

Hon Chris Hipkins
Minister of State Services

Strengthening Proactive Release
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Title: Cabinet Committee Paper Strengthening Proactive Release Requirements

Author: State Services Commission

This is one of a suite of documents released by the Hon Chris Hipkins, Minister of State Services that has informed the Government's proactive release of information policy.

Explanatory note

Cabinet Committee Minute Strengthening Proactive Release Requirements: GOV-18-MIN-001 on 13 February 2018 invited the Minister to submit a revised paper to Cabinet. It was later decided that the paper would first be considered by the Cabinet Business Committee on 20 August 2018.

In-confidence

Office of the Associate Minister of State Services (Open Government)

Chair, Cabinet Government Administration and Expenditure Review Committee

STRENGTHENING PROACTIVE RELEASE REQUIREMENTS

Proposal

- 1 The paper proposes that Cabinet agree to a policy to strengthen the expectations on Ministers on the proactive release of official information.

Executive Summary

- 2 The proposals in this paper focus on two objectives:
 - 2.1 enabling the public to understand decision-making; and
 - 2.2 strengthening the accountability of decision makers and advisors.
- 3 These objectives need to be balanced against the need to maintain clear safeguards to ensure that sensitive official information is appropriately protected, and to support the free and frank expression of opinions between participants in the public policy-making process.
- 4 The policy to strengthen the expectations on Ministers on the proactive release of official information will introduce a non-statutory process for providing information, separate to, but informed by, the Official Information Act 1982 (OIA).
- 5 Under New Zealand's Open Government Partnership National Action Plan 2016-2018, the Government has a milestone to improve practices around proactive release of information. Democracies thrive when citizens trust and participate in their government. There is a global trend of falling trust in government and its institutions. New Zealand is not immune to this trend. Although we continue to rank at the top of most international measures of trust in government,¹ an increasing number of New Zealanders believe that the system is (or could be) failing them.²
- 6 In 2015 the Chief Ombudsman's report on OIA practices in central government agencies³, noted that wider public release, rather than withholding information, along with routine proactive release of information is the best strategy. This is because the strategy is consistent with the purposes of the OIA and demonstrates commitment to openness and communication about its work.
- 7 Proactive release of official information promotes good government and transparency and fosters public trust and confidence in agencies. Proactive release includes publishing a wide variety of official information, without any request from the public. It also includes publishing the same or edited information that has previously been released to an individual OIA requester and releasing it more widely. As the information that ends up being proactively released under this policy, will not have been requested under the OIA, the protections of the OIA do not apply.
- 8 The requirement for chief executives to provide Ministers with free and frank advice is not altered by the proposed proactive release policy and this will be reinforced in the Cabinet Office circular. The policy does not propose that:

¹ This is reflected in the ratings given to New Zealand such as first equal in the Transparency International Corruption Perceptions Index 2016 and Open Budget Index 2015, second in the International Civil Service Effectiveness Index 2017, as well as top ten ratings in the Open Data Barometer 2015 and Rule of Law Index 2016.

² Acumen Edelman Trust Barometer, 2017

³ Not a Game of Hide and Seek

http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/1573/original/not_a_game_of_hide_and_seek_-_review_of_government_oia_practices.pdf?1466555782

- 8.1 information should be released that would not be released if requested under the OIA; or
- 8.2 exploratory advice, 'blue skies' thinking or advice intended to be provocative should be released.
- 9 The starting point for the proactive release policy is the 2017 New Zealand Cabinet Manual. The Cabinet Manual includes a new general expectation that Cabinet material (Cabinet and Cabinet Committee papers and minutes) on significant policy decisions should be released proactively once decisions have been made (section 8.17 refers). This option still requires guidance to be developed.
- 10 We can choose to build on the current Cabinet Manual expectation by:
- 10.1 expanding the general expectation of Cabinet material, where significant policy decisions are made by Cabinet, to include the key advice papers provided to Ministers by departments to take these significant decisions, subject to a risk assessment;
- OR**
- 10.2 expanding the general expectation to all Cabinet material, where decisions are made by Cabinet, subject to a risk assessment;
- OR**
- 10.3 expanding the general expectation to all Cabinet material where decisions are made by Cabinet and the key advice papers provided to Ministers by departments to take these decisions, subject to a risk assessment;
- OR**
- 10.4 expanding the general expectation to all Cabinet material where decisions are made by Cabinet and the papers that informed the final Cabinet paper, only where this supports the public understanding of the decisions being taken, subject to a risk assessment.
- 11 My preferred suite of papers to be considered for proactive release is option 10.3 above. If we agree that key departmental advice papers or other papers are included in the scope of the proactive release policy, I recommend that the relevant Minister(s) be responsible for the decision on which papers to release. Irrespective of the option we select, Ministers can always choose to proactively release more information.
- 12 I recommend that the new policy commence on 29 March 2018. For selected papers that fall between 26 October 2017 (the commencement date of this administration) to 28 March 2018. I recommend that these papers must be released by 30 June 2018.
- 13 I recommend that supporting guidance be released by 29 March 2018.
- 14 Initially I am recommending that papers be released on departmental websites. Further work will be undertaken on whether having one access point for this information could further improve accessibility to this information.
- 15 There is also a choice to be made on the timeframe for the papers included in the proactive release policy, subject to a risk assessment, to be released. The proposed timeframe for papers to be released could be:
- 15.1 as soon as is practicable but not later than 30 working days⁴ of a Cabinet decision;
- OR**
- 15.2 As soon as is practicable but not later than 60 working days of a Cabinet decision;
- 16 For timeliness reasons, my preferred option is as soon as is practicable but not later than 30 working days of a Cabinet decision.

⁴ The definition for working days will come from the Official Information Act 1982.

- 17 Subject to Cabinet's decisions, supporting and detailed guidance will be provided in a Cabinet Office circular, including on the risk assessment that should be undertaken prior to material being proactively released.
- 18 A review of the proactive release policy should be undertaken after a year by the State Services Commission to assess its effectiveness in meeting the policy objectives and its associated guidance. The findings of the review will be reported back to Cabinet.

Open Government

- 19 New Zealand is well accustomed to deliberately improving integrity, openness and transparency in government. Being high in world rankings does not mean, however, that New Zealand has reached the pinnacle of open government or that the Government is meeting all New Zealanders' needs. The Acumen Edelman Trust Barometer, 2017 shows that trust in New Zealand's government, business, media and non-governmental organisations is declining. The reasons for this may be many and varied. For example, technological disruption, the impact of digital connectedness, privacy breaches, corporate failures, a sense of injustice and growing inequalities, and a belief that political systems are broken.
- 20 All New Zealanders deserve a transparent, open democracy that is free from corruption and abuse of power and works for them. New Zealanders also need to have confidence that there is sound democratic process in law-making and a parliamentary process that they can participate in and can be used to hold successive Governments to account.
- 21 My approach for the Open Government portfolio is to:
 - 21.1 take a joined-up, aspirational approach to our digital economy, seeking to increase productivity and the economic benefits of the internet;
 - 21.2 address the digital divide to reduce the gap between the internet "haves" and "have nots";
 - 21.3 strengthen protection of New Zealanders' digital rights;
 - 21.4 enhance the voice of independent public service media, to improve plurality of broadcasting and underpin growth of our culture; and
 - 21.5 drive the ongoing transformation towards a more open, digital Government.

Open Government through proactive release of official information

- 22 The proactive release of official information enables the public to understand decision-making and can strengthen the accountability of decision-makers and advisors.
- 23 Proactive release includes:
 - 23.1 publishing (usually via the internet) a wide variety of agency-produced documents, without any request from the public (e.g. research reports, policy advice); and
 - 23.2 publishing the same (or edited) information that has previously been released to an individual requester under the OIA and is now being released more widely.
- 24 Building on New Zealand's Open Government Partnership National Action Plan 2016-2018 commitment to improving how Government responds to requests for official information, I have made it one of my priorities to establish a process for the proactive release of government information.

Current settings in New Zealand

- 25 As the incoming Government, we endorsed the 2017 Cabinet Manual that included the new general expectation that Cabinet material (Cabinet and Cabinet Committee papers and minutes) on significant policy decisions should be released proactively once decisions have been made.

26 There are no other general mandatory requirements or expectations to proactively publish official information. Any obligation to publish official information is limited to specific types or categories of information. For example:

26.1 Section 20 of the OIA requires the Ministry of Justice to publish information on each department and organisation covered by the OIA, including a description of its structure, functions and responsibilities, and the categories of documents it holds.

26.2 Various other statutes and regulations require public sector organisations to publish specified types of information. There are obligations to report publicly under the Public Finance Act 1989, the Crown Entities Act 2004, the State-owned Enterprises Act 1986 (and the State-owned Enterprises Continuous Disclosure Rules), the Crown Research Institutes Act 1992 and the Local Government Act 2002, among other pieces of legislation. Some of these Acts contain detailed requirements as to the types of information that must be published in annual reports (for instance, the Crown Entities Act requires information about remuneration and severance payments, and details of insurance cover).

26.3 To help ensure that the regulatory process is open and transparent, Regulatory Impact Assessments are published at the time the relevant bill is introduced to Parliament or the regulation is gazetted or at the time of Ministerial release.

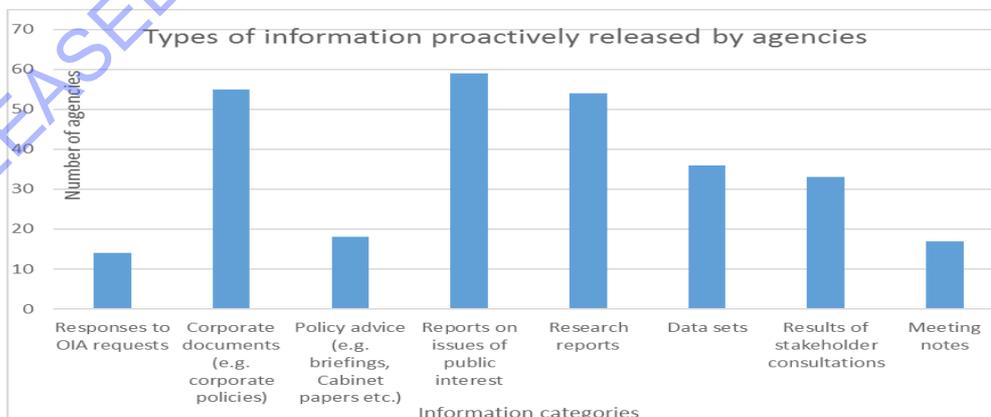
Current practice

27 There has been some improvement in proactive release practices over the previous decade, but Cabinet material and key advice that supports Cabinet decisions are published on an ad hoc basis.

28 Some agencies have publishing protocols and proactive release policies that provide for information to be released in accordance with the agency’s risk assessment framework. Budget material, including Budget Cabinet papers and supporting policy advice, has been proactively released (in increasing scope) on The Treasury’s website since 2005. It is now standard practice for departments to place discussion document submissions on their websites. Some agencies seek Cabinet approval to place Cabinet papers on their websites at the conclusion of a policy process.

29 A recent State Services Commission (SSC) survey of agencies’ proactive release practices found that only 11, out of the 25 agencies that responded, proactively release policy advice. As detailed in Table 1 (on the next page), agencies’ proactive release practices are largely focused on corporate documents and reports on issues of public interest.

Table 1: Types of information proactively released by New Zealand agencies



- 30 The 2015 Chief Ombudsman report noted that she “was surprised to learn that not all agencies that had attempted proactive release of information experienced a reduction in the number of OIA requests they received. Rather, many agencies advised that they continued to receive a high number of requests about the particular issue the public wanted to find out about. The benefit of proactively releasing information for these agencies seemed to include:
- 30.1 a decrease in broad, wide-ranging and repeat requests on an issue;
 - 30.2 an increase in targeted, specific requests for information which made responses easier to prepare; and
 - 30.3 an enhanced reputation for being transparent and open.”
- 31 The Ministry of Defence is one of the agencies that has experienced a reduction in OIA requests when using proactive release. For example, after the release of Cabinet Papers on the Defence White Paper in 2010 and 2016, the Ministry of Defence received no OIA requests.
- 32 Standardising proactive release practice is an important step towards assisting the public to get the information they are after and for increasing the transparency and reputation of government information. Increased availability of official information also demonstrates a commitment to creating full, accurate and accessible records, which enable the Government to be held accountable. This is a core purpose of the Public Records Act 2005.

Practice in other jurisdictions

- 33 There are no global indices on the volume of proactive releases of government material. This reflects a number of difficulties in measurement, including an agreed standard as to the amount, regularity, or content that should be proactively released. There are also no global indices on the policy and practice of proactive release. This reflects a number of difficulties in measurement, including assessing whether the information meets user needs in scope, quality, topic, or format. Without global indices, it is difficult to determine New Zealand’s international position. Internationally there seems to be a focus on assessing information legislation – as a proxy for measurement of proactive release.
- 34 There is activity overseas in the proactive release of public sector information. However, in some respects, the starting point in a number of these jurisdictions has been a freedom of information regime that is less liberal than New Zealand’s OIA. It appears that legislation also does not typically mandate proactive disclosure of government information. However, a number of conventions are developing (refer to Table 2).

Table 2: Proactive release in other countries

Country	Comment
Nordic countries	Generally seem to be exploring proactive release of Government business. For example in May 2017, the Finnish Government held its first open-to-the-public Cabinet meeting. This one-off event more widely reflects their Act on the Openness of Government Activities (1999) which outlines that all government meetings are to be open.
Croatia	Has an online directory of proactively released information.
Mexico	Has created a searchable database for all information requests and responses, allowing officials to track requests and identify information that should be a candidate for proactive release.
Thailand	Has taken the same approach as Mexico.
Bangladesh	The Cabinet has included, in the performance agreements for ministries, specific requirements about proactive publishing of information.
United Kingdom	Public authorities are required to adopt a scheme for the publication of information by that authority, as well as the concept of disclosure logs that provide online access to information released in response to specific requests. Disclosure logs can then be made available to a wider audience.
Australia	Agencies (departments and prescribed authorities, as specified under the Freedom of Information Act 1982) are required to publish the information used to assist the agency in making decisions affecting members of the public. However, Cabinet documents are excluded from this requirement. Public authorities are required to adopt a scheme for the publication of information by that authority, as well as the concept of disclosure logs that provide online access to information released in response to specific requests. Disclosure logs can then be made available to a wider audience.
Canada	Canada are working on changes (BILL C-58) to amend the Canadian Access to Information Act and the Privacy Act and to make consequential amendments to other Acts. The Bill creates a new Part providing for the proactive publication of information or materials related to the Senate, the House of Commons, parliamentary entities, ministers' offices, government institutions and institutions that support superior courts. The information to be proactively released includes expenses, contracts, briefing materials to incoming Ministers, and reclassifications of positions in government institutions. Many of the documents that will be proactively disclosed under the proposed legislation are already being voluntarily disclosed. Having these requirements in law will go further than the New Zealand system. However, the information and material does not go into the areas this Cabinet paper is seeking to have proactively released.

- 35 While New Zealand's proactive release practices compare favourably with other jurisdictions, we must nevertheless be aware of the risk that New Zealand might fall behind, as other countries modernise their Freedom of Information regimes⁵.

Options

- 36 We need to take decisions on the scope of the proactive release policy.

Which papers

- 37 The two objectives of this proactive release policy are to:

37.1 enable the public to understand decision-making; and

37.2 strengthen the accountability of decision makers and advisors.

- 38 There are a number of combinations of papers that could be released, all of which support the two key objectives to a greater or lesser extent.

⁵ Report of the Law Commission, New Zealand Law Commission, *The Public's Right to Know*. (NZLC R125, 2012).

- 39 Starting with Cabinet material, I see five options, four of which expand on the 2017 Cabinet Manual general expectation. The five options are summarised in Table 3.

Table 3: Options on papers to be considered for release.

Papers in scope of release once a Cabinet decision has been taken, and subject to a risk assessment	Options				
	1	2	3	4	5
Cabinet material on significant policy decisions – as per the 2017 Cabinet Manual general expectation	✓	✓			
All Cabinet material where decisions are taken			✓	✓	✓
Key departmental advice papers provided to Ministers by departments		✓		✓	
The papers that informed the final Cabinet paper only where this supports the public understanding of the decisions being taken					✓

- 40 Irrespective of the option we select, Ministers can always choose to proactively release more information. For example, such other analysis or contextual information that the Minister considers would be useful.
- 41 My preferred suite of papers to be considered for proactive release is Option 4. This option is ambitious as it includes the key departmental advice considered by the decision-maker prior to Cabinet's consideration of the associated Cabinet paper. This suite of papers, taken together, allow the public to better understand how decisions were taken and makes no assumptions on what the public is, or will be, interested in. The releases may also aid understanding of how Government operates and how the public might get involved in current and future policy development.

Exceptions and risk assessment

- 42 There will be some material (in part or in full) that may not be appropriate for proactive release in accordance with this policy, given particular sensitivities around timing or content or other matters. Some examples that fall into these categories are:

Papers with timing sensitivities

- 42.1 Sensitive Budget papers (prior to Budget day).
- 42.2 Sensitive Treaty settlement negotiation papers.
- 42.3 Sensitive machinery of government proposals (prior to the announcement of decisions).
- 42.4 Other decisions that are to be publicly announced, but the announcement is scheduled to take place outside the policy timeframes.

Papers with content sensitivity

- 42.5 Legally privileged papers; although in some instances this will only apply to one section of a paper. The Cabinet Office Manual, paragraphs 4.58-4.68 requires the Attorney-General's authority be sought (through the Crown Law Office) if a Minister or government department proposes to release or disclose material subject to legal professional privilege.⁶
- 42.6 Appointments papers (information included in the paper that has privacy considerations or the provision of free and frank advice).
- 42.7 Papers relating to international relations, including trade and travel papers and reports (international relations reasons).

⁶ CO (16) 2: Cabinet Directions for the Conduct of Crown Legal Business 2016,

42.8 Papers, or sections of paper, classified Restricted or above (to ensure compliance with the Protective Security Requirements and the departments' protective security standards, although this may change if the paper is subsequently declassified).

42.9 Commercially sensitive papers.

Other matters

42.10 Legal risk matters such as those listed in s48(2) of the OIA, for example, information that may be defamatory, subject to an obligation of confidence or copyright, and

42.11 Official information that would not be released if requested under the OIA.

Potential liability

43 Ministers and their departments will also need to consider any potential liability, whether civil or criminal, that might result from the proactive publication (in part or in full) of Cabinet material and related advice when considering whether to release material. For example, defamation, copyright, privacy or breach of contract. This is because the protections under Section 48 of the OIA will not apply to information that is proactively released under this policy.

44 This supports a risk assessment being undertaken prior to a decision to proactively release material. It is proposed that a Cabinet Office Circular to support the policy will include a risk framework and guidance on timing sensitivities and content sensitivity, potential legal liability, and any relevant legislative and other considerations (refer to paragraphs 60-68).

Decision rights on proactive release of official information

45 Only Ministers approve the proactive release of Cabinet and Cabinet Committee papers and associated minutes.

46 Under the OIA, departments 'hold' information provided to Ministers. In lieu of any legal framework or Cabinet decision, Ministers and departments have pragmatically applied this OIA holding principle to other proactive release procedures.

47 However, if we agree that key advice papers departments provided to Ministers or other papers are included in the proactive release policy, I recommend that the decision on the release of these papers rests with the relevant Minister, with the department providing advice on the proposed release(s). These papers and the final Ministerial decisions are closely linked and it makes sense for the papers selected for possible release to be considered as one package by one decision-maker.

48 Ministers and departmental chief executives will still be expected to continue assessing other types of information for proactive release.

What timeline

49 It may often be desirable for papers to be released quickly, for example when there is a planned announcement. In some instances (for example an extended policy process with multiple decisions required by Cabinet) Ministers may wish to delay release of a Cabinet paper until the suite of decisions are made, to allow advice under active consideration to be worked through. There may be other reasons for delaying a proactive release (for example, if a Minister is overseas and not available to approve material for release). Guidance on the implementation of the policy will include detail on extensions.

50 There is a choice to be made on the timeframe for papers to be released. Timeliness is a vital element in keeping the public informed and engaged in government matters. A short timeframe of as soon as practicable but not later than 30 working days for release after the Cabinet decision would ensure the issue is still fresh in the minds of Ministers and officials. However, this may be administratively hard to achieve, especially when a

paper includes timing, content or other sensitives and consultation requirements, without extra resource being proposed for departments.

- 51 Alternatively we could agree a timeframe of as soon as practicable but not later than 60 working days of a Cabinet decision timeframe. This option has some relationship to the three month period that the Chief Ombudsman's 2009/10 Annual Report indicated (as a rule of thumb) as a timeframe to start to consider whether ongoing withholding of departmental weekly reports to Ministers is necessary. The within 60 working days allows for announcements of key decisions to have taken place and for any collateral communications to be developed.
- 52 My preferred option is as soon as is practicable but not later than 30 working days of a Cabinet decision.
- 53 The default timeframe, however, may require reconsideration post a proposed discussion with the Chief Ombudsman on whether a 30 working day or 60 working day default timeframe for proactive release will meet the OIA test for refusing a request on the grounds that the information will "soon" be available.
- 54 It is a possibility that once the proactive release policy commences, requestors will anticipate proactive releases and lodge increasing numbers of OIA requests that will bring with these requests a shorter decision timeframe. Irrespective of the proactive release timeframe selected, Ministers and departments will need to respond to any OIA requests for the same information in accordance with the OIA.
- 55 I recommend that Cabinet agree that the timeframe for papers to be released is:
- 55.1 as soon as is practicable but not later than 30 working days of a Cabinet decision;
- OR**
- 55.2 as soon as is practicable but not later than 60 working days of a Cabinet decision.

Implementation Timeframe

- 56 I recommend that the new policy commence on 29 March 2018. For selected papers that fall between 26 October 2017 (the commencement date of this administration) to 28 March 2018. I recommend that these papers must be released by 30 June 2018.
- 57 I recommend that supporting guidance be released by 29 March 2018.

Accessibility of released official information and future work

- 58 I recommend that the papers to be released be made available through departmental websites. This approach does not recognise that individuals may not know which website to go to or the differing ways in which departmental policies and websites are constructed. I recommend that Cabinet direct that further work be undertaken by the State Services Commission to assess the benefits of a centralised approach. This work can leverage off work being undertaken for the release of OIA requests.
- 59 Other areas that could be explored include future legislative change to recognise and encourage proactive release or a team to consistently review Cabinet papers.

Risks and mitigations

Legal liability

- 60 Proactive disclosure of official information can create a range of legal risks and liability under various statutes could arise, depending on the context. It may not always be clear what information should be withheld to minimise legal risk.
- 61 Under Section 48 of the OIA, the Crown is protected from liability that may otherwise result from making information available in good faith “pursuant to the OIA” (including consequences that follow from the making available of that information). As noted earlier, the protections in section 48 will not extend to the information that is proactively released under this policy.
- 62 Given the legal complexity, there will need to be robust processes in place to consider any potential liability, whether civil or criminal, that might result from the proactive publication (in part or in full) of a Cabinet paper or policy paper, and provide advice on whether or not to release the material.
- 63 SSC will also continue to work with departments to support them to develop broader proactive release policies and processes, including guidance on how to manage the risks associated with the publication of material.

Effect of policy on free and frank advice

- 64 There may be a concern that release of certain information would prejudice the free and frank expression of opinions between participants in the public policy-making process, create a perverse incentive for more oral items and/or lead to final Cabinet papers being edited more than should occur prior to release. These types of responses will undermine the quality of advice produced in the policy development process, and thereby the quality of the decision ultimately reached. The policy does not propose that:
- 64.1 information should be released that would not be released were it to be requested under the OIA; or
- 64.2 exploratory advice, ‘blue skies’ thinking or advice intended to be provocative should be released.
- 65 The provision of free and frank advice, as central to our system of government, is well acknowledged. Free and frank advice demonstrates and upholds the impartiality that is fundamental to maintaining a politically neutral Public Service. The Cabinet Manual states that Ministers have a duty to give fair consideration and due weight to free and frank advice provided by the Public Service (section 3.8 refers). Under the State Sector Act 1988, departmental chief executives have a corresponding responsibility to tender free and frank advice to Ministers.
- 66 The Cabinet circular to support this policy will mitigate some of these risks by:
- 66.1 making it clear that there will be no change to the current Cabinet Manual guidance as to when an oral item may be raised at Cabinet or Cabinet Committee and will include the expectation that the policy should apply to any papers tabled in support of an oral item; and
- 66.2 setting the expectation that the policy applies to all Cabinet material.
- 67 The issuing on 14 December 2017 of the State Services Commissioner’s expectations and formal guidance, to support chief executives to carry out the fundamental responsibility to provide free and frank advice, also supports this policy.

Classification “elevation”

- 68 There is a risk of classification “elevation” (i.e. papers being given a higher classification than is required, out of a concern about the potential risk of proactive release of that information). Guidance will reinforce the expectation that papers are released in accordance with the Protective Security Requirements and the New Zealand

Government Security Classification system, and will provide more general guidance on appropriately assessing material for release.

Cabinet Office Circular to support the policy

- 69 Prior to implementation itself, detailed guidance will be released for ministers and departments. This guidance document will further mitigate risk particularly through:
- 69.1 including appropriate guidance on the range of issues that may arise (e.g. joint papers, oral items, decisions under delegated powers to act, multi-stage policy processes, urgent issues), in addition to the areas in which exemptions are expected to apply;
 - 69.2 limiting the scope for inconsistent approaches across government or limiting disclosure for reasons other than those publicly committed to under the policy;
 - 69.3 judicious QA arrangements, to pick up potential errors before they occur (e.g. material released by mistake or at the wrong time);
 - 69.4 including clear safeguards to ensure official information is appropriately protected and decisions to withhold information are recorded. I recommend that a Cabinet Office Circular be drafted to support Ministers and departments.
- 70 SSC will work with departments to finalise the implementation arrangements.
- 71 The Cabinet Office template under the Publicity section says to “State whether any publicity is planned and whether or not the Minister proposes to release the paper proactively. If proposals are likely to create controversy, the paper should draw Cabinet’s attention to the implications.” The Cabinet Office will make any changes required to the Cabinet paper template and Cabinet Office summaries as a result of the new proactive release requirements.
- 72 The Cabinet Office Circular will include a risk framework against which material should be assessed prior to a decision to proactively release, incorporating guidance on timing sensitivities and content sensitivity, the requirement to provide free and frank advice to Ministers, potential legal liability, and any relevant legislative or other considerations.
- 73 The development of the risk framework will be informed by the existing provisions in the OIA and the Protective Security Requirements.
- 74 I recommend that Cabinet authorise a group of Ministers comprising the Prime Minister, the Minister of Justice and me to approve a new Cabinet Office Circular on the proactive release requirements. This paper covers Cabinet matters, which is the domain of the Prime Minister. The involvement of the Minister of Justice is because of the close relationship between proactive release of information under this new policy and information requested in accordance with the OIA.

Financial Implications

- 75 It is difficult to estimate the financial implications of this fundamental shift in the way the system operates. Costs to Ministers’ Offices and departmental support will depend upon a number of variables including:
- 75.1 the number and complexity of the Cabinet decision papers generated by each Minister;
 - 75.2 the current maturity of proactive release policies and implementation within departments;
 - 75.3 the number of papers to be released that inform Ministers’ decisions;
 - 75.4 the ability of Ministers’ Offices and departments to move resources into assessing ‘historic’ Cabinet material for release; and

- 75.5 an increase in consultation requests, for example, there may be increased need for the Attorney-General to consider approving a legal waiver of legal privilege, if the nature of the legal advice cannot be easily redacted from the paper.
- 76 Some of these resourcing and financial implications may be mitigated by changed business practices.
- 77 In the first instance, I propose that any increased costs be absorbed in baselines.
- 78 It is likely that future work to improve the system approach and move towards greater ease of accessibility by New Zealanders to this material will require new money.

Review mechanism and monitoring

- 79 I recommend that the policy and its associated guidance be reviewed after a year by the State Services Commission and the findings of the review reported back to Cabinet. The purposes of the review will include:
- 79.1 determining whether the objectives of the policy are being met;
- 79.2 recommendations on whether changes are required to improve the effectiveness or clarity of the policy and procedures;
- 79.3 recommendations on whether the policy should be broadened to include other agencies that provide advice to Ministers for decision-making; and
- 79.4 providing the first set of statistical information, by portfolio and department, on proactive releases made.
- 80 Following this review, I expect an ongoing monitoring regime and reporting of proactive release statistics to be formalised by the State Services Commission.

Consultation

- 81 The Department of the Prime Minister and Cabinet (including the Cabinet Office) and the Ministry of Justice have provided advice on the development of the proposal.
- 82 The following departments have been consulted on the proposals: the Ministry of Business, Innovation and Employment, the Department of Conservation, the Department of Corrections, Crown Law Office, the Ministry for Culture and Heritage, the Ministry of Defence, the Ministry of Education, the Education Review Office, the Ministry for the Environment, the Ministry of Foreign Affairs and Trade, the Government Communications Security Bureau, the Ministry of Health, the Inland Revenue Department, the Department of Internal Affairs, the Ministry of Justice, Land Information New Zealand, Te Puni Kōkiri, the New Zealand Customs Service, the New Zealand Security Intelligence Service, Oranga Tamariki—Ministry for Children, the Ministry for Pacific Peoples, the Ministry for Primary Industries, the Department of the Prime Minister and Cabinet, the Serious Fraud Office, the Ministry of Social Development, Statistics New Zealand, the Ministry of Transport, The Treasury, and the Ministry for Women. The Social Investment Agency was also consulted.
- 83 Te Kāhui Whakamana Rua Tekau mā Iwa—Pike River Recovery Agency was informed of the proposals.

Human Rights

- 84 There are no implications for the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993.

Legislative Implications

- 85 There are no legislative implications.

Regulatory impact analysis

86 A regulatory impact statement (RIS) has not been provided, as this paper deals with changes to the internal administrative and governance arrangements of the government, and has no or only minor impacts on parties outside government.

Gender implications

87 A gender analysis has not been undertaken as the proposals in this paper do not seek to distinguish between genders.

Disability perspective

88 The proposals in this paper do not have any negative implications for people with disabilities.

Publicity

89 I will develop a communications plan to support publicity on the proposal and intend to announce the policy following Cabinet's decisions. I intend to release the Cabinet Material for this policy and any relevant associated papers on the State Services Commission's website.

RELEASED BY THE MINISTER OF STATE SERVICES

Recommendations

The Minister recommends that the Committee:

- 90 **note** that the proposals in this paper focus on two objectives:
- 90.1 enabling the public to understand decision-making; and
 - 90.2 strengthening the accountability of decision-makers and advisors.
- 91 **note** that Cabinet material is the Cabinet and Cabinet Committee papers and minutes;
- 92 **agree** that the scope of the proactive release policy cover is:
- 92.1 Cabinet material on significant policy decisions which aligns with the 2017 Cabinet Manual expectation on Ministers;
- OR**
- 92.2 expanding the general expectation of Cabinet material where significant policy decisions are made by Cabinet to include the key advice papers provided to Ministers by departments to take these significant decisions, subject to a risk assessment;
- OR**
- 92.3 expanding the general expectation to all Cabinet material where decisions are made by Cabinet, subject to a risk assessment;
- OR**
- 92.4 expanding the general expectation to be all Cabinet material where decisions are made by Cabinet and the key advice papers provided to Ministers by departments to take these decisions, subject to a risk assessment (my preference);
- OR**
- 92.5 expanding the general expectation to all Cabinet material where decisions are made by Cabinet and the papers that informed the final Cabinet paper, only where this supports the public understanding of the decisions being taken; subject to a risk assessment;
- 93 **agree**, if either departmental advice papers or other papers that informed the final decision are included in the decision in recommendation 3 above, that the decision on the release of these papers rests with the relevant Minister(s);
- 94 **note** the policy does not propose that:
- 94.1 information should be released that would not be released if requested under the OIA; or
 - 94.2 exploratory advice, blue skies thinking or advice intended to be provocative should be released;
- 95 **agree** the proposed timeframe for the papers, selected for inclusion in the proactive release policy in recommendation 2 above, to be released is either:
- 95.1 as soon as is practicable but not later than 30 working days of a Cabinet decision (my preference);
- OR**
- 95.2 as soon as is practicable but not later than 60 working days of a Cabinet decision;
- 96 **agree** that the proactive release policy comes into effect from 29 March 2018;
- 97 **agree** that selected papers that fall between 26 October 2017 (the commencement date of this administration) to 28 March 2018 must be released by 30 June 2018.
- 98 **agree** that supporting guidance will be issued by 29 March 2018;

- 99 **agree** that the supporting guidance will include a risk assessment framework, information on timing sensitivities and content sensitivity, detail on extensions to the selected timeframe, a requirement to provide free and frank advice to Ministers, potential legal liability, and any relevant legislative or other considerations;
- 100 **note** that Public Service Departments will support Ministers to prepare the information release, including supporting Ministers in a risk assessment of the material;
- 101 **agree** that the information that is proactively released be released on departmental websites;
- 102 **agree** that the increased costs associated for options, agreed by Cabinet under recommendation 3 and recommendation 6 respectively, be absorbed by baselines;
- 103 **direct** the State Services Commission to undertake further work to improve accessibility and standardisation of information to be released, including the benefits of moving to a centralised approach;
- 104 **note** that the State Services Commission will work with departments and with the Cabinet Office to finalise the implementation arrangements to support the proactive release improvements as reflected in Cabinet's decisions on the recommendations of this paper;
- 105 **direct** the State Services Commission, in consultation with the Cabinet Office and the Ministry of Justice, to draft a new Cabinet Office Circular, for issuing by the Cabinet Office which sets out Cabinet's policy on proactive release;
- 106 **authorise** the Prime Minister, the Minister of Justice, Minister and the Associate Minister for State Services (Open Government) to approve the new Cabinet Office Circular on the proactive release requirements;
- 107 **note** that the Cabinet Office will make any changes required to the Cabinet paper template and Cabinet Office summaries as a result of the new proactive release requirements;
- 108 **direct.** the State Services Commission to undertake a review of the policies' effectiveness, and its associated guidance and report the findings to Cabinet; and
- 109 **note** that this Cabinet paper and the associated minute be released on the State Services Commission website.

Authorised for lodgement.

Hon Clare Curran

Associate Minister of State Services (Open Government)

Date: