

## Proactive release

Good practices for proactive release of official information

*This guide:*

- *explains what proactive release is;*
- *describes the benefits of proactive release; and*
- *identifies some good practices in proactive release.*

*It is not intended to be a comprehensive guide to proactive release, but to pull together the Ombudsman's previous guidance on this subject.*

*It complements existing guidance by:*

- *Te Kawa Mataaho—Public Service Commission: see [Proactive release webpage](#) and;*
- *the Cabinet Office: see [CO \(23\) 4 Proactive Release of Cabinet Material: Updated Requirements](#).*

*The guide will be updated over time, so [contact us](#) if you have any feedback or questions.*

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## What is proactive release?

Proactive release is where agencies publish official information (usually on the internet) without being asked for it.

Proactive release is not just publishing responses to OIA<sup>1</sup> requests. However, publishing OIA responses should be part of any [proactive release policy](#).

Responses to OIA requests submitted via [fyi.org.nz](http://fyi.org.nz) are automatically published online, so similar considerations may apply to these.

### Examples of proactive release

- data published on [data.govt.nz](http://data.govt.nz)
- tender information published on [gets.govt.nz](http://gets.govt.nz)
- budget information published on [budget.govt.nz](http://budget.govt.nz)
- ministerial diaries published on the [beehive.govt.nz](http://beehive.govt.nz)
- crime statistics published on [policedata.nz](http://policedata.nz)
- [decision summaries](#) published by the Overseas Investment Office
- [rest home audit reports](#) published by the Ministry of Health
- advice to Ministers published by government agencies (for example, the [Ministry for the Environment](#) and [Statistics New Zealand](#))
- [research and commentary](#) published by the Treasury

## What are the benefits?

Proactive release can:

- strengthen the accountability of government decision makers;
- inform public understanding of the reasons for decisions;
- facilitate informed participation in government decision making; and
- improve public trust and confidence in government.

For agencies, it can reduce the burden of responding to individual requests—by signposting requesters to information that has already been published, reducing the need for some

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<sup>1</sup> The Official Information Act. References to the OIA should also be taken as references to the Local Government Official Information and Meetings Act (LGOIMA).

requests altogether, managing expectations about when information will become available, or helping requesters narrow what they are asking for.

It also lets information reach a wider audience, and enables more consistent messaging. Agencies have greater flexibility to decide when and how information is released, and what additional context to put around it so that readers can derive greater meaning. Proactive release allows agencies to become a reliable and authoritative source for their own information.

## Why does it matter?

Proactive release is not required under the OIA, but it is consistent with the purpose of the Act, which is to progressively increase the availability of official information to the people of New Zealand.<sup>2</sup>

Proactive release also aligns with Government priorities. Under the [Declaration on Open and Transparent Government](#), for example, Cabinet has committed to *'actively releasing high value public data'*.

New Zealand is also a member of the Open Government Partnership, and has in this context developed a [National Action Plan](#) that includes a commitment *'to progressively increasing the proactive release of official information by publishing responses to requests for information made under the [OIA]'*.

Te Kawa Mataaho—Public Service Commission *'encourage[s agencies] to establish internal policies and practices that support increased proactive release (including publishing appropriate OIA responses), in line with the OIA's purpose to make official information more freely available'*.<sup>3</sup> It reports every six months on the number of OIA responses published on agency websites.

Effective proactive release is strongly encouraged by the Ombudsman, and is one aspect considered by the Ombudsman when conducting investigations into agencies' official information practices (read more about [our programme of official information practice investigations here](#)).

## Good practice proactive release

### A proactive release culture

How innovative and agile an agency is in the proactive release space depends largely on its leadership and culture.

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<sup>2</sup> See s 4 OIA and LGOIMA.

<sup>3</sup> See [Proactive release guidance](#).

The shift from a predominantly reactive posture to a much more proactive one is fairly fundamental. Release in this context is less of an afterthought, and more something that is anticipated and planned for at the beginning of any process.

Consideration is given to whether information should be released before it is created, or at the time it is created. Information that cannot be released should be easily identifiable to make the redaction process easier later.

To develop a proactive release culture, agency leaders should send clear and explicit messages to their staff and stakeholders that they encourage and support proactive release of official information.

## A proactive release policy

Agencies should develop a proactive release policy to guide their decision making. A proactive release policy should include:

- a high level commitment to proactively releasing information;
- the establishment of [systems to support proactive release](#);
- the [types of information](#) the agency will proactively release, including [criteria for publication of OIA responses](#);
- a process for [preparing for proactive release](#);
- the frequency and [timing of publication](#);
- a commitment to releasing information in [accessible](#) and [usable](#) forms; and
- provision for the policy and information disclosed under it to be [reviewed and maintained](#).

## Systems to support proactive release

Agencies should put in place systems to support proactive release. These can include:

- a senior manager with specific responsibility for promoting and overseeing proactive release;
- clear lines of authority to authorise proactive release;
- a mechanism for staff to identify opportunities for proactive release;
- monitoring emerging issues and trends to identify opportunities for proactive release (for example, upcoming work in which there is likely to be a high level of public interest; ‘hot topic’ issues; patterns in OIA requests, public and media enquiries, and website searches; and feedback received during stakeholder engagement activities);
- regular reporting to senior management on opportunities for proactive release; and

- records management and business systems that facilitate proactive release through the classification of information as it is created.

## Types of information that should be considered for proactive release

Agencies developing a proactive release policy should carefully consider the types of information they will proactively release.

This could include:

- Information about the role and structure of the agency, and the information it holds.<sup>4</sup>
- Policies, procedures, manuals and guidelines used by the agency, including its official information and proactive release policies.<sup>5</sup>
- Information released in response to OIA requests.
- Strategy, planning and performance information.
- Information about expenses, tendering, procurement and contracts (see [The OIA and the public tender process](#) for more guidance on proactive release).
- Information about current or planned work programmes.
- Information about policy development, including Cabinet papers and advice to Ministers.
- Information about statutory decision making processes.
- Information about regulatory or review activities.
- Information about grants administered by the agency.
- Minutes, agendas and papers of boards or committees.
- Information about public engagement processes, including public submissions.
- Information about lists and registers maintained by the agency.

## Criteria for publication of OIA responses

Agencies should adopt clear criteria for the publication of OIA responses.

Some agencies have adopted a '*publish unless there is a good reason not to*' approach, which aligns with the principle of availability in the OIA.<sup>6</sup>

Other agencies have adopted a more restrictive '*publish if it is in the wider public interest*' approach.

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<sup>4</sup> See s 20 OIA.

<sup>5</sup> See s 22 OIA and s 21 LGOIMA.

<sup>6</sup> See s 5 OIA and LGOIMA.

The first approach will lead to more information being made available, which is good, but the Ombudsman recognises that this will come at a cost. The appropriate balance to be struck is a decision for the agency.

Another option is to consider publication of an OIA response (subject to the [due diligence](#) process discussed below), where the information would be of use or interest to people other than the requester.

It may not be appropriate to publish an OIA response if the request is purely in the personal interest of the requester, particularly if it could reveal something about the requester's personal circumstances.

**FAQ: 'What about publishing information that you are planning to charge an OIA requester for?'**

This can be done in theory. Requesters are paying to offset the cost of labour and materials involved in making the information available under the OIA. They are not purchasing an exclusive right to the information.

However, it will most likely antagonise a requester who has to pay for the privilege of receiving information that is then offered up free of charge to the rest of the world. This needs clear communication with the requester in order to manage their expectations.

In addition, if the agency's reason for publishing is the public interest in the information, it should consider whether it would be appropriate to remit some or all of the proposed charge. You can find more information in our [Charging](#) guide.

## Preparing for proactive release

[Proactive release policies](#) should have clear processes for preparing for proactive release, which include:

- giving notice to the requester (applicable only to the proactive release of OIA responses);
- consulting third parties; and
- a due diligence assessment of any legal risks associated with release.

These processes will be similar to what agencies already do when responding to OIA requests. Agencies can therefore leverage off existing OIA best practice.

## Giving notice to the requester

Agencies intending to proactively release responses to OIA requests should give the requester advance notice.

This can be done when the request is acknowledged, and when the decision on the request is made (find example wording in our template [acknowledgement](#) and [decision letters](#)). Agencies can also explain that requesters' personal information will not be published.

While a requester cannot veto an agency's decision to proactively release an OIA response, agencies should give fair consideration to any concerns raised, and let the requester know what decision they've made, and why.

## Consulting affected third parties

It may be appropriate to consult third parties prior to proactively releasing official information that:

- is about them;
- was supplied by them; or
- could adversely affect them, if published.

Third parties may include private individuals or entities, other agencies, agency staff, or Ministers.

While third parties cannot veto an agency's decision to proactively release official information, agencies should give fair consideration to any concerns raised, and whether those concerns present any legal risk. They should let the third party know what decision they've made, and why.

## Due diligence

Agencies should be aware of other legal obligations when deciding whether to release official information proactively, including obligations under the Privacy Act 2020.

Unlike with responses to particular OIA requesters,<sup>7</sup> agencies are not protected from any civil or criminal liability that might arise from releasing information proactively online.

This means it is important to have a robust process for reviewing the information at issue for potential legal risks associated with publication, including peer review, and sign-off by an appropriately authorised staff member.

### What legal risks should be considered?

The Cabinet Office circular on [Proactive Release of Cabinet Material](#) says the following due diligence matters should be considered before approval to publish Cabinet material and key advice online:

*34.1 whether the document contains any information that would have been withheld if the information had been requested under the OIA;*

*34.2 the application of the principles in the [Privacy Act 2020](#);*

*34.3 consideration of national security. The application of the [Protective Security Requirements](#) (PSR) information and personnel requirements to ensure information is*

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<sup>7</sup> See s 48 OIA and s 41 LGOIMA.

*handled according to the PSR, the agency's protective security standards (although these may change if the paper is subsequently declassified), and the application of the [New Zealand Government Security Classification system](#);*

*34.4 whether the document contains any information that must be withheld under the terms of any other legislation;*

*34.5 whether there is any potential liability, civil or criminal, that might result from the proactive release of Cabinet material and key advice papers. Matters to be considered include:*

*34.5.1 defamation: if the information proposed for release says or does something that may potentially harm the reputation of another person, group, or organisation, then seek legal advice;*

*34.5.2 privacy of natural persons: if personal information is contained in the material, consider whether the information should be released at all and, if released, whether there is a need to redact the information. Consult with all individuals named in any information proposed to be released. Guidance from the Office of the Ombudsman and the Privacy Commissioner should be used when considering the release of personal information;*

*34.5.3 interests of organisations: if information about an organisation is contained in the material, consider whether the information should be released at all and, if released, whether there is a need to redact information. Guidance from the Office of the Ombudsman should be used when considering release of information about organisations;*

*34.5.4 breach of copyright: if the information proposed for release is the creative work of others, their trademarks, or certain confidential business information, the owner of the information must give permission before it can be published;*

*34.5.5 whether the Attorney-General has waived privilege over any legally privileged material;*

*34.5.6 the disclosure of commercially sensitive information: consider the type of information at issue and how it came to be in the possession of the government;*

*34.5.7 breach of contract: consider whether there is a contractual interest in the information proposed for release and whether there is a need to redact information to protect contractual obligations and /or whether the information should be released at all;*

*34.5.8 whether breach of any law or statute will occur if the information were released. Consider all laws or statutes that apply to the information; and*

*34.5.9 whether a breach would constitute contempt of court.*

### **FAQ: ‘Can a requester complain to the Ombudsman about an agency’s proactive release?’**

With proactive release an agency can decide what to release and what to withhold. While the OIA might provide a good framework for deciding whether any information needs to be held back from a proactive release, it does not strictly apply when an agency is deciding what to release proactively. Users can’t complain to the Ombudsman about an agency’s decision to withhold information from a proactive release. This is because the Ombudsman’s investigation and review function under the OIA applies to refusals ‘to make official information available to any person in response to a request made by that person’.<sup>8</sup> If someone wants to obtain information that has been withheld from a proactive release, they have to request that information under the OIA. If their request is refused then they can complain to the Ombudsman.

## **Timing of publication**

The timing of publication of proactive releases is at the agency’s discretion. Release ‘as soon as reasonably practicable’ is a good aim, particularly in cases of high public interest. It can pay to release information early in the day and/or week so that people can make better use of it. If the timing of release appears cynical, this is more likely to undermine public trust and confidence than promote it.

Agencies can also choose when to publish OIA responses, although they may want to stagger release to the requester and publication online. This is not a requirement, but something some requesters may prefer. Agencies may also find it more efficient to publish OIA responses in batches, at regular intervals.

### **FAQ: ‘Can I refuse an OIA request because the information will be proactively released soon?’**

Maybe, but the requested information has to be the **same** as the information that will be proactively released, and the agency must be **reasonably certain** that the requested information will be published in the **near future**. It’s good practice to tell the requester when the information is expected to be made available, and to let them know once it’s available, including where they can find it. For more information on this topic, see [Publicly available information—A guide to section 18\(d\) of the OIA and section 17\(d\) of the LGOIMA](#).

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<sup>8</sup> See s 28(1)(a) OIA and s 27(1)(a) LGOIMA.

## Making sure the information is accessible

Information that is published online needs to be accessible to everyone, including disabled people, and people who use assistive technologies to read or access information.

New Zealand has obligations under the [United Nations Convention on the Rights of Persons with Disabilities](#) (the Convention), to ensure disabled people have equal access to information, including by providing information in accessible formats.<sup>9</sup>

One of the priorities of the [New Zealand Disability Strategy](#)—which implements the Convention—is to increase accessibility of information across government agencies.

All government agencies are expected to sign the [Accessibility Charter](#), which commits them to ‘...working progressively over the next five years towards ensuring that all information intended for the public is accessible to everyone’.

To support agencies in implementing the Accessibility Charter, the Ministry of Social Development (MSD) has published an [Accessibility Guide](#).<sup>10</sup>

The Accessibility Guide states:

*Information on the web should follow the New Zealand Government Web Standards, which includes:*

- *conformance to WCAG 2.1 (the [Web Content Accessibility Guidelines](#)) at Level AA*
- *correctly marked-up HTML (HyperText Markup Language)*
- *tagged/structured PDFs that are optimised for accessibility, including alt text on images and tagged tables. The document properties should include title, an author such as the organisation, the language and ‘window option’ as document title. PDFs are not to be relied on as an accessible version.*
- *PDFs created from scanned content should not be used as the only communications tool. They cannot be read by screen readers and can be inaccessible to people with other impairments.*
- *alternate formats like audio, New Zealand Sign Language (NZSL) videos, captioned and audio described videos, transcripts and webpages embedded with Easy Read.*

This means that scanned ‘image only’ PDFs should **not be the only format** in which official information is proactively released, because they cannot be accessed by everyone.

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<sup>9</sup> See Articles 9 and 21.

<sup>10</sup> Ministry of Social Development. 2021. *Accessibility Guide: Leading the way in accessible information*. (3rd ed). Wellington: Ministry of Social Development, <http://msd.govt.nz/about-msd-and-our-work/work-programmes/accessibility/accessibility-guide/index.html>.

HTML is the preferred form of publication. It is very important to ensure that the HTML is well-formed and properly reflects the structural elements of the underlying document or information.

Failing that, Word documents and appropriately tagged and structured PDFs may be used. However, these may not be fully accessible to everyone. Agencies should state what form the information has been published in, and how users can request the information in a more accessible format.

Although proactive release usually relates to publishing information on the web, it must always be remembered that not everyone can use the web. MSD's [Accessibility Guide](#) is a good starting point for finding out more about producing information in alternative accessible formats that might be more appropriate for people with different disabilities. The cost of producing information in other accessible formats can be minimised by ensuring the information is prepared from the outset with accessibility in mind. There are a number of organisations and businesses in the community that can give good advice and convert your information to accessible formats for a reasonable commercial fee.

To ensure that information is accessible, it would be best practice for agencies to consult disabled people's organisations when developing policies and procedures around proactive release.

### ***'Released under the OIA'***

One potential barrier to accessibility is the use of 'watermarks'. Watermarks are sometimes attached to documents to show they have been released under the OIA, or released proactively. Watermarks can interfere with reader software, and create difficulties for people with vision or cognitive impairments.

The use of watermarks is not required. It is a practice that evolved out of a concern that information released under the OIA could be misrepresented as having been leaked. However, where information has been proactively released on an agency's website, there is no question of that information having been leaked. Agencies could publish information without a watermark, or use the header or footer of a document to note that it has been released proactively.

## **Making sure the information is discoverable and usable**

To get the full benefit of proactive release, the published information needs to be easy to discover and use.

Proactive releases, and published OIA responses, should have a permanent home on the agency's website that is easy to navigate to. Ideally, users would be able to search these and other types of publications, and filter their search results by reference to useful parameters (for example, document type). Documents should have clear, high quality metadata attached to make them easily discoverable through search engines.

Information should be made available on open licencing terms where possible, and the agency's position on copyright and re-use should be clearly stated (refer to the [New Zealand Government Open Access and Licensing framework](#) (NZGOAL) for more information).

## Reviewing and maintaining proactive releases

It is good practice for agencies to review and update their proactive release policies, at least annually.

Agencies should also plan to periodically review published OIA responses to check the information remains relevant, up to date and accurate, and to remove or archive outdated material.

If the agency's decision on an OIA request is changed as a result of an investigation by the Ombudsman, the proactively published response should also be updated.

## Further information

Related Ombudsman guidance includes:

- [Charging](#)
- [Public interest](#)
- [Publicly available information](#)
- [The OIA and the public tender process](#)
- Template OIA request [acknowledgement](#) and [decision](#) letters

Agencies can ask us for help with questions about proactive release, or developing a proactive release policy, by email to [info@ombudsman.parliament.nz](mailto:info@ombudsman.parliament.nz) or freephone 0800 802 602.

Other guidance includes:

- Te Kawa Mataaho—Public Service Commission's [Proactive release guidance](#)
- *Cabinet Office circular* [CO 23 \(4\) Proactive Release of Cabinet Material: Updated Requirements](#)
- [digital.govt.nz](https://digital.govt.nz) guidance on accessibility
- MSD's [Accessibility Guide](#)
- [New Zealand Government Open Access and Licensing framework](#)

Agencies can also contact Te Kawa Mataaho—Public Service Commission for advice on proactive release, including proactive release of Cabinet material, by emailing [commission@publicservice.govt.nz](mailto:commission@publicservice.govt.nz).