



Intended for Ministers
All Senior Private Secretaries
All Private Secretaries
All officials

Proactive Release of Advice that Relates to Decisions Made in a Pandemic with Direct Human Rights Implications

Purpose

- 1 This Circular sets out the requirements and procedures for the proactive release of advice that relates to decisions made during a pandemic that have direct human rights implications.
- 2 Where relevant, this Circular should be read in conjunction with [CO \(23\) 04](#), which sets out the requirements for the proactive release of Cabinet material and to which this Circular refers when applying certain expectations.
- 3 Requirements relating to the proactive release of Cabinet material, as set out in CO (23) 04, continue to apply.

Application

- 4 The expectations set out in this Circular apply to ministers, ministerial office staff and public service agencies, as defined in [section 10](#) (a) of the Public Service Act 2020.

Key points

- 5 To better support transparency and access to information during a pandemic, advice that relates to decisions made during such events with direct human rights implications must be proactively released within five business days of the decision being taken. This applies to decisions made in response to or as a consequence of a pandemic, not other decisions of government with human rights implications that happen to occur during a pandemic.
- 6 For the purposes of this Circular, human rights include rights protected in domestic legislation, including in the New Zealand Bill of Rights Act 1990, Human Rights Act 1993 and the Privacy Act 2020, and rights protected in relevant international human rights instruments, including the core human rights treaties New Zealand has ratified.
- 7 A decision with a direct human rights implication means a decision that limits or restricts human rights as an immediate or proximate consequence of the decision.

- 8 This Circular applies only to decisions where the limitation or restriction on human rights has application at a population level. This means the restriction or limitation applies to a class or subpopulation of unspecified people (like border workers or people living in a specific region), rather than to identified individuals or specified properties.
- 9 Only final decisions trigger the requirement for proactive release.
- 10 The scope of material to be considered for proactive release includes:
 - 10.1 advice that relates to the decision (for example, briefing papers, reports, risk assessments, regulatory analysis summaries or other material that informs, supports or recommends a decision); and
 - 10.2 technical or expert advice related to the decision from a third party that was commissioned and received by ministers, minister's offices or public service agencies in the course of the advisory or decision-making process.
- 11 Proactive release is different from release under the Official Information Act 1982 (OIA) in that material is published in the interests of broader transparency, not in response to a request under the OIA. A due diligence process must be undertaken by the minister's office or agency before the advice is proactively released. It is the publisher's responsibility to ensure that the required due diligence steps have been undertaken before material is published.

Background

- 12 The New Zealand Royal Commission of Inquiry into COVID-19 Lessons Learned report included recommendations relating to the transparency of decisions made during a pandemic. The report emphasised that where rights are to be restricted or limited there should be a high degree of transparency in relation to advice received and the reasons for imposing limitations on rights.
- 13 In response, Cabinet agreed to require the proactive release of advice that relates to decisions made in a pandemic with direct human rights implications within five business days of the decision being taken [CBC-26-MIN 0030].

When do these requirements apply?

- 14 The requirements apply when:
 - 14.1 a state of emergency is in place under the Emergency Management Act 2026, due to a communicable disease outbreak among humans; or
 - 14.2 an epidemic notice is in force under the Epidemic Preparedness Act 2006; or
 - 14.3 the exercise of special powers under section 70 of the Health Act 1956 has been authorised by the Minister of Health for the purpose of preventing the outbreak or spread of an infectious disease.

What is required to be proactively released

- 15 Advice that relates to decisions with direct human rights implications must be proactively released, unless there is a good reason not to publish all or part of the advice (see sections below regarding *material to be considered for release*, *what material may be withheld or delayed for release*, and *due diligence*).

Definition of human rights

- 16 For the purposes of this circular, human rights include:
- 16.1 rights protected in domestic legislation, including the New Zealand Bill of Rights Act 1990, Human Rights Act 1993 and the Privacy Act 2020; and
 - 16.2 rights protected in relevant international human rights instruments, including the core human rights treaties New Zealand has ratified.
- 17 The Human Rights team at the Ministry of Justice can be contacted if further guidance about human rights is needed.

Scope of decisions that trigger proactive release requirements

- 18 For the purpose of this circular, a decision with a direct human rights implication is one that limits or restricts human rights as an immediate or proximate consequence of the decision. For example, in the context of face-mask requirements, a Cabinet decision to require the wearing of face masks would trigger the proactive release requirement, whereas a decision to simply promote or encourage the use of face masks would not.
- 19 Only decisions that apply at a population level, to a class or subpopulation of unspecified individuals, are caught by the requirements of this Circular, not decisions that relate to specific individuals or specific properties.¹
- 20 Decisions in scope are those made in response to or as a consequence of a pandemic. This includes decisions made to prevent or limit the spread of the pandemic infection (for example, population-level requirements to isolate or quarantine) as well as decisions taken as a consequence of the pandemic (for example, imposing fuel restrictions due to pandemic-related supply chain disruptions). It does not include decisions that are unrelated to pandemic response that happen to be made during a pandemic (for example, changes to criminal law).
- 21 Decisions include collective decisions of Cabinet, decisions made by an individual minister, and decisions made by chief executives or statutory officers under specific statutory authority (such as under the Health Act 1956).
- 22 Only final decisions trigger the proactive release requirements. A minister forming a view to seek Cabinet approval of a specific proposal is not a decision for the purpose of this Circular. However, the subsequent decision of Cabinet would be in scope if this decision limited or restricted human rights as an immediate or proximate consequence of the decision.

¹ For example, a requirement that a specific business close, that specified individuals present during an exposure event are required to isolate, or a decision on whether to allow an individual exemption to more general population-level restrictions would not be covered by the requirements. Restrictions that apply to any specific class or subpopulation of unidentified people, for example border workers or people living in a specific region, would be considered to have population-level impacts.

Material to be considered for release

- 23 All advice that relates to the decision must be considered for proactive release. Advice includes relevant briefing papers, reports, risk assessments, regulatory analysis summaries, or other material that informs, supports or recommends a decision. Where Cabinet is the decision maker, all related advice that was provided to the portfolio minister who submitted the Cabinet paper is in scope.
- 24 Technical or expert advice related to the decision by a third party that was commissioned and received by ministers, minister's offices or public service agencies in the course of the advisory or decision-making process should also be considered for proactive release. Ministers and agencies should be proactive in advising third parties of this point when commissioning such advice.
- 25 Only the final version of advice should be proactively released. The final version of advice is:
 - 25.1 the version that was submitted to the chief executive or statutory officer in the event of a decision by those parties;
 - 25.2 the version submitted to the relevant minister in the event of a decision by a minister or Cabinet;
 - 25.3 for technical or expert advice that was commissioned and received by ministers, ministers' offices or public service agencies, the version of the advice that was current at the time of the decision.
- 26 Where it is recommended that information is redacted, the reasons should be clearly stated. More information about this is discussed below.
- 27 Each release must be accompanied by a coversheet that contains, at a minimum, the information shown in the example coversheet in the appendix to this Circular. The exact layout of the coversheet will depend on each agency's website and the material being released. As a protection against misuse of information, copyright statements should be included with the content of each paper published.
- 28 Where possible, all related advice and Cabinet materials should be proactively released together as a package so that readers have context for the decisions. Requirements relating to the release of Cabinet materials are set out in CO (23) 04.

What material may be withheld or delayed for release

- 29 Advice must be released proactively unless there is good reason not to publish all or part of the material, or to delay the release beyond five business days. A good reason includes those reasons listed at CO (23) 04 paragraph 25 and the due diligence considerations listed at CO (23) 04 paragraph 34, including considerations relating to legal professional privilege.

Who is responsible for proactive release of advice

- 30 The following parties are responsible for authorising the proactive release of advice under this Circular:
 - 30.1 for a collective decision made by Cabinet, the relevant portfolio minister. In the case of joint papers, joint ministers are responsible;

- 30.2 for decisions made by an individual minister, the minister;
- 30.3 for decisions made by an agency chief executive or other statutory decision maker, the relevant agency chief executive, in consultation with the portfolio minister.

31 A publisher is the person or persons in an agency or a minister's office who is responsible for administering the proactive release and publication of the advice online. It is the publisher's responsibility to confirm that the due diligence and authorisation steps have been undertaken before advice is proactively released and published online. Information about this process is in the sections below.

When must advice be proactively released

- 32 Advice must be proactively released and published online within five business days of final decisions being taken, unless there is good reason not to publish all or part of the material, or to delay the release. Authorising parties can choose to release advice earlier than the five business days.
- 33 The counting of the five business days in which advice must be proactively released starts from the day after the decision is taken. A business day has the same meaning as at CO (23) 04 paragraphs 16.1 - 16.2.

Preparing for proactive release

Indicating proactive release in papers

- 34 Agencies should be proactive in considering the requirements of this Circular when preparing advice. Where possible, papers seeking or informing decisions should signal the application of this Circular where it is likely to be relevant and seek the decision maker's in-principle agreement to the proposed approach to proactive release, subject to a final due diligence assessment following the decision and before publication.
- 35 Papers should set out the reasons that officials consider any material should be withheld from release, released only in part, or released after the standard publication timeframe.

Matters to consider when drafting advice

- 36 In preparing advice, agencies should apply the considerations set out in paragraphs 31–33 of CO (23) 04 as appropriate, adapted as required to reflect the particular requirements and information covered by this Circular.

Due diligence

- 37 All material proposed for release must undergo a thorough review process. Because proactive release material is not released under the OIA, the Crown is not protected from any civil or criminal liability that may occur as a result of the release of information (see s48 of the OIA).
- 38 The person or agency reviewing material should refer to both the good reasons not to publish all or part of the material, or to delay the release of material, set out at CO (23) 04 paragraph 25 and the due diligence requirements set out at CO (23) 04 paragraph 34 before approval is given to proactively release advice.

Publishing advice

- 39 The same considerations and requirements set out at CO (23) 04 paragraphs 36 – 42 apply as appropriate, adapted as required to reflect the particular requirements and information covered by this Circular. Where a requirement in CO (23) 04 is only relevant to Cabinet material, it does not apply.

Other considerations and requirements

- 40 The considerations set out in the following paragraphs of CO (23) 04 apply, adapted where required to reflect this relates to advice not Cabinet material:
- 40.1 paragraph 43 relating to reviewing the security classification of material once it has been proactively released;
 - 40.2 paragraph 44 relating to keeping records of released information;
 - 40.3 paragraph 48 relating to amending published material;
 - 40.4 paragraph 49 relating to OIA requests for advice that has not yet been released.

Further advice

- 41 The Ombudsman's OIA guide (including '[Free and frank opinions](#)', '[Good practices for proactive release of official information](#)', and '[The OIA and the public policy making process](#)') should be used by Minister's offices, departments and agencies.
- 42 Agencies should also refer to the Public Service Commission's '[Agency guidance on the proactive release of official information](#)'.
- 43 The Public Service Commission is available to provide further advice on the implementation of this Circular.

Rachel Hayward
Secretary of the Cabinet

Enquiries:

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Example of a coversheet

The exact layout of the coversheet will depend on each agency's website and the material being released.

Proactive release under CO [26] 06

Decision maker and portfolio (for Ministers)

Name of package

Date of issue

This/these documents have been proactively released.

Date, title, author e.g. agency, expert advisory group

Explanation of material redacted e.g. some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act). Where this is the case, the relevant sections of the Act that would apply have been identified. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Key to Redaction Codes:

Insert either the Official Information Act section and the explanation for that section or other reason for redaction (e.g.: national security, potential liability as per CO (23) 4)

Insert a Copyright statement

For Cabinet material and any public service departmental advice use this copyright statement [© Crown Copyright, Creative Commons Attribution 4.0 International \(CC BY 4.0\)](#)

For key advice and other papers from agencies other than public service departments you will need to select the appropriate copyright statement for this information