

2 December 2024

██████████
By email: ██████████

Dear ██████████

Your request for information under the Official Information Act 1982 (OIA)

1. We received your OIA request on 14 November 2024 for *“all and any material held by the FMA (including its board) relating to the regular public commentary on contentious political, trade and other policy matters by your chair Craig Stobo”*. You specifically noted that your request *“includes, without limitation:*
 - *any policy documents FMA has governing this sort of activity by board member (including what if any disclaimers are required)*
 - *any documents commenting on the application of the PSC statement of conduct expectations for Crown entity board members,*
 - *any advice or communication to or from the minister (Bayly) and/or his office on these matters, and Stobo's conduct in particular*
 - *any advice sought or received from other government agencies, whose territory he often seems to trespass on (most notably MFAT or NZTE, but including the Reserve Bank as well).”*
2. Additionally, we have also received a related OIA request from you to the Minister’s Office that was transferred to us on 14 November, for *“all and any material held by you or your office regarding the public commentary undertaken by Craig Stobo, FMA chair, on matters beyond the remit of the FMA (most particularly, but not necessarily limited to, his regular interview slot with Michael Laws on The Platform... This request includes all briefings from and correspondence to or from either Stobo, the FMA Board, or the FMA's senior management, and any advice or comment sought or received from elsewhere in government (including, but not limited to, MFAT).”*
3. We are providing you with all the information that we hold relating to these two requests. Please find attached:
 - 3.1. FMA Board Member Induction Manual, Section 8.6;
 - 3.2. Board Communications and Information Guidelines; and
 - 3.3. Screen shot of a text exchange between the FMA’s Manager, External Relations and the Private Secretary of the Minister’s office referring to an article that was written by Mr Stobo that the NZ Herald had published that morning. The Manager, External Relations leads the day-to-day engagement with the Minister’s office on behalf of the FMA.

4. We do not hold any other information within the scope of your two requests and we are not aware any other information exists.
5. You have the right to seek an investigation and review by the Ombudsman of this decision. Information about how to make a complaint is available at www.ombudsman.parliament.nz or freephone 0800 802 602.
6. If you have any questions about this response, please contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'KRoss', written in a cursive style.

Kristen Ross
Principal Legal Counsel, Internal Governance

[Extract from FMA Board Induction Manual]

8.6 Standards of integrity and conduct

Members are required to comply with the Code of Conduct for Crown Entity Board Members (in the Board Resource Centre). Members must:

- a) act in the spirit of service, bringing to their role a spirit of service of the community and a desire to improve the wellbeing of New Zealand and all New Zealanders, including of Māori consistent with Te Tiriti o Waitangi. A key requirement of Board roles is to act with the highest levels of integrity and professional and personal standards.
- b) be honest and open. Members are encouraged to speak up in board meetings on decisions or advice that may be detrimental to the public interest.
- c) deal with people fairly, impartially, promptly, sensitively and to the best of their abilities. Members should not act in a way that unjustifiably favours or discriminates against particular individuals or interests. Members should help create an environment where diverse perspectives and backgrounds are encouraged and valued, and treat other members and staff employed by the FMA with courtesy and respect.
- d) report unethical behaviour when they see it and treat all concerns raised by others seriously (see: the FMA's Protected Disclosure Policy).
- e) act in a politically impartial manner. Members should conduct themselves in a way that enables them to act effectively under current and future Governments, and should not make political statements or engage in political activity in relation to the functions of the FMA.
- f) when acting in their private capacity, members should avoid any political activity that could jeopardise their ability to perform their role or which could erode the public's trust in the FMA. Members should discuss with the Chair any proposal to make political comment or to undertake any significant political activity.

Further information on ethics provisions (for example on the permitted use of FMA information, conflicts of interest, gifts and hospitality, and statutory and administrative requirements) can be found in this Manual, the Board Governance Charter and Manual and the relevant policies, all of which are in the Board Resource Centre.

Owner:	Board Secretary
Review Date:	March 2024 (with updates to member bios and ELT Team in Aug 2024).
Approved:	Board at 2 April 2024 board meeting



BOARD COMMUNICATION AND INFORMATION GUIDELINES

Introduction

1. Open and frank communication between the FMA executive and Board members and among Board members is vital to allow Board members to carry out their functions and to support the objectives of the FMA.
2. As a Crown entity, communications to, from, and within the FMA should be treated as potentially open to public scrutiny. This public scrutiny increases the FMA’s accountability and contributes to the goals of open government, but also poses reputational and legal risks to the FMA arising from the content or tone of communications.
3. The FMA also has obligations to keep confidential the information it obtains from market participants. Inadvertent or unauthorised release of this information can erode trust and respect in the FMA and can raise legal risks.
4. These risks can be mitigated if care is taken in the generation and dissemination of communications on matters relevant to the FMA.

FMA Information is confidential

All FMA communications should be treated as strictly confidential unless release has been authorised by the FMA.

5. The FMA Act requires the FMA to keep confidential information that it obtains in the performance of its functions, with certain exceptions that allow us to use this information as required for those functions. This is intended to provide comfort to market participants in relation to information they provide to us and so to increase the flow of information to the FMA from market sources.
6. This deemed confidentiality assists in protecting such information where release under the Official Information Act 1982 (OIA) could be prejudicial. It also places a duty on the FMA to treat all the information it holds with care and to guard against inadvertent or unauthorised release of information held by the organisation.

Owner:	General Counsel		
Review Date:	July 2024	Next review date & cycle:	July 2026 (2 yearly cycle)
Approved by:	FMA Board – 6 July 2024		

7. The FMA holds personal information about individuals such as license-holders and subjects of inquiries. The FMA is subject to the Privacy Act 2020 and must take reasonable steps to ensure that personal information it holds is kept secure and is not inappropriately disclosed.

Assume information is available to the public

Board members should assume that all communications are potentially capable of discovery or release to Courts, Ombudsmen, or members of the public, and should keep this in mind when generating or responding to communications.

8. The FMA is a Crown entity and is subject to the OIA. Under this legislation, any information held by an organisation must be provided to anyone who asks for it unless there is “good reason” to withhold the information under the OIA.
9. Much of the information held by the FMA, particularly information obtained by the FMA which is treated as being confidential under the Financial Markets Act, can be withheld under the OIA. Some of the grounds for withholding information are set out further in this guidance (see “Official Information Act” below). However, every request for information must be considered on its own merits.
10. Where the FMA takes Court proceedings in relation to any matter it must meet certain disclosure requirements, in both criminal and civil cases. The grounds on which information can be withheld in these circumstances are very limited.
11. The FMA is subject to the Ombudsmen’s jurisdiction under the Ombudsmen Act. Where any matter is investigated by an Ombudsman the FMA has an obligation to provide to the Ombudsman any information that is sought of it, including information that is subject to legal professional privilege (although the Ombudsmen cannot publish privileged information obtained from the FMA).
12. For these reasons all communications should be treated as potentially available to the public.

Content, context and tone of communications

Communications should be considered, professional, and not should pose risk either to the FMA’s reputation or to the performance of the FMA’s functions.

13. Board members who are “interested” in any matter, in terms of the Crown Entities Act, should avoid communicating at all with the FMA in relation to the matter, even if the communication is based on publicly available information. If these communications occur and are later disclosed in the course of proceedings, they can be used to give the impression that the “interested” member was able to influence the FMA’s deliberations, or in some other way remained involved in the matter.
14. Communications with Board members need to be open and frank, so that the Board is appropriately informed, and its views clearly communicated. These communications should always be appropriate to the FMA’s role as a regulator and a public authority.
15. It is particularly important that communications are not phrased in a manner that could give the impression that the FMA or any Board member has predetermined an issue or is

biased against any person.

16. Comments that may be considered offensive, derogatory, defamatory, or disparaging of persons should be avoided. Bear in mind that comments intended as light-hearted or humorous can appear quite differently if taken out of context.
17. If you are not certain whether to commit a comment to writing, it is often better to consider dealing with the matter by phone call or meeting.
18. All FMA Board members are involved in the financial markets regulated by the FMA, and are likely to find themselves in situations, private or public, where they are called upon to comment in their personal or professional capacity on matters that are, or are likely to be, under consideration by the FMA. As a basic rule in such cases, Board members should make it clear that they are speaking in their private capacity and not on behalf of the FMA.
19. Any public comment by a Board member on political matters or matters that could be associated with the FMA should be clearly identified as being made in the Member's private capacity. Consistent with Te Kawa Mataaho Public Service Commission advice, Board members should take particular care to avoid political commentary, or commentary on government policy, in the period running up to a general election.
20. Where possible, public comment by Board members on matters that could be associated with the FMA's functions should be discussed in advance with the Chairperson and notified to the Chief Executive. Any public comment should be consistent with Board members' obligations to the FMA. Comments on highly contentious matters, even if identified as personal comments, can pose a risk to the FMA in two ways:
 - It can give the impression that the Board members' comments are informed, consciously or unconsciously, by their position within the FMA. Even where there is no such knowledge the public perception can be that the statement has a special status or credibility because it comes from an the FMA member;
 - Public comment by Board members that is contrary to or that prejudices an FMA policy position can raise perceptions of bias or division within the FMA Board and can detract from the effective performance of the FMA's functions.

Media communications

The FMA will comment to the news media only through its designated representatives. Ordinarily the Chief Executive is the spokesperson for the FMA and the Chairperson is the spokesperson for the Board.

21. The FMA aims to have an open, mature, and transparent relationship with the news media. The dominant impression journalists should have of the FMA, in a media relations context, is of a pro- active and approachable entity whose comments and market reputation always make it worth listening to.
22. Communications with the news media need to reflect our priorities and objectives, and for this reason should occur only through the Chief Executive or authorised delegates.
23. Board members should not comment to the news media on FMA-related matters without authorisation from the Chairperson. If Board members receive enquiries from the news

media these should be directed to the External Communications team.

Complaints from market participants and members of the public

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Complaints from market participants and members of the public

Complaints sent to Board members should be forwarded to complaints@fma.govt.nz for action.

27. Board members will from time to time receive complaints or enquiries from members of the public or market participants. If these are received for action by the FMA they should be forwarded to complaints@fma.govt.nz, where they will be acknowledged, assessed, and actioned.
28. Board members should note that complainants and interest groups may on occasion direct communications to Board members in an attempt to influence or change the FMA action or to embarrass the FMA. To avoid prejudicing the complaint, or giving a perception of special treatment, Board members should not engage directly with complainants beyond informing them that their complaint has been forwarded to the FMA for action. All responses to complainants should be treated as likely to be released to news media.

Communications between the Board and the FMA

Queries or requests for information from the FMA should be directed through the Chief Executive, General Counsel, Board secretariat, and division and committee secretaries.

29. It is important that the FMA has an accurate record of all communications with Board members. This is particularly so in respect of matters requiring a formal determination of the Board, where we need to ensure we can produce a full record both of the Board's deliberations and of the matters it took into consideration.
30. The Chief Executive, General Counsel, Board secretariat, and division secretaries are the usual conduit for communications between Board members and the FMA. Board members

should direct queries or requests for information through these channels.

31. Communications from Board members concerning operational matters or specific entities, whether seeking or providing information on a matter, can raise the perception that Board members are able to take advantage of privileged access to the FMA. Board members who wish outside of regular Board meetings to contact the FMA directly about a matter or entity relevant to regulatory operations should only contact a member of the Executive Leadership Team. Board members should not contact staff at all concerning any matter in respect of which the member has a conflict (except as required for management of the conflict). For transparency, the Chief Executive will inform the Chairperson at their weekly meeting, including of any proposed action (if any) that the executive proposes to take as a result of the contact. In addition to being reported to the Chairperson, any matters raised by Board members with the executive will also be reported to the full Board, for transparency. Board members seeking non-public information about any aspect of the FMA's operations should raise this at a Board meeting.

Privileged communications

Legal professional privilege ensures that legal advice can be openly and honestly sought and that free and frank legal advice is given to the FMA's Board. Privilege in legal advice belongs to the FMA and must not be waived without authorisation. Privileged information should be kept secure to avoid inadvertent waiver of privilege.

32. Legal professional privilege is a term that covers both solicitor-client privilege and litigation privilege. Communications to and from the FMA's legal advisers (both internal and external) for the purpose of seeking or giving legal advice are protected by solicitor-client privilege. Communications are protected by litigation privilege if they are created in the course of litigation (or in contemplation of litigation) where the dominant purpose of the communication is to enable the FMA's legal advisers to advise on or conduct litigation.
33. Although legal professional privilege applies to legal advice provided by in-house lawyers where they are acting in this capacity, a communication is not privileged merely because one party is a lawyer. Communication between Board members will rarely be privileged.
34. Legal professional privilege stops applying if the privilege is waived. Privilege can be waived expressly and can also be deemed to have been waived by the client's actions (such as passing the information onto a third party or revealing the contents of the advice, even in summary form).
35. Where communications from staff lawyers are privileged, any requests for further advice or clarification should be directed to those lawyers. Aside from that it is best to avoid communications referring to or discussing privileged information.

Official Information Act

The Official Information Act (OIA) applies to all information held by the FMA, and to information held by Board members in their capacity as such.

Board member communications relating to the FMA should be copied to the Board secretariat, Chief Executive, or relevant staff contact to ensure the FMA can comply with its obligations to access all information it holds relating to any request.

36. The FMA is subject to the OIA. This legislation says that all information held by the FMA can be requested and must be made available unless there is “good reason” to withhold it in terms of the OIA. Every request must be considered on its own merits, so there are few instances in which blanket rules can be said to protect information. As such, all communications should be treated as potentially subject to public release (this is even more so the case in relation to enforcement matters, where the FMA is likely to be required to disclose all information relevant to its case in the course of civil or criminal discovery).

37. There are specific grounds on which information can be withheld under the OIA, and these serve to protect much of the information held by the FMA, particularly in relation to complaints and enforcement matters. The main grounds relied upon by the FMA are that:

- the making available of the information would be likely to:
 - prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by any other government or international organisation; or
 - prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or
- withholding of the information is not outweighed by public interest in release, and is necessary to-
 - protect the privacy of natural persons;
 - protect information where the making available of the information would disclose a trade secret or be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information;
 - protect information which is subject to an obligation of confidence [most information we obtain from the market, under the FMA Act] or which someone could be compelled to provide, where the making available of the information would be likely to prejudice the supply of similar information, or information from the same source where it is in the public interest that this should be supplied, or would otherwise damage the public interest;
 - maintain the effective conduct of public affairs through-
 - the free and frank expression of opinions by or between or to Ministers, members of an organisation, or officers and employees of an organisation; or
 - maintain legal professional privilege.

38. It is worthwhile noting that most of the grounds on which information can be withheld must be weighed against the public interest in release (in the circumstances of the information and the request). This means our ability to resist disclosure of any piece of information usually can be assessed only in the context of a request for the information. For this reason it is better to treat all communications as potentially liable to release.

39. The grounds for withholding information set out in the OIA do not apply where discovery is sought in litigation under the rules of Court. Almost any information held by the FMA that may be relevant to a case must be disclosed (the exception is legally privileged

information).

40. OIA requests made to the FMA are coordinated by the legal team. If Board members receive a request for information held by the FMA this should be directed to the legal team for response.

Public Records

The Board secretariat will maintain a record of Board proceedings. Board papers should not be retained unless required in the course of litigation.

41. The FMA must comply with the Public Records Act 2005, which requires it to create and maintain full and accurate records of its affairs. The records of the FMA's affairs comprise the formal records of decisions and the correspondence, reports, and briefings that support those decisions. The records of the FMA's affairs are kept by staff on our electronic and paper records systems.
42. The Board secretariat will maintain a record of all Board proceedings, which will form the basis for response to any request for such information and for compliance with our record-keeping and archiving responsibilities. Board members do not need to keep copies of Board papers, and in the interests of security it is preferable that they do not do so. Copies of papers or minutes from any Board meeting can be obtained from the Board secretariat at any time (subject to conflicts of interest). If papers are retained, they must be held securely. Retention and archiving of papers delivered via the Diligent App are managed by the FMA.
43. An exception to the general rule applies where litigation is underway, or is contemplated. In these cases, any relevant physical Board papers held by members (including any notations made to the paper(s) by individual members) are likely to be discoverable and should be handed to the Board secretariat or division secretary at the conclusion of the relevant meeting.

Thu, 13 Jun at 07:47

Just out of interest, did your office know mr stobo was going to publish an article in the nz herald this morning?

Thu, 13 Jun at 09:04

I was not aware. I'll ask Will M / Grace if they were aware



All good. Just wanted to flag as well. Don't think there are any issues in terms of content.