

Request for average remuneration of 10 highest paid staff broken down by gender

Legislation	Official Information Act 1982, ss 9(2)(a), 9(2)(i)
Agency	Television New Zealand (TVNZ)
Ombudsman	Peter Boshier
Case number(s)	473280
Date	18 February 2020

Section 9(2)(a) OIA applied—small numbers in top 10 meant there was a real likelihood release could reveal fairly accurate salary information about identifiable individuals—withholding necessary to protect their privacy—s 9(2)(i) did not apply—insufficient causal link between release of this information and prejudice or disadvantage to commercial activities—public interest in transparency around the gender pay gap required release of the requested information for top 20

Background

A newspaper journalist asked TVNZ for the combined annual salary and benefits paid to the 10 highest paid presenters and non-presenters. They also asked for this number to be broken down by gender, identifying the number of men and women, and the average paid to each gender.

TVNZ responded that the total remuneration of its 10 highest paid employees was reported in its Annual Report in \$10,000 bands. It withheld the specific information sought under section 9(2)(a) of the Official Information Act (OIA), in order to protect the privacy of the staff.

The requester replied to TVNZ that he had hoped to address any privacy concerns by asking for the information in respect of groups of 10. He asked TVNZ to tell him the *'lowest possible number'* of staff that would enable TVNZ to respond to his request without impacting on privacy.

TVNZ confirmed that this type of information would not be released, and the requester complained to the Ombudsman.

Investigation

The Chief Ombudsman requested a copy of the information at issue and an explanation of the reasons for withholding.

TVNZ confirmed its reliance on the privacy withholding ground (section 9(2)(a)) and argued, in addition, that release would prejudice its commercial activities (section 9(2)(i)).

Privacy

Section 9(2)(a) applies where withholding is necessary to protect the privacy of natural persons.

Previous Ombudsmen have accepted that when an identifiable individual's exact salary would be revealed by the information requested, this will give rise to a privacy interest requiring protection under section 9(2)(a) of the OIA (see [440549](#)). However, deciding whether there is a protectable privacy interest is more difficult when the information requested does not identify an individual and their exact salary; for example, where aggregate or statistical information has been requested, such as in this case.

TVNZ's key concern here was the provision of a gender breakdown of average pay. The number of staff broken down by gender, combined with the average pay per gender for each group of 10 staff, could reveal information that would enable a close approximation of an identifiable individual's salary. This is because once broken down by gender, the sample size for one gender in each group was relatively small.

TVNZ submitted that disclosure of the average pay of a small number of staff *'would make it very easy for those within TVNZ to identify each other's salaries, which would be a breach of privacy'*. In relation to the presenters, TVNZ suggested that others in the wider industry might also be able to estimate likely salaries given how small the industry is, and how often staff move employment between media companies. TVNZ also argued that the impact on the privacy of presenters would be compounded due to the inevitable media coverage of their likely salaries if the information was released.

The Chief Ombudsman consulted the Privacy Commissioner, who said there was a high privacy interest in the average remuneration amounts for the 10 highest paid males and females in presenting and non-presenting roles. This was because, for one gender in particular, the average would be based on relatively small sample sizes, which could be reduced further if members of the sample group isolated their own salary.

The Chief Ombudsman also noted the standards set by Statistics New Zealand, the lead agency for government-held data, for preserving the confidentiality of personal information.¹ These standards indicate that the sample size of the gender groups involved in the request for the

¹ Statistics New Zealand, *Microdata output guide* (Fourth Edition 2016), retrieved from <https://www.stats.govt.nz/assets/Uploads/Integrated-data-infrastructure/microdata-output-guide-fourth-edition.pdf>

top 10 staff was below the threshold that would normally be applied when publicly releasing this type of data.

In light of these statistical reporting standards, and the Privacy Commissioner's views, the Chief Ombudsman was satisfied that the small numbers involved meant that there was a real prospect disclosure could reveal fairly accurate salary information about identifiable individuals. He therefore accepted there was a sufficient privacy interest in the information at issue to trigger the application of section 9(2)(a) of the OIA.

Commercial activities

Section 9(2)(i) of the OIA applies where withholding is necessary to enable an agency to carry out, without prejudice or disadvantage, commercial activities.

The Chief Ombudsman accepted that, as a national television and digital media company, TVNZ operates in a competitive market and is required by law to maintain its commercial performance.² However, section 9(2)(i) does not permit the withholding of an entire class or category of information solely on the basis of any relative disadvantage between TVNZ and the private sector as a result of it being subject to the OIA. TVNZ needed to demonstrate how disclosure of the specific information would prejudice or disadvantage TVNZ in carrying out its commercial activities.

TVNZ argued that release would essentially *'put a price tag'* on its most critical talent, which would disadvantage TVNZ vis a vis its competitors, *'result[ing] in [TVNZ] losing [its] primary point of market differentiation to competitors, and driv[ing] labour cost inflation in a marginally profitable (cash flow negative) business'*.

However, the Chief Ombudsman was not persuaded that there was a sufficient causal link between release of the information at issue and a subsequent disadvantage to commercial activities. It seemed to him that the risk of 'poaching' was already there, and he was not convinced that release of this information would appreciably increase that risk to the extent that withholding was necessary.

The Chief Ombudsman was not persuaded that section 9(2)(i) of the OIA applied to the information at issue.

Public interest

Having established that section 9(2)(a) of the OIA applied, it was necessary to consider the 'public interest test'. This means the need to withhold must be balanced against the countervailing public interest in release. If the countervailing public interest weighs more heavily, the information must be released. If not, it can be withheld.

² See ss 5 and 12(1) Television New Zealand Act 2003.

Gender pay equity

The requester's purpose in seeking the information was for a report on gender pay equity. The Chief Ombudsman commented that *'the gender pay gap is a significant public issue, touching on core human rights'*.

The Government recognised the importance of this issue in 2018 when it announced a commitment to eliminating the gender pay gap within the state sector, of which TVNZ is a part.³ One of the Government's five Gender Pay Principles is transparency.⁴

Unlike core public sector organisations, TVNZ was not required to apply the Gender Pay Principles and publish information about pay equity.⁵ However, the Gender Pay Principles Working Group signalled that the Principles were relevant beyond the core public sector.

At the time of the request, TVNZ did not publish any information about its own gender pay gap. This changed in 2019, when TVNZ's annual report published a percentage showing the gap in average pay between men and women for all its permanent employees.⁶

However, the Ombudsman's role is to form an opinion on TVNZ's decision at the time it was made, and at that point there was no publicly available information about the gender difference in average pay at TVNZ.

The request also focused on staff at the top of the remuneration structure. A key element contributing to a gender pay gap calculated on the average rate of pay across an organisation, will be the number of women represented in the higher paid roles.⁷

The Chief Ombudsman considered that there was a strong public interest in disclosure of information that promotes the transparency of a gender pay gap. The information relevant to this public interest was the number of men and women in the groups specified in the request, and the gender differential in pay, rather the amount of money spent on the remuneration of those staff.

Financial accountability

The Chief Ombudsman noted the approach of successive Ombudsmen that there is public interest in the disclosure of salary-related information in order to promote the accountability of public sector agencies for spending public money.

³ Hon Chris Hipkins and Hon Julie Anne Genter 'Government plan to fix women's pay' (Press release, 26 July 2018) retrieved from <www.beehive.govt.nz/release/government-plan-fix-women%E2%80%99s-pay>.

⁴ Published by the Ministry of Women, retrieved from <women.govt.nz/work-skills/income/gender-pay-gap/gender-pay-principles>.

⁵ State Services Commissioner 'Government Expectation of Employment Relations in the State Sector' (3 April 2018) retrieved from <www.ssc.govt.nz/govt-expectations-pay-employment>.

⁶ TVNZ Annual Report 2019, p 22: https://images.tvnz.co.nz/tvnz_images/TVNZAnnualReport2019_digital.pdf.

⁷ For example, Westpac NZ was surprised to find that its gender pay gap was 30.3% despite a strong focus on pay parity (paying men and women the same rate for equivalent roles). The Westpac gender pay gap reflects the fact that more men work in higher paid areas and women dominate the lower paid parts of the bank. See <https://www.stuff.co.nz/business/115838873/westpacs-gender-pay-gap-is-303-per-cent-says-chief-executive>.

TVNZ noted that it receives no direct public funding for operations, and the public funding it does receive (from New Zealand on Air and Te Māngai Pāho) is for specific programmes. That public funding only makes up approximately 5 percent of TVNZ's revenue. TVNZ also noted that private media channels receive public funding for programming at similar, sometimes higher, levels. TVNZ therefore submitted that accountability for spending public funds was not a relevant consideration in this case, as the money spent on the salaries was not paid for from the public purse.

However, the Chief Ombudsman did not accept that a state entity only needs to be financially accountable in respect of the public funds it receives. The Ombudsman's [Public interest](#) guidance reflects this:

But we don't spend public money

Some agencies subject to the official information legislation don't spend 'public money' in the sense that they are funded by tax-payer or rate-payer revenues. For instance, some entities may be funded through commercial revenues and others through stakeholder levies or tariffs. That does not mean there is no public interest in disclosure of information about their expenditure...

Some entities—for example, state-owned enterprises—may be accountable to the public as 'owners' rather than 'funders'. As the Privy Council has recognised:⁸

A state-owned enterprise is a public body; its shares are held by ministers who are responsible to the House of Representatives and accountable to the electorate. [It] carries on its business in the interests of the public.

As a Crown entity company TVNZ is subject to the financial reporting requirements in the Public Finance Act 1989 and the Crown Entities Act 2004. By making Crown entity companies subject to this level of scrutiny, Parliament has indicated that it is in the public interest that entities like TVNZ demonstrate appropriate financial management practices.

The Chief Ombudsman considered that there was a public interest in the amount TVNZ spends on remuneration as this is a key part of its budget, and an area where the public would expect TVNZ to make sound financial decisions. However, he did not see a high public interest in release of the particular information requested. He was not persuaded that disclosure of the cumulative and average remuneration amounts for the top 10 staff, broken down in the manner requested, would promote better financial management.

TVNZ already published the number of staff paid over \$100,000 in \$10,000 bands in its annual report to meet its obligations under the Crown Entities Act. This provided the public with a good overview of how much staff were paid at the higher end of the pay scale.

⁸ *Mercury Energy Limited v Electricity Corporation of New Zealand* [1994] 2 NZLR 385 at 388.

Outcome

The Chief Ombudsman concluded that section 9(2)(a) of the OIA applied, given the *'real likelihood that release of the full information requested, in respect of the top 10 [presenters and non-presenters], could lead to a fairly accurate estimate of the salaries for some individuals'*.

However, there was also a high public interest in transparency around the gender pay gap as regards the differential in pay and the numbers of men and women in higher paid positions, and a lower public interest in the monetary amount of that remuneration.

Balancing these considerations, the Chief Ombudsman concluded that additional information should have been released. He identified two options:

1. Releasing the percentage differential in average pay, and the numbers of men and women in the top 10 presenters and non-presenters, and withholding the monetary amounts to protect privacy; or
2. Releasing the full information requested, including the monetary amounts, but for the top 20 presenters and non-presenters, rather than the top 10.

TVNZ chose the second option and released this information to the requester.

The Chief Ombudsman formed the opinion that TVNZ should not have refused the request given that the requester had offered to accept the same information for a larger group to address any privacy concerns.

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