ombudsman</b>	Text messages, WhatsApp and Snapchat messages Peter Boshier
<b>Case number(s)</b>	CASE-011329, CASE-011326, CASE-011325
<b>Date</b>	21 November 2024

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## Summary

The complainant made requests to:

- Hon Shane Jones in his capacity as Minister for Oceans and Fisheries, Regional Development, and Resources;
- Hon Simeon Brown in his capacity as Minister for Energy, Auckland, Local Government and Transport;
- Hon Chris Bishop in his capacity as Minister for Infrastructure, Housing, RMA Reform and Sport and Recreation.

The complainant requested all text messages, WhatsApp and Snapchat messages sent and received within these roles relating to the period 20 March to 20 April 2024. It covered all devices and timestamps.

The complainant was happy for Ministers to remove phone numbers and all names/details of members of the public but he stated that for *'messages...to or from people with any role in the current Government or with relevant public departments at a minimum that role should be listed'*.

Where Ministers considered the messages to be out of scope, the complainant asked that an entry be included and the scope they are within stated.

Two of the Ministers, Hon Shane Jones and Hon Chris Bishop contacted the complainant before refusing the request. Minister Jones advised that the request was *'particularly broad and would require substantial collation and research'*. These Ministers asked the complainant to consider refining his request by either narrowing the timeframe or specifying particular information. Mr Jones advised that depending upon the response; he might extend the timeframe for processing the request and/or consider refusing the request under section 18(f) of the Official Information Act 1982 (OIA). Minister Bishop similarly noted that the request as worded would require substantial collation or research and recommended narrowing the scope of the request.

The complainant did not agree that a refusal under section 18(f) was justified and declined to refine his request.

All three Ministers ultimately refused the request under section 18(f) *'as the information requested cannot be made available without substantial collation or research'*.

Based on the information before me, I have formed a final opinion that it was open to the Ministers to refuse the requests, as worded, under section 18(f) as the requested information for the portfolios and time period specified could not be made available without substantial collation or research.

However, I am disappointed that Minister Jones and Minister Bishop's efforts to consult the complainant before relying on section 18(f) were not more fulsome. I am also disappointed that Minister Brown did not consult the complainant before refusing the request, in

circumstances where consultation could have enabled the complainant to make the request in a form that would remove the reason for the refusal. I consider these concerns resolved by all Ministers confirming to me that they remain open to discussing potential alternative approaches with the complainant to address his information requests should he so wish.

## Ombudsman's role

1. I am authorised to investigate and review, on complaint, any decision by which a Minister or agency subject to the OIA refuses to make official information available when requested. My role in undertaking an investigation is to form an independent opinion as to whether the request was properly refused under the OIA.

## Background

2. On 21 April 2024, the complainant asked Ministers Jones, Brown and Bishop for all text messages, WhatsApp and Snapchat messages sent and received in their ministerial capacities relating to the period 20 March to 20 April 2024.
3. Ministers Jones and Bishop consulted the complainant on 17 May and 24 April 2024 advising of a likely refusal under section 18(f).
4. Ministers Jones, Brown and Bishop refused the requests under section 18(f) on 21 May, 17 May and 15 May 2024 respectively.
5. The complainant made a complaint to me about these decisions on 15 and 21 May 2024.

## Investigation

6. On 14 June 2024, I made preliminary inquiries with the Ministers' offices about these requests; in particular, I sought to understand what would be involved in accessing the requested information. All Ministers had responded to my inquiries by 12 July 2024. I formally notified the Ministers of the complaints on 23 July 2024. I noted that the complaints raised important questions about the management of business conducted in a ministerial capacity via these messaging services.
7. I requested additional information about the decision making on the request including a sample of messages from the relevant period, the categories assigned to each of the messages and the time taken to identify the requested information from that sample. I requested information about the guidance the Ministers followed for the purposes of the records management of such messages, the resourcing available to process the requests, and the considerations given to other options for meeting the requests.
8. All Ministers had responded to my notification by 16 August 2024.

9. On 18 October 2024, I sent my provisional opinion to the Ministers for comment.
10. On 25 October 2024, Minister Brown's Office agreed that it should have consulted the complainant before refusing his request and that the Minister would apologise to the complainant.
11. On 30 October 2024, Minister Jones' Office acknowledged that during its consultation with the complainant it could have provided more detail on the complexity involved in responding to his request. The Office noted that it remained open to discussing potential alternative approaches with the complainant to address his information request should he so wish.
12. On 30 October 2024, I sent my provisional opinion to the complainant. He responded on the same day disagreeing that the task of identifying the requested information was substantial. He suggested that the requested information should be more readily accessible and the difficulty involved in meeting the request was due to administrative failings.
13. On 5 November 2024, I consulted the Chief Archivist. I asked for the Chief Archivist's views on the complaint from a record-keeping perspective and whether there was anything concerning from her perspective about the Ministers' responses to these requests. She advised me that she considered my provisional opinion was correct from a recordkeeping (Public Records Act 2005) perspective.

## Comments received from complainant when making complaint

14. The complainant considered that as his request covered a single month and a very small number of devices there would be little effort involved in locating the information. The complainant asked that I consider his complaint urgently as he considered there had been a lack of transparency and '*“backroom dealings” by members of the Fast-track Approvals group*'.

## Comments received from the Hon Shane Jones

15. The messages within the requested period are text messages. The Minister did not send or receive WhatsApp or Snapchat messages within the requested period.
16. The Minister follows the 2017 Guidance of the Department of Internal Affairs (2017 DIA Guidance) (Appendix 2) for record keeping in respect of the text messages. He routinely forwards text messages of consequence for capture in record keeping systems to ministerial staff in his office, departmental staff in the office, and or senior managers in departments, depending on the content and context of the message. The Minister

provided me with an example of a text message that he had forwarded to the Minister's Senior Private Secretary and Ministerial advisor.

17. The Minister counted the number of messages sent or received on his phone over five days. There were 182. The Minister therefore estimated that the request for a month's worth would involve manually reviewing 900–1,200 messages. It took a staff member 30 minutes to identify the portfolio capacity of a batch of 19 messages. The staff member had to discuss some of the messages with the Minister to determine their context.
18. The Minister provided me with a sample of 50 messages captured for the relevant period. The first nine pages were categorised by capacity. Only three emails/threads are official information relating to the Oceans and Fisheries portfolio.
19. To collate the requested messages, the Minister's Office would have to copy and paste the messages into a text document on the phone (with additional work to obtain the requested timestamp for each message). Alternatively, they would have to individually screenshot the messages and paste them into an electronic file.
20. There are four non-departmental staff in the Minister's office. The job of collating the information would fall on the Private Secretary (Advisory/Media) whose ordinary duties include facilitating responses to OIA requests. The Minister estimated that the task would likely require a week or more for one staff member to complete. While working on this request, the staff member would not be able to carry out most of their normal tasks.
21. The Minister did not consider there was any other means of managing this request that would alleviate the impact on his staff and his own time. The Minister had consulted the complainant noting that the request was broad and would require substantial collation and research. The Minister asked the complainant to refine the request by narrowing the timeframe or specifying particular information and noted that depending on the response he would either extend the timeframe for processing the request or consider refusing under section 18(f).

## Comments received from the Hon Simeon Brown

22. The Minister's use of messaging is overwhelmingly for '*transactional discussion*' such as coordinating meetings or sending/receiving situational updates. In relation to this specific request, the Minister used both text messaging and WhatsApp. The Minister does not use Snapchat in any capacity. Given the nature of his roles as Minister for four portfolios, Member of Parliament, member of a political party and as a private citizen, his communications on his mobile phone are extensive.
23. The Minister follows the 2017 DIA Guidance for record keeping in respect of the messages. The DIA guidance provides that messages should be retained which are of more than facilitative, transitory and/or short-term value.

24. Preliminary checks by the Minister indicated that there could be thousands of messages across the two platforms. The Minister received a considerable number of messages both direct and as part of several groups. In response to this complaint, the Minister took the time to review three communication threads in the requested period that he considered reflective of the broader nature of his communications over texts and WhatsApp. Reviewing these three communications, threads took over 45 minutes. The Minister provided me with the three threads and some examples of messages he had forwarded to staff.
25. The first thread was a media update group the Minister is part of on WhatsApp. In a five-day period, there were 99 messages. It took the Minister more than 30 minutes to review this thread. Of these messages, 17 relate to portfolios of which he is a Minister. A further 67 are of a parliamentary nature and the remaining 15 personal.
26. The second batch of messages was with his Senior Private Secretary. Of the nine texts: two are Ministerial, four are Parliamentary, and three are personal. This took several minutes to review.
27. The third batch of messages were with the Minister's National Party Electorate Chair. Almost all of the 22 messages are political in nature and the Minister needed to review these closely to establish that they were not parliamentary or ministerial. This also took several minutes to review.
28. The Minister's phone is a personal device used for personal as well as professional communications and he does not grant staff members access to his phone. The Minister himself conducts the searches for information that need to be undertaken. The Minister often receives OIA requests and written parliamentary questions concerning his text messages and he routinely releases messages in response to more precisely scoped requests, such as those specifying a particular sender or topic of interest. As an example, the Minister referred to written parliamentary question 9833 (2024).
29. If the Minister were to carry out the task of collating the information regarding a month's worth of messages it would likely take a week or more because he would need to review and evaluate every message sent/received over that time. Given the extensive time commitment required, the Minister did not consider that the request could be processed without impacting on his ministerial duties.
30. The Minister did not consult the complainant prior to refusing the request because *'given the broad scope and significant volume of communications involved, it was determined that a consultation would unlikely result in a meaningful reduction of the workload to a manageable level'*. The Minister remains open to discussing potential alternative approaches with the complainant to address his information needs in a more practical and manageable manner.

## Comments received from the Hon Chris Bishop

31. The Minister receives a considerable number of messages both direct and as part of several groups. The Minister looked at the number of notifications received across his text messages and Whatsapp over the course of a week. In a week, the Minister received 445 notifications from his text messages App, and 436 from his Whatsapp App. The Minister does not use snapchat in his official capacity. The Minister therefore estimated that in one week, he sends and receives roughly 1,300 text messages and Whatsapp messages. Extrapolating that out over four weeks that is about 5,200 messages captured by this request.
32. The Minister follows the 2017 DIA Guidance to manage his record keeping in respect of the messages.
33. Like Minister Brown, the Minister noted that his use of messaging is predominantly for *'transactional discussion'*.
34. The Minister provided me with the messages he received in one day in respect of one of his WhatsApp groups. These messages were what he received on this one WhatsApp thread in the morning of the first day of the period in question – roughly 40 messages. Compiling these messages and assessing each for portfolio relevance (10 relating to ministerial portfolios) took one staff member 35 minutes to assess.
35. At the time of the request, the Minister had only one Ministerial advisor to manage the request. However, due to the large scope of the request, it potentially captures personal family messages and therefore it is likely that the Minister would have to assess a large number of threads personally. The Minister does not routinely grant staff members access to his phone. *'Unlike my emails, where I conduct Ministerial business, and where my staff have full access - searches for information on my phone are conducted by myself.'*
36. The Minister emphasised that this request would possibly have been a manageable task had specific information been requested. However, as worded, the request would likely take more than four weeks, with the staff member undertaking this work unable to carry out their normal tasks, including responding to other OIA requests and correspondence. In terms of the impact on him (noting the extent of the searching and review required by him personally), the task would be *'intrusive and burdensome and contrary to good government'*.
37. The Minister had consulted the complainant, noting that the request captured a broad range of information and recommended narrowing the scope of the request by using a specific keyword (for example, specific agency, correspondence or meetings with a particular agency, stakeholder or organisation).
38. The Minister did not consider that extending the time limit for the request would have assisted in managing this request as *'extending even by 20 working days would not have given me and my office sufficient time to fully review every message on my phone'*.



## The legislation

### Section 18(f)

39. This section provides that a request may be refused if *'the information requested cannot be made available without substantial collation or research'*.
40. Section 18(f) is an administrative reason for refusal and may be used if the other mechanisms in the legislation do not provide a reasonable basis for managing an administratively challenging request.
41. As noted in the Ombudsman's guide to this section *'it is about the physical accessibility of the requested information'*. *'Research'* means finding the information and *'collation'* means bringing it together. These terms can encompass the following tasks: identifying the requested information; determining whether the requested information is held; searching for the requested information; retrieving the requested information; extracting the requested information; and assembling or compiling the requested information. These tasks may be considered *'substantial'* where they would have a significant and unreasonable impact on the agency's ability to carry out its other operations.
42. Time required to make a decision on withholding or release of information that has already been found and brought together is not a task that is relevant to the application of this section. If an agency's concern is about how much time it will take to assess the information for release, consult or redact information, there are other ways to manage those situations. In particular, there is the ability to extend the maximum timeframe for making a decision on the request or releasing the information in an alternative form where to do otherwise would *'impair efficient administration'*.<sup>1</sup>
43. In addition, reliance on section 18(f) is discretionary rather than mandatory, so an agency may still choose to release information even if it would require substantial collation or research. This will usually be in cases where the agency recognises that the information should be readily accessible, even though it is not, or because there is a clear and compelling public interest in release.
44. Before refusing a request on the grounds of substantial collation or research, agencies must consider whether charging or extending the timeframe for response would enable the request to be met. Agencies must also consider whether consulting with the person who made the request would enable them to make the request in a way that would not require substantial collation or research.
45. I note that in this case, the complainant asked the Ministers to identify where entries were out of scope and explain why. However, under the OIA, there is no requirement to

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<sup>1</sup> Section 16 of the OIA.

identify messages that are not *'official information'* and provide an explanation for their exclusion.

## Public Records Act 2005

46. The records requested by the complainant are public records under the Public Records Act 2005 (PRA). They were created or received in the Ministers' official capacity. Ministers are responsible for meeting the requirements of the PRA for the management of these records. In particular, Ministers must create and maintain full and accurate records of their affairs, in line with normal prudent business practice. The records must be maintained in an accessible form until their disposal is authorised.<sup>2</sup>
47. The 2017 DIA guidance is specific to text messages but is relevant to all messages of this ilk. It notes that many text messages Ministers create in their official capacity will be *'facilitative, transitory and/or short-term value'* and do not need retaining.<sup>3</sup> However, *'some text messages may require or initiate further action or are potentially of longer-term value'*.<sup>4</sup> In these cases, DIA advises Ministers that *'the text message may need to be sent on to someone else to action or to be retained for a period of time as evidence of a decision or a transaction'*.<sup>5</sup> Relevant questions when making decisions about retention are:
  - a. Does the information record a decision or action taken as Minister?
  - b. Does it affect the rights and entitlements of New Zealanders?
  - c. Will the information be needed by be Minister or others in the future?
  - d. Is it a copy of information received by others?

## Analysis and Findings

48. Naturally, the Ministers' phones contain a mixture of official information pertaining to their roles as Ministers and information that is not official information (relating to constituency or party political, MP, or private matters). The requirements of the PRA do not apply to the latter category of records and their disposal is at Ministers' discretion.
49. The Ministers' sampling exercises provide confirmation that the work involved in identifying, extracting and compiling the requested official information would have a significant and unreasonable impact on Ministers' ability to carry out their functions. The staffing resource available to each of the Ministers is small and removing a person

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<sup>2</sup> Section 17 of the PRA.

<sup>3</sup> Ministers can delete this information under General disposal authority 7.

<sup>4</sup> Disposal Authority DA719.

<sup>5</sup> Ministers can transfer these messages to support staff. The Minister may then delete the original text message.

from their duties to focus on this request for over a week would impact significantly on their ability to deal with other ministerial work. In addition, due to the quantity of non-official information held on Minister's phones, a large part of the processing of this request would fall on Ministers themselves. This request therefore qualifies as administratively challenging.

50. As Ministers have pointed out, it is the wide portfolio focus of this request combined with the time period which makes it problematic. Ministers need to review each message within the requested period to establish whether it is within scope and extract it. Text messages do not include metadata about the portfolio capacity in which a message is sent or received. This is different to other forms of ministerial information, such as departmental briefings, ministerial correspondence or cabinet papers which generally include metadata identifying the portfolio and are therefore searchable by portfolio. Had the complainant chosen to scope his request for text messages around particular topics of information or specific individuals or groups rather than by portfolio, the request may have been manageable with use of key words.
51. The fact that Ministers are able to search for information using key words and follow the 2017 DIA guidance on record keeping satisfies the public interest in official information held on Ministers' phones being readily accessible.
52. The Danks Committee was clear that a balance must be struck between the '*need for readier access*' to official information, and '*the price of that access*':<sup>6</sup>

*The granting of access to official information ... cannot be an absolute priority to which all other functions of administration must yield. Especially in times of financial and staff restraints on government activities, some limitation of the resources available for providing information to members of the public is inevitable.*
53. Before refusing a request under section 18(f), Ministers must consider the other options for managing a request.<sup>7</sup> The charging option is not generally of help in situations like this where the work needs to be done by a particular person whose diversion from other duties would have a substantial and unreasonable impact on the Minister's functions. Neither would an extension have assisted given the workload pressures of Ministers' offices. Two of the Ministers made the decision to consult the complainant and discuss refining the request. One Minister did not consult on the assumption that consultation was unlikely to assist in reducing the workload to a manageable level.
54. I am satisfied that the Ministers all considered the other options for managing a request, and it was therefore open to them to refuse the requests under section 18(f)

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<sup>6</sup> Committee on Official Information. *Towards Open Government: Supplementary Report*. (July 1981) at 31.

<sup>7</sup> Sections 18A and 18B of the OIA

on the basis that the information could not be made available without substantial collation or research.

55. However, while the duty in section 18B of the OIA is only to consider consulting, I generally expect agencies to make reasonable efforts to consult the person who made the request before relying on section 18(f).<sup>8</sup> In this case, although two Ministers consulted the complainant, I am disappointed that they merely advised that the request was broad and would require substantial collation and research. They asked the complainant to refine the request and suggested means to do this. However, they did not explain the volume and nature of the information that would need to be searched through, the likely time involved, why searching for portfolio information had to be done manually and the impact on the work of the Minister and their staff. In addition, Minister Brown did not consult the complainant at all in circumstances where I consider that could have enabled the complainant to make the request in a form that would remove the reason for the refusal.
56. The 2017 DIA Guidance advises Ministers that they can delete messages created or received in their official capacity where this is *'facilitative, transitory and/or short-term value'* or where retaining the message, transfer to support staff for saving in the relevant system. This guidance no doubt assists Ministers to avoid a build-up of official information on their phones that they are not required to retain and ensures that information which should be retained is recorded elsewhere and can be readily accessed.
57. Ministers indicated that the number of messages transferred in the relevant period would likely be small given that the vast majority of the messages are *'facilitative, transitory and/or short-term value'* and therefore not required to be maintained. It therefore appears that during consultation with the complainant, Ministers could have discussed the option of focusing on transferred information. The collation of that information could be achieved without trawling through the Minister's phone, but by asking all potential support staff to identify any of the Minister's forwarded messages for that period. This would have enabled the complainant to make the request in a form that would remove the reason for the refusal.

## Chief Ombudsman's final opinion

58. For the reasons set out above, I have formed the final opinion that it was open to the Ministers to refuse the requests, as worded, under section 18(f), as the requested

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<sup>8</sup> Under section 30(1)(b) of the OIA, I may form an opinion that the decision complained of was unreasonable, and this could include situations where a request is refused under section 18(f) without consultation having been undertaken or if the consultation undertaken was inadequate.

information for the portfolios and time period specified could not be made available without substantial collation or research.

59. However, I am disappointed that Minister Jones' and Minister Bishop's efforts to consult the complainant before relying on section 18(f) were not more fulsome. I am also disappointed that Minister Brown did not consult the complainant before refusing the request, in circumstances where consultation could have enabled the complainant to make the request in a form that would remove the reason for refusal. I consider these concerns resolved by all Ministers confirming to me that they remain open to discussing potential alternative approaches with the complainant to address his information requests should he so wish.

Peter Boshier  
Chief Ombudsman

## Appendix 1. Relevant statutory provisions

### Official Information Act 1982

#### 4 Purposes

The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—

- (a) to increase progressively the availability of official information to the people of New Zealand in order—
  - (i) to enable their more effective participation in the making and administration of laws and policies; and
  - (ii) to promote the accountability of Ministers of the Crown and officials,—and thereby to enhance respect for the law and to promote the good government of New Zealand:
- (b) to provide for proper access by each person to official information relating to that person:
- (c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

#### 5 Principle of availability

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

#### 18 Refusal of requests

A request made in accordance with section 12 may be refused only for 1 or more of the following reasons, namely:

...

- (f) that the information requested cannot be made available without substantial collation or research:
- (g) that the information requested is not held by the department or Minister of the Crown or organisation and the person dealing with the request has no grounds for believing that the information is either—
  - (i) held by another department or Minister of the Crown or organisation, or by a local authority; or

- (ii) connected more closely with the functions of another department or Minister of the Crown or organisation or of a local authority:

**18A Requests involving substantial collation or research**

- (1) In deciding whether to refuse a request under section 18(f), the department, Minister of the Crown, or organisation must consider whether doing either or both of the following would enable the request to be granted:
  - (a) fixing a charge under section 15:
  - (b) extending the time limit under section 15A.

**18B Duty to consider consulting person if request likely to be refused under section 18(e) or (f)**

If a request is likely to be refused under section 18(e) or (f), the department, Minister of the Crown, or organisation must, before that request is refused, consider whether consulting with the person who made the request would assist that person to make the request in a form that would remove the reason for the refusal.

**30 Procedure after investigation**

- (1) Where, after making an investigation of a complaint made under section 28, an Ombudsman is of the opinion –
  - (a) that the request made in accordance with section 12 should not have been refused; or
  - (b) that the decision complained of is unreasonable or wrong or is otherwise a decision to which subsection (1) or subsection (2) of section 22 of the Ombudsmen Act 1975 applies