

## CHIEF EXECUTIVES AND THE ‘NO SURPRISES’ PRINCIPLE

### Introduction

1. The ‘no surprises’ principle operates in the context of the constitutional framework governing the relationship between Ministers and departmental Chief Executives.
2. In short, the principle is a convention by which Chief Executives keep their Ministers informed of significant or controversial matters, especially those that may arise in public, in the Minister’s portfolio areas of responsibility (Cabinet Manual 3.26(a)).
3. In practice, the judgement to be exercised in getting the balance right between the ministerial and executive responsibilities cannot be readily converted to a test or guideline. Rather, it requires a good understanding of the constitutional framework and statutory obligations. A proper understanding of the constitutional conventions underpinning the relationships protects both Ministers and Chief Executives from criticism of straying into each other’s areas of accountability.
4. This guidance document sets out that framework and provides some particular examples of the principle in practice.<sup>1</sup> Chief Executives and other senior leaders should seek collegial and/or legal advice where they are unsure of how to proceed.

### Constitutional framework

5. The relevant aspects of the framework are:
  - a. **Ministers are accountable to the House:** Under the constitutional convention of individual ministerial responsibility, Ministers are accountable to the House for ensuring that the agencies for which they are responsible carry out their functions properly and efficiently. This accountability extends to errors made by public servants in administering a Minister’s portfolio responsibilities, even where the Minister has had no knowledge of, or involvement in, the matter at issue<sup>2</sup> (Cabinet Manual para 3.31). Public servants are the Minister’s ‘agents’ in this context. Except with respect to functions or powers that officials must exercise independently (addressed below), a public servant’s actions are in the agency’s name and the responsible Minister is accountable to the House – and, ultimately, to the electorate, for them.
  - b. **Chief Executives are accountable to Ministers:** Under s 52 and clause 1, schedule 6 of the Public Service Act 2020 and s 34 of the Public Finance Act 1989, Chief Executives of departments are responsible to their portfolio Minister, and vested with the necessary powers for (among other things) carrying out the functions and duties of the department (including those imposed by statute or by the policies of the government). This statutory formula recognises a hierarchical relationship of accountability that is consistent with, and reinforces, the convention of individual ministerial responsibility.

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<sup>1</sup> Crown Entities operate under different statutory frameworks and this guidance may not apply to those relationships between Chief Executives and Ministers.

<sup>2</sup> For ministerial responsibility for operational matters see Speaker’s Ruling 157/4 (15 May 2013) 690 NZPD 9927.

- c. **Chief Executives must be politically neutral:** The convention of public service neutrality complements the convention of individual ministerial responsibility. It requires public servants to behave in a politically neutral manner, to give free and frank advice to Ministers and to act in such a way that their agency maintains the confidence of its current Minister and of future Ministers (Cabinet Manual para 3.72).
6. As a matter of practice, there is an expectation that Chief Executives manage their departments without the Minister's involvement in day-to-day operations (Cabinet Manual para 3.9). Consistent with individual ministerial responsibility, however, Ministers are entitled to direct matters within their portfolios (except with respect to functions and powers that Chief Executives and other officials within their departments must exercise independently). While Ministers should "take care to ensure that any direction they give their chief executive could not be construed as improper intervention in administrative, financial, operational, or contractual decisions that are the responsibility of the chief executive" (Cabinet Manual para 3.26(c)), it is important to recognise that not all ministerial direction in these areas is improper. The degree of managerial freedom that Ministers may and do accord Chief Executives over the administration and operation of their departments is a matter to be determined between Ministers and Chief Executives, and is not subject to any specific statutory or constitutional constraints.

### **Nature of 'no surprises' principle**

7. In order for the accountability relationships within the above constitutional framework to function well, there must be continuing engagement between the Minister and the Chief Executive. The 'no surprises' principle provides guidance in this context.
8. Particular care is required in applying the 'no surprises' principle in relation to functions or powers that officials must exercise independently of the Minister<sup>3</sup>. It is important to be clear, however, that advising a Minister of a matter in accordance with the 'no surprises' principle does not in itself indicate a lack of independence. The 'no surprises' principle applies to all matters within a Minister's portfolio responsibilities, including functions or powers that officials must exercise independently of the Minister.
9. As with constitutional conventions, the 'no surprises' principle is subject to law. There may be situations in which the lawfulness of informing the Minister will need to be considered prior to approaching the Minister.<sup>4</sup> (see below for the specific example of suppression).

### **Application of 'no surprises' principle**

10. When considering whether to inform the Minister of a matter, it is important to be clear whether it relates to a function or power that officials must exercise independently of the Minister, either by virtue of statute or convention. Examples of such functions and powers include the duty to act independently of Ministers in matters relating to decisions on individual employees (Public Service Act, s 54), and the independence of certain officers to

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<sup>3</sup> Ministers and CEs may wish to record in some formal way: (a) areas of independent decision-making, and (b) an agreed approach in areas of operational decision-making. The Briefing to an Incoming Minister or the departmental priorities are options to consider.

<sup>4</sup> For example, the confidentiality requirements found in ss 18-18K of the Tax Administration Act 1994, or the insider trading regime under the Financial Markets Conduct Act 2013, which imposes certain restrictions on officials holding inside information about a public issuer (such as a Mixed Ownership Model company) and would restrict the disclosure of such information to Ministers in certain circumstances referred to under the *Guidelines for Dealing in Financial Products on Markets (Inside Information and Market Manipulation (CO (23) 5))*.

investigate and prosecute independently of any Minister (constitutional convention and statute, e.g. Policing Act 2008, s 16(2)).

11. Where the matter at issue does **not** relate to a function or power that is required to be exercised independently of the Minister, the key factor is the **significance** of the matter within the Minister's portfolio responsibility. As the Cabinet Manual provides, the general principle is that Ministers should be informed **promptly** of matters of significance within their portfolio responsibilities, particularly where they may be controversial or may become the subject of public debate.
12. Where a function or power that officials are required to exercise independently is at issue, care is required in applying the 'no surprises' principle to ensure that independence is maintained (Cabinet Manual para 3.26(b)). The significance of the matter at issue is the starting point, but is not always determinative. The following considerations are helpful in determining whether – and, if so, when and how – to inform the Minister:
  - a. *Purpose*: Generally, a briefing in relation to a function or power that an official must exercise independently is provided for the Minister's information only, to ensure that the Minister is not surprised by a matter within his or her portfolio. It will generally be appropriate to inform the Minister of significant matters of this nature, **so long as the Minister can be informed in a way that will not compromise the official's independence**. Occasionally, the Minister's views may be a relevant factor for the official to take into account. In these situations, the Chief Executive should ensure that the Minister knows why the matter is being raised, and both the Minister and the Chief Executive must act to maintain the independence of the official's decision-making process.
  - b. *Timing*: Where a briefing is considered necessary or appropriate, timing may be critical to ensuring the actual and perceived independence of the official's decision-making is maintained. Where the briefing is prompted by a matter being potentially controversial or likely to generate public debate, timing may be influenced by whether publication of the decision (e.g. by media) is imminent.
  - c. *Manner*: Any briefing in relation to a function or power that an official must exercise independently must clearly identify the reasons that the matter is being raised. This will often include making it clear that the briefing is for the Minister's information only. As a matter of best practice, briefings should be in writing or at least documented in writing – both as a matter of clarity, and to avoid subsequent debate.
  - d. *Scope*: Decisions as to the scope of the notification will follow from the purpose of the briefing and should be clearly within the domain of the Minister's portfolio interests, i.e. not tangential or "loosely related" interests. The Minister should be notified to the extent that it is necessary or appropriate to do so.
13. Chief executives must also advise Ministers of the basis on which they are to receive the information, of any restrictions on further publication or discussion and what it is expected the Minister will do (if anything) in relation to the information.
14. A high-level summary of the decision-making process for determining whether to inform a Minister in accordance with the 'no surprises' principle is set out in the flowchart below.

**Is the matter of significance within the Minister's portfolio?**  
Matters that may be controversial or become the subject of public debate are likely to be significant.

YES

NO

No requirement to inform the Minister under the 'no surprises' principle

**Is it lawful to inform the Minister?**

YES

NO

Do not inform the Minister

**Is the function/power at issue required to be performed by the official independently?**

YES

NO

**Are the Minister's views a relevant factor to take into account when exercising the function/power?**

Inform the Minister promptly

NO

YES

Inform the Minister with careful regard to purpose, timing, manner and scope

**Is it nevertheless appropriate to inform the Minister?** In particular, can the Minister be informed in a way that does not compromise the official's independence?

NO

YES

Do not inform the Minister

## **Application in particular situations**

### ***Responsibilities under the Public Service Act and the Public Finance Act***

15. These responsibilities include functions, duties and powers conferred by government policy or statute. They are generally subject to ministerial influence.<sup>5</sup>
16. In terms of the ‘no surprises’ principle, paragraph 3.26(a) of the Cabinet Manual applies. The general principle is to inform Ministers of matters of significance within their portfolio, particularly where those matters are controversial or may become the subject of public debate.
17. Any matter relating to operational, regulatory or budgeting decisions, or service delivery, whether made pursuant to government policy or statutory authority, may be significant if it involves a serious mistake on the part of the department, or if it results in a serious disadvantage to a third party or affects a significant number of people. For example, a matter may be of interest to the Minister if a department fails to adhere to a standard or follow a process imposed by Cabinet directive, or if a department makes an error in performing a statutory function by materially miscalculating an entitlement or granting a licence to a business that does not meet the licence conditions.

### ***Responding to requests under the Official Information Act 1982***

18. Where a request for official information is made to a department, it is the department’s responsibility to decide how to respond to the request (Official Information Act 1982, s 15).
19. The distinction is drawn in paragraphs 8.53, 8.55 and 8.56 of the Cabinet Manual between consulting Ministers and advising under the ‘no surprises’ principle:

8.53 An agency may consult its Minister about any request for official information it receives. An agency should consult its Minister if the request relates to Cabinet material, because such material relates to their activities as a Minister. Ministerial consultation on an Official Information Act 1982 request is no different from any other consultation process. It should be clear that the agency is consulting rather than providing the request for the Minister’s information, and sufficient time should be allowed for the Minister’s office to provide any input about the proposed decision. The decision on how to respond to the request must nonetheless be made by the agency, in accordance with the Official Information Act 1982. It is good practice for Ministers and chief executives to agree on how consultation arrangements on Official Information Act requests will be handled generally. The Ombudsman has published a “model protocol” that can be used to guide these arrangements, and encourages agencies to proactively publish such arrangements.

8.55 On being consulted, the Minister may take the view that information that the agency considers should be released, should not be released. In such a case, transferring the request to the Minister may be an appropriate way forward, if the requirements of section 14 of the Act can be satisfied. Each case of this kind needs to be handled carefully at a senior level within the agency, with reference to the Minister if necessary. Where the request is not transferred to the Minister, the views of the Minister are not determinative, and an assessment needs to be made by the agency as to whether any of the withholding provisions apply.

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<sup>5</sup> There are some specific exceptions to this general principle. One is the exception of certain functions, duties and powers that Treasury officials must exercise independently under the Public Finance Act. Also of note is the requirement under s 26W of that Act to use “best professional judgment” in preparing economic and fiscal updates.

8.56 An agency should advise its Minister if it intends to release any information that is particularly sensitive or potentially controversial, in accordance with the “no surprises” principle (see paragraph 3.26). A notification for this purpose is not the same as consultation and should be done at the same time as, or just before, sending the decision to the requestor, so as not to delay the agency’s decision on a request.

20. The ‘no surprises’ principle may still apply where an information request does not warrant consultation with the Minister or his/her office. Chief Executives should identify the purpose when advising Ministers of information requests.

### ***Investigative and prosecutorial decisions***

21. By virtue of convention and (in some instances) statute, Chief Executives of all prosecuting departments are required to act independently of their Ministers with respect to the investigation and prosecution of offences (see, for instance, s 16(2) of the Policing Act 2008). Great care is required in applying the ‘no surprises’ principle in this context; paragraph 3.26(b) of the Cabinet Manual applies.
22. Notifying the Minister of matters that are likely to be controversial or the subject of public debate is generally appropriate *unless*:
  - a. there are legal restrictions upon the use of the information; or
  - b. notification may compromise, or be perceived to compromise, the official’s independence – for instance, an investigation is being carried out with respect to a family member or close associate of the Minister.
23. Any briefing should be provided before the matter attracts public attention, but should be timed to minimise the risk of any perception of interference by a Minister or prejudice to a fair trial. For the majority of cases, a briefing to the Minister would be appropriate once charges have been filed in Court. Briefing a Minister during the early stages of an investigation is generally not advised due to the risk of compromising the investigation’s independence. However, exceptions will arise where a controversial matter is expected to become public at that time.
24. All briefings in relation to criminal investigations and prosecutions should be documented in writing, and their purpose should be made clear – by stating why the Minister is being informed of the matter, and explaining that the briefing is for the Minister’s information only. The scope of the information provided should be tailored to meet the purpose of the briefing, again taking account of any legal restrictions.
25. In addition to Chief Executives notifying their portfolio Minister of investigations and prosecutions involving their department, the responsibility to keep Cabinet informed of progress of prosecutions involving the Crown (and in particular, Crown prosecutions for which the Crown has assumed responsibility) lies with the Attorney-General under paragraph 4.6 of the Cabinet Manual. The Attorney-General is briefed by the Solicitor-General who has responsibility for the conduct of Crown prosecutions and oversight and supervision of all public prosecutions.
26. A suppression order forbidding the publication of a defendant’s name and other identifying details does not prevent the CE from briefing the portfolio Minister on the matter, if it is

considered necessary under the usual ‘no surprises’ principle. In some cases, the Minister may already be aware of the matter from an earlier briefing. However, a suppression order will restrict the form and scope of the briefing so that it does not become a prohibited publication in terms of sections 194-211 of the Criminal Procedure Act 2011. Where the defendant’s identity is not a relevant factor it is prudent to keep the suppressed details out of communications with the Minister. In any event, if a ‘no surprises’ briefing is given in these circumstances, it must advise the portfolio Minister of the terms of the suppression order.

### *Decisions relating to individual employees*

27. In matters relating to decisions on individual employees, such as appointment, promotion or discipline, the Chief Executive of a department is responsible for acting independently and is not responsible to the Minister (Public Service Act, s 54). Paragraph 3.37 of the Cabinet Manual applies: It is generally inappropriate to involve the Minister in any staffing matter.
28. However, in certain circumstances Chief Executives may need to brief the Minister on a staffing matter in accordance with paragraphs 3.26(a) and 3.26(b) of the Cabinet Manual. Examples might include where a staff disciplinary matter is likely to attract public attention or debate, or a staff appointment is likely to be of high public interest or controversial. Another example is where an employee’s new role will require them to start meeting the Minister on a fairly regular or frequent basis.
29. In all matters relating to staffing decisions, where a Chief Executive considers a briefing to the Minister is required, the scope of any briefing and conformity with information privacy principles should be carefully considered, and the purpose made very clear.

### *Tax affairs of individual taxpayers*

30. The Chief Executive of Inland Revenue is also designated the Commissioner of Inland Revenue (Tax Administration Act 1994, s 5B). As Chief Executive, they are accountable under the Public Service and Public Finance Acts to manage operational matters and provide sufficient information and advice to support the Minister in meeting their responsibility to Parliament.
31. As Commissioner however, while they may be directed on matters relating to the administration of relevant legislation, they are independent from ministerial direction in matters relating to **the tax affairs of individual taxpayers** or the **interpretation of tax laws** (TAA, s 6B). The Commissioner’s independence in these areas protects the integrity of the tax system by ensuring taxpayers receive impartial treatment and thereby view the system as fair, and is consistent with the principle that taxpayer information is confidential (TAA, s 6).
32. In practice, this means the Minister does not receive information identifying individual taxpayers or their affairs, and cannot give directions regarding who to audit and when, or how much tax is payable.

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**(Updated in 2020 and 12 October 2023 only to update references to Cabinet Manual and relevant legislation)**