

Requests to Ministry of Health and ESR for Covid-19 cycle threshold values

Legislation	Official Information Act 1982, ss 9(2)(a) and 9(2)(c)
Agency	Ministry of Health, Institute of Environmental Science and Research Limited
Ombudsman	Peter Boshier
Case number(s)	547259, 550005
Date	October 2021

Request for information about Covid-19 testing results (cycle threshold values of every positive Covid-19 test)— Ombudsman accepted that the Covid-19 response is a measure to protect public health and safety — However, the harm of releasing data was not established — Agencies accepted Ombudsman recommendation to release the data

Background

The Ministry of Health (the Ministry) and the Institute of Environmental Science and Research Limited (ESR), both received requests for lists of the cycle threshold (CT) values of every positive polymerase chain reaction (PCR) Covid-19 test.¹ In simple terms, the CT value refers to the number of amplification cycles the test is required to complete in order to reach the detection threshold. In some cases, a given positive result may have more than one value, where there was a follow-up request to run the test again.

The information requested concerned bare CT values of positive test results. Both agencies initially refused the requests for privacy reasons, on the basis that the CT values were personal health information. The agencies subsequently focused on section 9(2)(c) of the OIA (to avoid prejudice to public health or safety measures.)

¹ PCR tests rely on a process where genetic material is copied over and over using a temperature cycling reaction or ‘amplification cycles’ in order to make any viral genetic material detectable.

The requesters made complaints to the Ombudsman. As the Ministry and ESR had consulted each other closely on the requests, the Chief Ombudsman progressed the two investigations together.

Investigation

Application of section 9(2)(c)

Section 9(2)(c) of the OIA applies if the withholding of the information is necessary to ‘*avoid prejudice to measures protecting the health or safety of members of the public*’. Under section 9(2) of the OIA, it must be ‘*necessary*’ to withhold the information to prevent harm to the interests recognised by sections 9(2)(a) to 9(2)(d). The term ‘*necessary*’ has been interpreted by the High Court in *Television New Zealand v Ombudsman*² as meaning ‘*reasonably necessary*’.

The Ministry and ESR considered that disclosing the information requested would prejudice the Covid-19 public health response for the following reasons:

- The PCR signal is influenced by a number of variables. This means that bare CT values are not necessarily directly comparable and cannot be reliably interpreted without additional clinical information and relevant expertise;
- Releasing the data, which cannot be accurately interpreted without additional clinical information and expertise, would potentially increase the level of misinformation already in circulation in the community;
- The spread of misinformation may undermine public trust and confidence in Covid-19 testing and lead to lower rates of participation in testing or to the public giving less weight to results; and
- If public trust in testing was undermined and there was less participation, then this would adversely impact case investigation and contact tracing efforts. A robust testing plan to detect cases early forms a key pillar of the surveillance strategy and is integral to the Covid-19 response.

The Ombudsman accepted that Covid-19 PCR testing is a measure for protecting the health of the public. It formed an essential part of the Government’s response to the Covid-19 pandemic, including case investigation and contact tracing in order to contain outbreaks. The Ombudsman acknowledged the importance of maintaining public trust and confidence in the system of Covid-19 testing.

The Ombudsman stated that, in order for withholding the information to be ‘*reasonably necessary*’, there must be a genuine causal link between the release of the information and the

² *Television New Zealand v Ombudsman* [1992] 1 NZLR 106, 118.

prejudice the section aims to avoid. There must also be a sufficient prospect of that prejudice occurring, not merely speculation or a remote possibility.

In this case, the Ombudsman did not consider that the agencies had established a convincing causal link between the release of the information and the harm they had identified. For example, the Ombudsman did not consider there was a reasonable likelihood that releasing the information would result in a significant increase in misinformation or conspiracy theories already in the public domain. Any risks that the information might be misinterpreted could be mitigated by the provision of explanatory information about the limitations in comparing the data.

Overall, the Ombudsman did not consider that section 9(2)(c) applied.

Application of section 9(2)(a)

Section 9(2)(a) of the OIA provides good reason for withholding information if it is necessary to *'protect the privacy of natural persons, including that of deceased natural persons'*. The Ombudsman consulted the Privacy Commissioner before forming his opinion that it was not necessary to withhold the information for privacy reasons, as the CT values data did not include any information that would identify individuals.

Outcome

The Ombudsman formed the opinion that the Ministry and ESR were not entitled to refuse the requests under sections 9(2)(c) or 9(2)(a) of the OIA. The Ministry and ESR accepted the Ombudsman's recommendation that the information should be released to the requesters.

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