

## Ombudsman's opinion under the Official Information Act

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<b>Legislation:</b>	Official Information Act, ss 9(2)(a), 9(2)(g)(i), 9(2)(g)(ii) (see appendix for full text)
<b>Requester:</b>	Tony Wall, Sunday Star Times
<b>Agency:</b>	PHARMAC
<b>Request for:</b>	Identities of members of the public making submissions and PHARMAC staff involved in decision making on funding of drug
<b>Ombudsman:</b>	David McGee
<b>Reference number(s):</b>	320402
<b>Date:</b>	14 December 2012

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## Summary

Tony Wall made a request to PHARMAC for information about the decision to fund the blood thinning drug dabigatran. PHARMAC released much of the information requested, but refused to provide the identities of members of the public making submissions and some PHARMAC staff involved in decision making on the drug. In refusing this information, PHARMAC relied on sections 9(2)(a), 9(2)(g)(i) and 9(2)(g)(ii) of the Official Information Act (OIA). Based on the information before me, I have now formed the opinion that these sections did not provide good reason to refuse the request for this information. Given that PHARMAC has indicated it is now prepared to release the information, I do not intend to make any recommendations in this case.

## My role

1. As an Ombudsman, I am authorised to investigate and review, on complaint, any decision by which a Minister or agency subject to the OIA refuses to make official information available when requested. My role in undertaking an investigation is to form an independent opinion as to whether the request was properly refused.

## Background

2. PHARMAC's primary statutory objective is set out in section 47(a) of the New Zealand Public Health and Disability Act 2000. That is to secure for eligible people in need of pharmaceuticals, the best health outcomes that are reasonably achievable from pharmaceutical treatment within the funding provided. The decision to fund the blood thinning drug dabigatran (Pradaxa) attracted interest from the media. This was in part because of the potential impact of the drug as a substitute for warfarin and reports of bleeding by some patients after the introduction of public funding.
3. In September 2011, Sunday Star Times reporter Mr Tony Wall requested material from PHARMAC under the Official Information Act 1982 (OIA) about the decision to fund dabigatran. The information requested included the names of those who made submissions to PHARMAC prior to the decision to fund the drug, along with the actual submissions. It included the names of PHARMAC staff members involved with the decision. The request also included other information about the decision to fund dabigatran.
4. PHARMAC responded in October 2011, providing much of the information requested by Mr Wall. But PHARMAC also relied on sections 9(2)(a), 9(2)(b)(ii), 9(2)(ba)(i), 9(2)(i) and 9(2)(j) of the OIA to refuse the request in part. In November 2011, Mr Wall sought an investigation and review of PHARMAC's decision.

5. The privacy issues arising from Mr Walls' complaint are the subject of this report. I have addressed Mr Walls' complaint concerning the other information withheld by PHARMAC separately.

## Investigation

6. On 12 January 2012, I notified PHARMAC of Mr Wall's complaint. I sought a report on the decision to withhold the information and a copy of the information at issue.
7. PHARMAC provided me with its response on 24 February 2012.
8. On 16 May 2012, I invited PHARMAC to provide a further explanation of its concerns about the release of the identities of the individual submitters and PHARMAC staff members involved in the dabigatran project. I advised PHARMAC that I was willing to consider any comments from PHARMAC or any third parties. PHARMAC took the opportunity to consult with all submitters and staff before providing its response.
9. On 20 August 2012, I received PHARMAC's further response. I consulted with the Privacy Commissioner before formulating a provisional opinion on 2 October 2012. I also asked PHARMAC to convey my provisional opinion to the attention of those submitters and PHARMAC personnel who did not consent to the release of their identities.
10. In November 2012, PHARMAC advised me that it had no further comment to make. I received comment from two of the health professionals who had made individual submissions about the proposal. I did not receive comment from submitters representing organisations (or from individual PHARMAC personnel).

## Analysis and findings

### Public submissions in general

11. The information withheld on privacy grounds consisted of the names of PHARMAC personnel and the identity of submitters concerning the proposal to fund dagibatran. Ombudsmen have taken the view that, while the disclosure of such information does involve the release of details about identifiable individuals, this does not constitute a significant infringement of their privacy interests for the purposes of the OIA.
12. There is also a strong public interest in knowing who participated in any decision-making process. I consider that as a general principle the public have the right to know the provenance of public policy decisions. This will generally include the content of the submission and the identity of those who elected to contribute. For that reason, it is important that public agencies seeking submissions make it clear that information provided may need to be disclosed in response to OIA requests. There is no guarantee of

anonymity for participants. There is a general presumption of release unless disclosure would reveal confidential information about the submitter (or a third party).

### Section 9(2)(a)

13. Section 9(2)(a) of the OIA provides good reason for withholding information about natural persons if, and only if, the withholding of the information is necessary to:

*"[p]rotect the privacy of natural persons, including that of deceased natural persons."*

14. This is subject to section 9(1) which states that the interest to be protected must not be:

*"Outweighed by other considerations which render it desirable, in the public interest, to make that information available."*

15. The question, therefore, is whether and to what extent it can be said to be "necessary" to withhold the particular information at issue to protect the privacy of the individuals in question and, if so, whether the public interest in this information outweighs the privacy interest to be protected.

### PHARMAC personnel

16. PHARMAC argued that "less senior" staff who do not have decision-making responsibility have a privacy interest to protect. The names of Board members, the Chief Executive, and other members of the PHARMAC Management Team were all released, as it is these individuals who are responsible for the advice tendered, and decisions made, in the course of PHARMAC's activities.
17. On initial consideration of the material available to me, I saw no justification for such a distinction. The names of officials should, in principle, be made available when requested. All such information normally discloses is the fact of an individual's employment and what they are doing in that role. Anonymity may be justified if a real likelihood of harm can be identified but it is normally reserved for special circumstances such as where safety concerns arise.
18. PHARMAC states that the release of the staff names would disclose that they worked on the dabigatran project, as opposed to only revealing their role. Previously, when staff names have been released they have been subject to disparaging public criticism. For that reason, most of the PHARMAC staff do not consent to the release and some were very concerned that release would have a detrimental effect on their work.
19. I acknowledge that in some cases anonymity may be justified if some harm can be identified which does not meet the threshold for withholding under another ground, such as section 9(2)(g)(ii) which deals with improper pressure or harassment. The possible harm in this case appears to be the risk of negative reporting. But it is important to bear in mind that the PHARMAC staff whose identities were redacted undertook a

senior advisory role. While they were not the decision-makers, they provided technical advice which was relied on by the PHARMAC Board when assessing the dabigatran proposal. These PHARMAC staff are already generally in the position of attracting public criticism. They contribute to what are often contentious decisions about the resourcing of pharmaceutical medicines. The roles of PHARMAC staff are readily ascertainable and it is likely that their involvement in projects could be deduced. PHARMAC staff were expressing their expert views in their official capacities. This reduces the strength of any privacy interest in their identities.

20. The Privacy Commissioner comments that PHARMAC staff who make an important contribution to the decision-making process have a lower privacy interest than their more junior colleagues who generally would be entitled to a degree of anonymity. The Commissioner was not sympathetic to the proposition that PHARMAC staff had a valid expectation of anonymity due to the risk of public criticism.
21. Overall, I am not persuaded that it is necessary to withhold the identity of PHARMAC staff members in order to protect their privacy. I also consider that there is a strong public interest in openness and transparency when developing PHARMAC funding decisions. Even if the release of PHARMAC staff names would result in some infringement of privacy for the purposes of section 9(2)(a), I am inclined to the view that their names should be identified on request for reasons of accountability.

## Submitters from organisations

22. PHARMAC initially released the identity of organisations along with the job title of each submitter to Mr Wall. PHARMAC considered that the individuals who made submissions on behalf of organisations had a privacy interest which requires protection. However, the individuals who signed submissions in their professional capacities as representatives of organisations were not making their views known in a personal capacity. This issue has also been discussed with the Privacy Commissioner. The Commissioner has indicated that there is a low privacy interest concerning the identity of individuals who make submissions on behalf of organisations. My thinking was thus that it was not necessary to withhold their identities to protect their privacy.
23. In response, PHARMAC confirmed that its consultation letter gave no information about what would happen to the submissions once received, other than that they would be considered by the PHARMAC Board prior to making a decision. PHARMAC took the opportunity to consult with agency submitters about their name and agency contact details being provided to Mr Wall. The views of these submitters about release of their personal information were fairly evenly spread. Nine individuals who made submissions on behalf of organisations agreed to the release of their identity. Of those nine, one expressed a reservation about his work contact details being provided. Eight submitters declined (one of those did not respond). The PHARMAC Committee members all agreed to the release of their identities.

24. PHARMAC submits that individuals who sign documents in their professional capacities are still "*natural persons*" and it is appropriate to consider the circumstances before deciding on whether section 9(2)(a) may apply. PHARMAC says that the release of the submitter's identity would allow Mr Wall to contact individuals directly to discuss the submissions thus bypassing their organisation's approach to media enquiries. Their comments would be attributed to them and quoted in the media when they were not prepared for that purpose. It follows that PHARMAC was only prepared to release the names of those who have consented to release.
25. Of course, section 9(2)(a) of the OIA would not be engaged if personal information about identifiable individuals were not at issue. The question under this provision is whether it is necessary to withhold personal information to protect the privacy of those individuals. Of the eight who declined, five of these were government health officials. As discussed above, I see no privacy interest which requires protection in respect of the names of officials acting in their official capacities (protection from harassment in terms of section 9(2)(g)(ii) of the OIA is a different matter to privacy and I advert to it later).
26. I therefore see no reason why the five officials making submissions on behalf of government agencies in their professional capacities should have their identities protected. I find it difficult to seriously countenance the "*threat*" of a direct approach from a journalist as constituting a ground for withholding this information.
27. Nor am I attracted by the proposition that the non-government agency submitters have a privacy interest which requires protection in terms of section 9(2)(a). The other three submitters were from a professional organisation, a clinical association and a pharmaceutical company. These individuals were participating in the development of public policy in their professional capacities and should have expected that their submissions would be made public, with the exception of any confidential information about the submitter. I do not consider that their names or contact details (with the exception of any contact details which are not readily available from other sources) fall into the category of private information that needs to be withheld.
28. The fact that PHARMAC failed to remind participants that their submissions and identities might be disclosed was remiss of it but does not alter my view of section 9(2)(a).

## Submissions from individuals

29. The names of individuals who made submissions on the proposal to fund dabigatran have been also withheld by PHARMAC. This group includes health professionals and a patient. PHARMAC consulted with this group of submitters and proposes to re-release only the submissions from the five individuals who consented to release (including the identity of the patient).
30. PHARMAC referred to the Ombudsmen's case note W50968 as demonstrating that organisations like PHARMAC are entitled to withhold the identify of individual submitters

who do not consent to disclosure or do not respond to enquiries. In W50968, submitters were not advised in the consultation letter that submissions may be made publicly available. Ombudsman Mel Smith concluded that it was necessary to withhold the identity of the individuals who made submissions and who expressed concerns about the release of their identities (including those who did not reply to enquiries).

31. The following comment was made:

*"Given the lack of advice in the discussion document that any submissions received from the Department may later be released in response to an OIA request, and given the surprised response from the individuals consulted during the course of this investigation, the Ombudsman noted that, as a matter of good administrative practice, government departments should consider including an explanatory statement when calling for submissions."*

32. It is disappointing that an organisation such as PHARMAC which engages in routine consultation about funding proposals (and which clearly knows about this case) did not take the elementary step of warning submitters about the inherent non-confidentiality of submissions. PHARMAC's website includes information about consultation in the document "*Having your say in our decisions*" but there is no information about OIA requests.
33. In this case, the non-consenting group is made up of six clinicians who expressed opinions in their professional capacities (but not on behalf of an employer) when responding to a request for public feedback on the PHARMAC website. One clinician from this group indicated that his submission was made with an expectation of confidentiality. He was reluctant to have his opinion known publicly and stated that he would not be giving any further opinions to PHARMAC.
34. The Privacy Commissioner considers that, as PHARMAC omitted to warn that submissions might be released, the identities of those individuals who have expressed concern should be withheld. This approach is consistent with case W50968. But I am generally inclined to the view that the public interest in transparency is more compelling than the lack of consent to disclosure.
35. In any event, I consider that this group of clinicians is in a different category from individual lay members of the public who might claim anonymity. First, their submissions carry the weight of their respective professions. Secondly, this group of medical professionals ought to have been aware that their opinions about PHARMAC's funding proposal might be made publicly available. It is difficult to justify a claim of confidentiality for having participated in the development of public policy in a professional capacity without having received or sought any prior assurance on that point. (I leave out of account in this case, whether any such assurance was deliverable. That would involve a consideration of section 9(2)(ba).) In addition, it seems unlikely that their opinions will be attributed to them in their personal, as opposed to professional, capacities.

36. There is a general expectation of openness and transparency associated with these types of submissions which reduces the strength of any privacy interest. I consider that there is a presumption that a submitter's identity will accompany their submission. That presumption might have a discouraging effect on some submitters. But that is off-set by the benefit of participants being able to express views on a subject before the agency makes a decision. It falls to submitters to balance any disadvantage of a lack of anonymity against the advantage of having their say.
37. Overall, I do not consider that section 9(2)(a) applies to the non-consenting group of health professionals. As foreshadowed earlier, even if the release of their names would result in some infringement of privacy for the purposes of section 9(2)(a), I would be of the view that their names should be made available on request for reasons of accountability.

### Health information

38. I consider that the redaction of health information by PHARMAC from one submission was justified. An individual's health information is generally regarded as highly confidential. I note, however, that the submitters concerned in this instance have consented to the release of their names and contact details.

### Section 9(2)(g)(i)

39. In order for section 9(2)(g)(i) to apply, the information at issue must contain material in the nature of "*free and frank expressions of opinion by or between or to members or officers or employees*" of PHARMAC, which, if disclosed, would prejudice "*the effective conduct of public affairs*" by inhibiting the expression of such opinions in the future.
40. PHARMAC considers that if submitters were to be publicly identified, there would be a risk of increased reluctance by interested parties in providing free and frank feedback to PHARMAC. Both doctors who commented on my provisional opinion expressed concern that disclosure of their identities would have an inhibiting effect. One doctor clarified that he had no objection to release of his identity but postulated that it might serve to "*stifle frank advice and opinion on potentially contentious issues on which the profession's input is sought*". The other doctor indicated that he would refrain from providing further submissions on the basis that he had expected confidentiality.
41. However, I very much doubt that most submitters would have an expectation that their input into the public policy decision-making process would be on an anonymous basis. I certainly approach this issue on the basis that the prospect of identifying which individual or organisation had made a submission would not have an inhibiting effect on the quality of the submission. Not only am I not persuaded that contributors to making a public policy decision of this nature would be inhibited by disclosure, I consider that, even if it could be plausibly claimed that they would, there would still be a strong case for applying a public interest override under section 9(1). In my view there is an important public

interest in knowing who made what contribution to a public policy outcome. Except in special circumstances (such as the disclosure of one's personal circumstances) I do not consider that submitters can have a reasonable expectation of anonymity. Thus, I am not persuaded that release of the submitters' names would prejudice the effective conduct of public affairs.

### Section 9(2)(g)(ii)

42. For section 9(2)(g)(ii) to apply, withholding of the information must be necessary to protect PHARMAC officials from improper pressure or harassment which would prejudice "*the effective conduct of public affairs*". If the section is to apply, there must not only be a reasonable likelihood of improper pressure or harassment, but a link must be made between the anticipated behaviour, the impact upon the person to whom it is directed, and the effective conduct of public affairs.
43. I have not seen evidence of any firm basis to support a conclusion that significant personal harassment would be a likely outcome of the release of the staff identities. Any concern about responding to media enquiries I discount entirely. (This can be readily addressed in any case by instructing staff how to respond.) In the absence of any compelling evidence of the danger of improper pressure or harassment arising from the identification of staff who may at some time have been engaged in the funding proposal, I am not disposed to consider that section 9(2)(g)(ii) is engaged.

### Ombudsman's opinion

44. For the reasons set out above, I have formed the opinion that PHARMAC's decision to refuse this aspect of the request is not sustainable. It is my opinion that neither section 9(2)(a), nor the other withholding grounds that I have identified as possibly relevant, justify withholding the identity of the submitters and the PHARMAC personnel.
45. Given that PHARMAC has indicated it is now prepared to release the information, I do not intend to make any recommendations in this case.

## Appendix: Relevant statutory provisions

### 4. Purposes

The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—

- (a) to increase progressively the availability of official information to the people of New Zealand in order—
  - (i) to enable their more effective participation in the making and administration of laws and policies; and
  - (ii) to promote the accountability of Ministers of the Crown and officials,—  
and thereby to enhance respect for the law and to promote the good government of New Zealand:
- (b) to provide for proper access by each person to official information relating to that person:
- (c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

### 5. Principle of availability

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

### 9. Other reasons for withholding official information

- (1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.
- (2) Subject to sections 6, 7, 10, and 18, this section applies if, and only if, the withholding of the information is necessary to—
  - (a) protect the privacy of natural persons, including that of deceased natural persons; or...
  - (ba) protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information—
    - (i) would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or
    - (ii) would be likely otherwise to damage the public interest; or...

- (g) maintain the effective conduct of public affairs through—
  - (i) the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty; or
  - (ii) the protection of such Ministers, members of organisations, officers, and employees from improper pressure or harassment; or...