

Request for information concerning increase in number of cochlear implants

Legislation	Official Information Act 1982, s 9(2)(f)(iv)
Agency	Minister of Health
Ombudsman	Peter Boshier
Case number(s)	539534
Date	July 2021

Section 9(2)(f)(iv) OIA applied to costing information and detailed analysis regarding unsuccessful Budget 2020 bid which had been resubmitted for consideration through the 2021 Budget process – small amount of high level information about the existence of the failed bid and the reasons it was unsuccessful was not protected – strong public interest in release of that information for reasons of transparency and accountability

Background

In October 2020, a Member of Parliament (MP) requested ‘*all original information in 2020 around an increase in the number of cochlear implants*’. The Associate Minister of Health released certain documents but withheld information under section 9(2)(f)(iv) of the Official Information Act 1982 (OIA) to maintain the constitutional convention which protects the confidentiality of advice tendered by Ministers of the Crown and officials. Following a change in portfolios, the Minister of Health (the Minister) adopted the Associate Minister’s decision.

The MP complained to the Chief Ombudsman that the information met the test for disclosure under the OIA. The MP considered there was a public interest in release given that hundreds of people were on waiting lists for cochlear implants and there had been an October 2020 election Labour Party manifesto commitment to increase the number of cochlear implants if re-elected.

Investigation

Section 9(2)(f)(iv)

Successive Ombudsmen have accepted that the general constitutional convention which protects the confidentiality of advice tendered by Ministers and officials is heightened during Budget preparation; and information relating to unsuccessful initiatives when resubmitted in the next Budget may require ongoing protection until the advice has been considered. However, this principle is not absolute.

Each case must be considered on its own merits. This requires that Ombudsmen take a very good look at the actual information at issue and what harm would result from its release. This will often include an examination of what information is already public.

In this case, the Ombudsman was satisfied that the Minister had good reason to withhold costing information and detailed analysis about an unsuccessful Budget bid concerning cochlear implants as part of the 2020 Budget process. The proposal had been resubmitted for consideration through the 2021 Budget process. At the time of the OIA request in October 2020, that information was under active consideration and release would have undermined the orderly and effective preparation of Budget 2021. The Ombudsman did not identify a public interest in disclosure of that information that outweighed the interest in withholding.

However, there was a small amount of information where the Ombudsman was not persuaded that its disclosure would result in harm to the protected interest. This was simply because it reflected information that the Associate Minister had made publicly available in November 2020. The Ombudsman considered that the released information signposted the existence of the unsuccessful 2020 Budget bid and anyone perusing Budget 2020 would see that the bid was unsuccessful.¹

In any event, the lack of increased funding for adult cochlear implants in Budget 2020 was well-publicised by stakeholders. The Ombudsman did not see that releasing information that simply confirmed this, and provided some limited reasoning for the rejection, would have prejudiced the Government's ability to consider and make decisions on advice that was under consideration for Budget 2021.

Even if he was to accept that section 9(2)(f)(iv) applied to this level of information, the Ombudsman considered there to be a stronger public interest in favour of release. That the proposal was unsuccessful in 2020 was a factor in favour of release. The fact that the deferral was due to the effect of COVID-19 also warranted transparency. Furthermore, the number of adults waiting for a cochlear implant at the time of the request had reportedly reached crisis

¹ For example, the Associate Minister had released an email, the subject of which was 'Original Budget Bid list attached'. The content of the email stated 'This is the list pre COVID-19 changes to process'. An attachment to the email was titled 'Minister Salesa Portfolio Health Budget 20 bids'.

point. In a September 2020 press release, both the Southern and Northern Cochlear Implant Programmes said the situation was critical, stating:

The current lack of access means New Zealand is now in breach of its obligations under the UN Convention on the Rights of Persons with Disabilities (Article 25).

Outcome

The May 2021 Budget provided for an extra \$28 million for cochlear implant programmes over four years. The Minister decided to release the high-level information discussed above, along with other information that related to an announcement he had made in February 2021 regarding additional adult cochlear implants.

The Chief Ombudsman finalised his opinion that the Minister had good reason at the time under section 9(2)(f)(iv) of the OIA to withhold most, but not all, of the information relating to the unsuccessful 2020 Budget bid.

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