

Request for information associated with PHARMAC's 2016/17 budget bid

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| Legislation | Official Information Act 1982, ss 9(2)(b)(ii), 9(2)(i), 9(2)(j) |
| Agency | Minister of Health |
| Ombudsman | Leo Donnelly |
| Case number(s) | 431098 |
| Date | June 2017 |

PHARMAC did not have a commercial position and was not engaged in commercial activities—s 9(2)(j) applies to information about PHARMAC's willingness to pay for pharmaceuticals but not to PHARMAC's indicative budget in out-years

The Minister of Health refused a request for information associated with PHARMAC's 2016/17 budget bid, and the requester complained to the Ombudsman. The Minister relied on section 9(2)(b)(ii) of the OIA, on the basis that disclosure would unreasonably prejudice PHARMAC's commercial position.

Section 9(2)(b)(ii)—unreasonable commercial prejudice

The Ombudsman noted that, in order to have a commercial position to protect, an entity must undertake commercial activities. PHARMAC stated that the relevant commercial activities were the procurement and negotiation of commercial arrangements for the supply of pharmaceuticals. The prejudice or disadvantage would be the disclosure to suppliers of information regarding PHARMAC's willingness to pay, with opportunities for gains to New Zealanders' health forgone as a result. PHARMAC commented that most pharmaceutical suppliers are large and sophisticated corporations who closely monitor information in the public arena and who would immediately factor such information into their commercial strategies.

However, the Ombudsman saw no reason to depart from the established approach of other Ombudsmen that, for the purposes of the OIA, PHARMAC does not undertake commercial activities by purchasing medicines. PHARMAC uses similar techniques that a commercial enterprise would employ to maximize profit, in seeking to secure the supply of a pharmaceutical for the best price. However, PHARMAC is not in competition with any other agency nor is it pursuing a profit. This means that sections 9(2)(b)(ii) and 9(2)(i) of the OIA are not available as withholding grounds.

Section 9(2)(j)—negotiations

In terms of s 9(2)(j), the Ombudsman noted the following relevant background information.

PHARMAC's function is to secure, for eligible people in need of pharmaceuticals, the best health outcomes that are reasonably achievable from pharmaceutical treatment, within the amount of funding provided.¹ As pharmaceutical prices are not regulated in New Zealand, PHARMAC uses its position to negotiate prices with suppliers. PHARMAC uses a variety of purchasing strategies to negotiate the best value from its budget. The success of negotiations is a critical factor in any decision by PHARMAC to fund a new medicine.

Medicines approved by PHARMAC are funded from the Combined Pharmaceutical Budget (CPB), which is set by the Minister of Health following consideration of the joint budget bid submitted by PHARMAC and District Health Boards (DHBs). PHARMAC's fixed budget precludes the funding of all potentially beneficial medicines that become available. The CPB is set annually and, as well as funding medicines already on the schedule, funds all medicines that are added to the schedule or approved under exceptional circumstances. PHARMAC does not hold the funds but monitors DHB spending to ensure that expenditure does not exceed the agreed notional budget. While the total CPB is fixed, its components (amounts spent on scheduled medicines and/or exceptional circumstances subsidies) are not.

As noted above, PHARMAC is concerned with getting the best possible deal within the amount of funding available. This means that no funding application is considered in isolation. PHARMAC must undertake a comparative analysis of all funding applications, which results in a priority ranking on a confidential list of investment options that is then matched against the available headroom in the CPB to determine what investments PHARMAC will work towards progressing.

Advice to Minister of investments with budgetary impact

The Ombudsman accepted that there was good reason to withhold information that would reveal PHARMAC's '*willingness to pay*' for pharmaceuticals deemed to be very good value for money. Negotiations with the suppliers of these pharmaceuticals were either underway at the time, or in reasonable contemplation.

¹ See s 47(a) of the New Zealand Public Health and Disability Act 2000.

While the advice was partly released, the medicine names and additional expenditure/purchasing options were withheld. This information would provide insight into PHARMAC's capacity to purchase new medicines deemed very good value, and enable suppliers to make an educated guess about PHARMAC's interest in particular medicines. Suppliers would likely be emboldened to adopt a more robust negotiating position, including with respect to their pricing expectations. This would disadvantage PHARMAC in carrying on those negotiations.

The Ombudsman was mindful of *'the significant public interest in PHARMAC's ability to negotiate the best possible price for pharmaceuticals, which ultimately impacts on the level of access New Zealanders have to medicines'* on the one hand, and the *'strong public interest in receiving meaningful information about PHARMAC's funding'* on the other. In light of the fact that PHARMAC agreed to release summary information about the 2016/17 budget, including an explanation of the process by which PHARMAC had obtained additional funding through the Treasury's social investment process, the Ombudsman concluded that the public interest in disclosure did not outweigh the need to withhold.

Indicative funding pathway

Government funding for the 2016/17 year was publicly announced, but indicative funding in out-years (2017/18 to 2019/20) was withheld. PHARMAC argued that this would give suppliers an indication of the likely funds available for future investments, and that *'uncertainty over future funding levels is important for PHARMAC to maintain competitive prices'*.

The Ombudsman rejected this argument. The indicative budget in out-years would not give suppliers any useful indication of PHARMAC's willingness to pay. The figures were subject to change, not linked to specific medicines, and only provided generalised insight into PHARMAC's projected capacity to purchase medicines. The Ombudsman concluded that section 9(2)(j) did not apply, and recommended that the Minister release this information.

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