



Request for information concerning a general surgeon

Legislation:	Official Information Act 1982, ss 9(2)(a), 9(2)(k)
Requester:	Fairfax Media
Agency:	Tairāwhiti District Health Board
Ombudsman:	Professor Ron Paterson
Reference number(s):	371760
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Summary

Fairfax Media made a request to the Tairāwhiti District Health Board (the DHB) for information regarding one of its general surgeons, including information about a complaint and his surgery statistics. The DHB refused the request under section 9(2)(a) of the Official Information Act 1982 (OIA) in order to protect the privacy of the individual concerned. Based on the information before me, I have concluded that section 9(2)(a) provided good reason to withhold most but not all of the requested information.

The disclosure of the requested work-related information is an important aspect of a DHB's accountability for the work of its general surgeons (as indeed would be the case for an information request about the workload of other senior medical officers). Surgeons are highly qualified specialists employed in the publicly funded health system to provide health services for patients. There is a public interest in members of the community and the media being able to access data about the nature (eg, type of procedure and quantity) of work performed by specialists in New Zealand's public hospitals. I recommend that the DHB release information relating to the number and type of procedures performed by the surgeon at the DHB.

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. On 22 November 2013, Stacey Kirk, Political Reporter, Fairfax Media, sought the following information from the DHB:

"All reports received by the DHB which relate to the outcome of any investigations (Medical Council or otherwise) into the qualifications or training of [Mr X]."

The August 2012, TDHB Hospital Advisory Committee agenda notes:

- *TDH has received copies of documentation sent to the Medical Council making allegations about general surgeon [Mr X's] training.*
- *The matter is in the hands of the Medical Council and they have begun an investigation process. [Mr X] is currently on leave from Gisborne Hospital.*

I would like to request a copy of the documentation that the DHB received, which was also sent to the Medical Council.

I would also like to request details of [Mr X's] current employment status with the DHB.

Could I please also request details of the length of time [Mr X] has been employed with the DHB, what roles he has held with the DHB and the numbers and types of surgeries and procedures he has performed whilst there.

I'd also like to request the total number of complaints that may have been made about [Mr X], along with details of any of those complaints and the dates they were made. What procedures were taken in each instance, to follow the complaints up?"

3. On 19 December 2013, the DHB responded to the request as follows:

"[Mr X] was employed by Tairāwhiti District Health on 27 June 2005 as a General Surgeon. He has Vocational Registration with the Medical Council of NZ as a General Surgeon. There has been no change in [Mr X's] designation since his employment."

All other details were withheld under section 9(2)(a) of the OIA.

4. On 19 December 2013, Ms Kirk complained to the Ombudsman about the decision to refuse her request, stating:

"He is a surgeon and one working in the public sector. His patients have the right to know he is appropriately qualified."

Investigation

5. On 25 February 2014, this Office contacted the Chief Executive of the DHB and made some informal enquiries. The complaint was formally notified to the DHB on 21 March 2014. By 7 May 2014, I had received all of the information requested from the DHB.
6. On 21 May 2014, I wrote to the Privacy Commissioner (as required by the OIA) to request his views on the merits of refusing the request under section 9(2)(a) of the OIA.
7. On 30 May 2014, the Association of Salaried Medical Specialists (ASMS) advised that it wished to make a submission on behalf of Mr X.
8. On 7 July 2014, I received the Privacy Commissioner's views on the complaint.
9. On 15 July 2014, I received ASMS's submission.
10. On 31 July 2014, after considering the information at issue and the views of the DHB, ASMS and the Privacy Commissioner, I formed a provisional opinion and sent copies to

the DHB and ASMS (for Mr X), and invited their comments. I have incorporated comments from the DHB and ASMS in the analysis below.

11. On 31 October 2014, I invited Ms Kirk's comments in relation to aspects of my provisional opinion. I have incorporated comments from Ms Kirk in the analysis below.

Analysis and findings

12. The questions regarding Mr X's current employment status with the DHB, length of time employed and roles held, were answered by the DHB in its response of 19 December 2013 to Ms Kirk. Accordingly, my investigation and review is limited to the DHB's decision to withhold:
 - A. All reports received by the DHB which relate to the outcome of any investigations (Medical Council or otherwise) into the qualifications or training of Mr X.
 - B. The documentation received by the DHB, which was also sent to the Medical Council.
 - C. The number and type of procedures performed by Mr X.
 - D. The total number of complaints made about Mr X, details of those complaints, dates when they were made and steps taken to follow up each complaint.
13. The DHB advised that Mr X was opposed to the release of any of this information.

Requests A and B – documents related to Medical Council investigation

14. In respect of reports received relating to the outcome of any investigations, the information at issue consists of a letter to Mr X which reports on the outcome of the DHB's investigation. The DHB also holds undocumented advice from the Medical Council (having been provided in a telephone call from the Council) that it had completed its investigation and no change had been made to Mr X's status.
15. In respect of the documentation received by the DHB and sent to the Medical Council, the information at issue consists of a letter of complaint and attachments.

Application of section 9(2)(a)

16. This section applies if the withholding of the information is necessary to protect the privacy of natural persons.
17. ASMS submits that section 9(2)(a) of the OIA applied to the documents at issue since:

“... the fact of the complaint to Mr X's employer and its investigation of the complaint relate to the employer/employee relationship not to the provision by Mr X of his medical services to the public. The employer/employee

relationship has consistently been regarded by the Ombudsmen as well as the Privacy Commissioner as within s 9(2)(a)”

18. The Privacy Commissioner considers the relevant documents are “*very private to [Mr X] and ought to be accorded a significant privacy value*” and that “*withholding is necessary to protect [Mr X’s] privacy*”.
19. I accept that withholding the documents is necessary to protect Mr X’s privacy and therefore that section 9(2)(a) applies. The information concerns Mr X’s conduct as an employee. He has a legitimate privacy interest arising from the expectation of confidentiality in employment. Information about complaints made to one’s employer is highly personal and is generally regarded as private to the employer/employee relationship. Both the DHB and Mr X hold this view, and it is supported by the Privacy Commissioner.

Public interest

20. Having accepted that section 9(2)(a) applies to the documents at issue, I must consider whether “*the withholding of the information is outweighed by other considerations which render it desirable, in the public interest, to make that information available*” (section 9(1)).

21. Ms Kirk submits:

“... [T]he point I would like to emphasise – and which I note has been taken into consideration – is that the existence of a complaint and the brief nature of it was made public by the District Health Board in its own agenda documents.

I do not accept that there is no public interest in knowing the outcome of an investigation into the qualifications of a surgeon working in the public health system.

At the very least, it’s in the public interest to know a thorough investigation took place, which can only be ascertained by understanding the outcome of such an investigation and how that decision was reached.

I accept however that in the case of a positive outcome from an investigation, a certain amount of privacy could be expected by [Mr X].”

22. ASMS submits:

“Here, as in many other situations, it is the public interest balancing that is vital to determining disclosure. ... [T]he public interest in competence of medical practitioners does not, ASMS submits, operate where a complaint has ... been dismissed”

23. However, ASMS also notes:

“It is crucial in this case that the item in the TDHB Advisory Committee agenda was a public document What is already public is the fact of the complaint and that it related to [Mr X’s] training. Since the fact and topic of the complaint and his name in that connection are public, the public interest balance would support disclosure of the result of the investigation. But it would support disclosure of the result only within the bounds of what was already public”

24. The Privacy Commissioner states:

“... [T]he public interest would be best served by these sorts of details not becoming public unless an investigation is advanced to an appropriate public forum on good grounds.”

25. However, like ASMS, the Privacy Commissioner notes that given what is already in the public domain about the complaint as a result of the Board minutes, it is appropriate to release a very brief summary statement to Ms Kirk. He states:

“Such a statement ought to be limited to commenting that there had been a complaint about the surgeon’s registration, that the matter had been investigated by the Medical Council and the District Health Board and that there was found to be no substance to the complaint.”

26. I have not identified any consideration which renders it desirable, in the public interest, to make copies of these documents available. However, given that the fact and nature of the complaint and the employee’s name had been publicised by the DHB, there is a public interest in transparency as to the outcome. For this reason, I conclude that a brief statement should be released along the lines suggested by the Privacy Commissioner.

Request C – number and type of procedures

27. In respect of Ms Kirk’s request for the number and type of procedures Mr X had performed, the DHB stated:

“TDH changed its patient management system in July 2009. This allows for ease of access to the information requested. Collection of information pre-dating this period would be onerous.”

Accordingly, the DHB provided me with the broad statistics it held for Mr X for the period since July 2009. This comprised a total number of surgical cases, along with figures for acute and elective cases. The figures cover the period from July 2009 to 22 November 2013 (the date of the request). The DHB also stated:

“As a general surgeon the type of procedures are standard for the scope of practice general surgery e.g. hernia repair, endoscopy, abdominal surgery, bowel surgery, minor vascular, minor urology, skin lesions.”

28. On 11 April 2014, Ms Kirk was advised of the difficulties associated with retrieving information prior to July 2009 and that I proposed to focus on the information collected since July 2009, even though Mr X had started work at the DHB in June 2005.

Application of section 9(2)(a)

29. ASMS submits:

“What TDHB has provided to the Ombudsman in its letter of 28 March 2014 is a statement of the procedures general surgeons normally undertake and totals of acute and elective surgical procedures that [Mr X] has performed over about 60% of his time at TDHB (2009-2013). ...

ASMS does not oppose the list of procedures provided on 28 March 2014 being disclosed.

As to the actual procedures undertaken by [Mr X], TDHB’s email to the Ombudsman ... identified 354 acute procedures and 781 elective procedures he had undertaken since 2009. How hard it would be to break those numbers down to a comprehensive picture of the work [Mr X] had done since 2005 is unknown but is unlikely to be such as to warrant withholding under s 18(f) (substantial collation or research). A disclosure that [Mr X] has, up to a specified date, performed n_1 appendectomies, n_2 hernia repairs, n_3 endoscopies etc, for TDHB would disclose the further information about his experience in specific procedures without any qualitative information on, for instance, the relative complexity of particular operations, pressures – of time etc – that he was under, and so on, which bear on his competence. Nevertheless, it is still penetrating well into the private employer/employee and doctor/patient relationships which fall within s 9(2)(a). It is submitted that the same analysis applies to a list of the different types of procedures actually performed, though it is acknowledged that this disclosure does not penetrate as deeply into [Mr X’s] privacy as the analysis by number of specific procedures just covered. The bare total numbers contained in the 28 March 2014 email represents a lesser degree again of penetration into privacy, but it remains an intrusion into those two relationships of employer/employee and doctor/patient.”

30. The DHB submits:

“[P]rovision of isolated information in terms of volumes of particular procedures delivered by one surgeon over a period of years with no reference against the context those volumes were delivered in, such factors as leave taken, case mix, working environment (for instance the presence or absence of registrars) etc, provides very little if any relevant information for public interest.”

31. The Privacy Commissioner states:

“ASMS submitted that release of these types of statistics for individual surgeons would prejudice the surgeon’s privacy. Their concerns extend to a principled argument about the effects of such a practice on other medical specialists. They submit that a disclosure of the numbers and types of surgeries performed ‘would disclose the further information about his experience in specific procedures without any qualitative information, on, for instance, the relative complexity of particular operations, pressures – of time etc – ... Nevertheless, it is still penetrating well into the private employer/employee and doctor/patient relationships which fall within s 9(2)(a).’ ASMS accepted that the bare totals contained within an email from the DHB in March 2014 were less intrusive. ...

I don’t agree with the sentiments of ASMS. While this sort of information is properly characterised as ‘personal information’ in terms of the Privacy Act, I consider the privacy value to be low. The release of information of volume and type of procedural statistics for individual surgeons may give rise to casual performance comparisons by members of the public. However, any false potential assumptions could be mitigated by a release of relevant information that explains the statistics in a way that gives them further context. For example, a light looking workload might be explained by a reference to the employee only having worked for the hospital for a short time.

In summary I don’t believe that the information about [Mr X’s] surgical case load needs to be withheld to protect privacy interests. I consider those privacy interests are low in the circumstances of a public hospital.”

32. As noted by the DHB and ASMS, the requested statistics will be drawn from internal and unpublished Board records and relate to an individual employee’s performance. I share the Privacy Commissioner’s view that a surgeon has a privacy interest, albeit low, in statistics about his or her surgical workload and that this interest is sufficient to engage section 9(2)(a).

Public interest

33. ASMS submits:

“The public interests to be weighed in respect of [Mr X’s] privacy interest are, first, the accountability of both [Mr X’s] as an official in terms of the OIA and of TDHB, and secondly the public’s interest in TDHB and other DHBs and, indeed all hospitals private and public, being staffed by competent surgeons.”

ASMS does not see a public interest in the release of the requested statistics. ASMS is concerned that the information is just one piece of a jigsaw and disclosure of that one piece would lend itself to misinterpretation.

34. The Privacy Commissioner is of the view that *“the public hospital’s responsibility to be transparent and accountable would seem to override privacy in the circumstances”*.
35. In my opinion, the withholding of the numbers and types of procedures this surgeon has performed is outweighed by other considerations which render it desirable, in the public interest, to make that information available.
36. When considering the nature of the considerations favouring disclosure of information in the public interest, section 4(a) of the OIA provides a useful starting point. One purpose of the OIA is *“to increase progressively the availability of official information to the people of New Zealand”*. The purpose clause also specifically recognises the public interest in promoting accountability.¹
37. The fact that such information has not been made available in the past illustrates the extent to which aspects of the publicly funded health system have remained shrouded in secrecy. As noted by the Tairāwhiti District Health Board Annual Plan for 2014/15:
- “The health environment is constantly changing. New technologies, changes in models of care, work practices, clinical practice, a changing demographic ... and increases in demand and community expectations require our health care system to be both adaptable and responsive.”*
38. It is increasingly recognised in the publicly funded health system in New Zealand, and in analogous health systems such as the National Health Service in England, that transparency is a key lever to improve the quality of health care and public confidence in the health system. On 19 November 2014, NHS England published consultant surgeons’ outcomes data for 10 surgical specialties on the MyNHS website, to increase transparency for the public.²
39. Robert Francis QC noted, in his *Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry* (2013), that transparency includes *“allowing true information about performance and outcomes to be shared with staff, patients and the public”*.³ In relation to the duty of public hospitals to publish information, Francis recommended:⁴
- “All healthcare provider organisations should develop and publish real time information on the performance of their consultants and specialist teams in relation to mortality, morbidity, outcome and patient satisfaction, and on the performance of each team and their services against the fundamental standards.”*

¹ In relation to the public interest in accountability of hospitals in the United States, see Makary M, *Unaccountable: What Hospitals Won’t Tell You and How Transparency Can Revolutionize Health Care* (2012).

² Accessible at <http://www.nhs.uk/service-search/performance/Consultants> .

³ Executive Summary, para 1.176.

⁴ Executive Summary, para. 1.222.

40. Proactive disclosure of performance and outcome information at organisational, team and (over time) individual consultant level is likely to become standard practice for district health boards in New Zealand, consistent with international developments in health policy. Currently, New Zealand lags behind these developments.⁵ They are, however, relevant context when assessing the public interest in determining the scope of mandatory (reactive) disclosure of workload output information in response to an OIA request.
41. In response to my provisional opinion, ASMS submitted that it is *“the quality of results that is a matter of public interest, not the speed with which a surgeon operates or the raw numbers of procedures the surgeon has undertaken”*. ASMS also noted that it *“does not object to a DHB providing DHB-level volume output statistics”*.
42. It is reassuring to see that ASMS recognises the public interest in the *quality* of an individual surgeon’s work. Medical professionalism in an information-rich age includes a responsibility to disclose quality-related information to patients.⁶ No doubt future cases will test the boundaries of required disclosure of outcome information for individual surgeons, in response to official information requests. As noted above, there are international precedents for disclosure of such information. Leading health policy academic Robin Gauld notes:⁷
- “New Zealand could join the ranks of health systems that embrace public reporting of quality data in the spirit of full and open transparency, benchmarking and continual improvement.”*
43. In the present case, this part of Ms Kirk’s request is limited to *quantitative* information – the number and type of procedures performed by an individual surgeon. I consider that there is a valid public interest in disclosure of such information. I note that the volume–outcome relationship is well recognised in the medical literature.⁸
44. Any concern about potential false assumptions being drawn by readers of such information can be addressed by the release of an accompanying contextual statement by the DHB, as noted by the Privacy Commissioner.

⁵ *“There is a significant discrepancy in public disclosure and reporting of New Zealand hospital quality data when compared with both the United Kingdom and United States. Currently, the data are being used internally and between each DHB for individual and collective quality improvement. However, some of these and other such data may also be relevant to New Zealanders who are the funders and patients of hospital services.”* Gauld R. Questions about New Zealand’s health system in 2013, its 75th anniversary year. NZMJ (2013) 126(1380).

⁶ Madison K, Hall M. Quality Regulation in the Information Age – Challenges for Medical Professionalism, in Rothman D, Blumenthal D (eds) *Medical Professionalism in the Information Age* (2012) ch 2.

⁷ Gauld R. Questions about New Zealand’s health system in 2013, its 75th anniversary year. NZMJ (2013) 126(1380).

⁸ Birkmeyer JD, Stukel TA, Siewers AE, et al. Surgeon volume and operative mortality in the United States. N Eng J Med 2003, 349: 2117-2127.

45. I consider that the public interest in disclosure of the requested information about the individual surgeon's caseload outweighs his low privacy interest in that information.
46. I conclude that the DHB should release to Ms Kirk the information it holds on the number and type of procedures performed by Mr X at the DHB from July 2009 to 22 November 2013.

Request D – complaint history

47. Ms Kirk requested details of the complaints made about Mr X and of the DHB's response to each complaint.
48. The DHB provided me with details of Mr X's complaint history.

Application of section 9(2)(a)

49. I accept that Mr X has a high privacy interest in information about complaints made about him to his employer, and that it is necessary to withhold this information to protect his privacy. This view is shared by the Privacy Commissioner and is consistent with the submissions of Mr X (via ASMS) and the DHB.

Public interest

50. There may be a public interest in "lifting the veil" on a health practitioner's complaint history at a district health board when the frequency and/or recurrent themes in complaints, or the serious nature of an individual complaint (eg, raising significant patient safety concerns) justifies disclosure of the relevant complaint history, notwithstanding the practitioner's privacy interest.
51. On the basis of the information provided by the DHB about Mr X's complaint history, I am satisfied that there are no special features that justify disclosure of that complaint history to an OIA requester.

Section 9(2)(k)

52. This section applies if the withholding of the information is necessary to prevent the disclosure or use of official information for improper gain or improper advantage.
53. ASMS submits:

"... [O]n 28 April 2014 Ms Kirk met the Executive Director of ASMS, Mr Powell. When Mr Powell told her that the complaint had been rejected, she responded with 'There goes my story' (or words to that effect). That she is continuing to seek information on the allegations suggests that she has some other object in view. ...

Now, with the investigation completed and the complaint found to be without substance, ASMS submits that Ms Kirk's continued pursuit of the ...

allegations, and, particularly, her pursuit of allegations in any other complaints points sufficiently clearly towards her pursuit of [Mr X] personally as to bring s 9(2)(k) into question, so that the Ombudsman should use his powers to investigate whether s 9(2)(k) does in fact apply.”

Section 12 of the OIA does not prescribe the type of information which can be requested nor require requesters to justify their request or to have an objectively reasonable motive. The judgement of the High Court in *Television New Zealand Ltd v Ombudsman*⁹ is pertinent:

*“As pointed out, requests for information do not have to be accompanied by reasons why the information is required. That is fundamental to the spirit and purpose of this Act. If it was trammelled by requirements to justify a request for information, much of the spirit of the Act would be lost. Dominating the Official Information Act is its purposes and principles as set out in s 4 and s 5:
...*

There is no question of establishing a need for the information. Information by its very nature needs to be available if the purposes of the Act are to be achieved. That the onus is cast on the holder of information to show good reason why it should be withheld, runs contrary to any question as to its ultimate relevance or utility”

54. The word “*improper*” has also been held by the courts to import an element of illegality or moral turpitude.¹⁰ An agency wishing to rely upon section 9(2)(k) needs to demonstrate that any advantage to be gained by the requester through the release of information is “*improper*” in this sense. In other words, it is not sufficient for the purposes of the section to argue that requested information is not relevant to the concerns of a requester or that the information *might* be used to the advantage of the requester or a third party.
55. I do not accept the ASMS submission that withholding the information is necessary to prevent “*disclosure or use ... for improper gain or improper advantage*”. There is nothing improper about a journalist seeking further information about a complaint which she has been advised has been rejected.

Recommendation

56. I recommend the release of the following information:
- That there was a complaint in 2012 about Mr X’s registration. The matter was investigated by the Medical Council and the DHB and the complaint allegations were not substantiated.

⁹ [1992] 1 NZLR 106, 118.

¹⁰ *Waitemata County v Expans Holdings Ltd* [1975] 1 NZLR 34, 46.

- The number and type of procedures performed by Mr X at the DHB from July 2009 to 22 November 2013.¹¹

¹¹ The DHB complied with the recommendation on 9 December 2014, by releasing the information to Ms Kirk.