

Request for information relating to the business case for Wiri Prison

Legislation	Official Information Act 1982, ss 9(2)(i), 9(2)(j) (see appendix for full text)
Requester	Max Rashbrooke
Agency	Department of Corrections
Request for Ombudsman	Information relating to the business case for Wiri Prison
Case number(s)	317251
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Summary

Max Rashbrooke asked the Department of Corrections (the Department) for copies of reports to Government entitled '*Business Case Prison Capacity Supply & Procurement 2010 – 2019*'

(First Business Case) and *'Detailed (Stage Two) Business Case: Procurement of a new men's prison at Wiri through a Public Private Partnership'* (Second Business Case) relating to the building of a then proposed prison at Wiri, South Auckland. The prison is known as the Auckland South Corrections Facility (ASCF).

The Department released copies of the requested reports with substantial redactions made in reliance on sections 9(2)(i) and 9(2)(j) of the Official Information Act 1982 (OIA). Mr Rashbrooke complained about that decision to the Ombudsman.

During the Chief Ombudsman's investigation, the Department released further information to Mr Rashbrooke. The Chief Ombudsman formed the opinion that the Department was entitled to rely on section 9(2)(j) of the OIA to withhold the remaining information at issue. Releasing that information would prejudice or disadvantage the Department in negotiating a favourable outcome for future prison projects.

Ombudsman's role

1. 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. The Department is responsible for the provision and administration of prisons. Until recently, with two exceptions,¹ the Department managed and operated all prisons.
3. The prison population continues to increase—a major challenge for the Department, especially having regard to the age of prisons.
4. In July 2009, the Government asked the Department to consider *'alternative procurement approaches'* and various *'procurement models'* (the Department's expressions) to meet the need for prisons for the next 10 years.
5. In February 2010, the Department provided a report to Government entitled *'Business Case Prison Capacity Supply & Procurement 2010 – 2019'* (First Business Case), and in October 2010, a report entitled *'Detailed (Stage Two) Business Case: Procurement of a new men's prison at Wiri through a Public Private Partnership'* (Second Business Case).
6. The First Business Case evaluated various procurement models (and their costs) to meet the demand for prisons. These models included a *'conventional design and build'* model and a *'public private partnership'* (PPP) model.

¹ Auckland Central Remand Prison was under private management between 2000 and 2005; Serco New Zealand Ltd has operated Mt Eden Corrections Facility since August 2011.

7. Under a conventional design and build model, the Department designs, builds and operates a prison. There are two forms of the PPP model, the 'non-custodial PPP' and the 'custodial PPP'. In the case of the non-custodial PPP, the private sector designs, builds, finances and maintains the prison; in the case of a custodial PPP, the private sector designs, builds, finances, maintains and operates the prison.
8. In response to the First Business Case, the government decided to provide a new men's prison at Wiri, South Auckland, the ASCF, using the custodial PPP model, pending completion of a detailed business case.
9. The Second Business Case focused on the cost of providing the new prison at Wiri, the ASCF, for the next 25 years under the conventional design and build and custodial PPP models.
10. The Second Business Case re-examined the First Business Case analysis of the costs of the ASCF using the conventional design and build and custodial PPP models. The Second Business Case, in particular, analysed how much private sector participants under the custodial PPP model would receive, the commercial principles underpinning the custodial PPP, and the procurement process the Department would follow.
11. The Treasury's website contains the following description of a PPP:

a long term contract for the delivery of a service, where the provision of the service requires the construction of a new asset, or the enhancement of an existing asset, that is financed from external (private) sources on a non-recourse basis and where full legal ownership of the asset is retained by the Crown.
12. The website describes the primary purpose of a PPP as being:

To improve the delivery of service outcomes from major public infrastructure assets by:

 - *integrating asset and service design;*
 - *incentivising whole of life design and asset management;*
 - *allocating risks to the parties who are best able to manage them; and*
 - *only paying for services that meet pre-agreed performance standards.*
13. The Second Business Case describes three possible procurement models for custodial services:

Conventional Design and Build

This model would involve the Department building and operating the Prison. The Department would let a design and build contract to a constructor and provide design oversight. The Department would assume responsibility for the operation of the Prison and delivery of the custodial and rehabilitation and

reintegration services. Some of the facilities management services might be out-sourced to a third party.

Whole of life considerations would be addressed in this model by the Department considering operational efficiencies in the design brief. However, there would be no ongoing operational relationship between the constructor of the Prison and the Department. This could lead to a reduction in the whole of life benefits of the facility.

Also, under this approach the Department would assume all maintenance and operational risks. Subject to the nature of the contract with the constructor, the Department might also assume the risks of construction cost overruns and time delays.

Non-Custodial PPP

In this model, design, build, finance and maintenance of the Prison would be tendered to the market and undertaken by a contractor. The Department would be responsible for the custodial services delivery. Some non-custodial operational services might also be contracted out (such as maintenance).

Bidders would respond to an output specification based on the desired accommodation. Performance would be monitored against availability and quality key performance indicators.

Whole of life facility costs would be incorporated into the model through the contractor being responsible for design, construction and facility management services. However, the relationship between facility design and operational services would be indirect given the contractor will not be responsible for custodial services delivery.

Custodial PPP

A custodial PPP model is similar to a non-custodial PPP but with the addition of custodial service outcomes included within the contract. The benefit of this model is that the Contractor integrates operation with design thereby achieving greater whole of life efficiencies and effectiveness.

Bidders would respond to an outcome specification based on requirements for full custodial services delivery, in addition to responding to construction outcome requirements.

14. On receipt of the government's approval, in November 2010, the Department sought expressions of interest for a custodial PPP for the ASCF, and in March 2011 issued a Request for Proposals (RFP) to those it shortlisted.

15. The Department, in correspondence with this Office, described the process it undertook in assessing the shortlisted expressions of interest as:

[an] evaluation process ... focused on assessing the best quality proposal that meets the Department's requirements at the price that does not exceed the Affordability Threshold.

16. In September 2012, the Department awarded the PPP contract to design, build, finance and operate the ASCF to SecureFuture Wiri Ltd. Fletcher Construction Ltd designed and built the new Prison. SERCO New Zealand Ltd will operate the prison for 25 years. The Prison received its first prisoners in May 2015.
17. The Second Business Case, in respect of the ASCF, contains information relating to the Department's 'affordability threshold' and information using the 'Public Sector Comparator' (PSC) financial model comparing the costs of providing the new prison using the conventional design build and custodial PPP models.
18. In the RFP released to the shortlisted parties, the affordability threshold for the ASCF is stated to be:

\$ [amount deleted] million, in net present cost terms at the expected date of Financial Close (being 1 July 2012).

19. In 'Guidance for Public Private Partnerships (PPPs) in New Zealand' (October 2009), published by the Treasury, the PSC is described as follows:

The PSC is a measure of what the project would cost if delivered through conventional procurement.

The PSC is made up of:

- *the construction and operating costs of a project, plus*
- *provision for competitive neutrality adjustments to remove any advantages or disadvantages that accrue to a public sector procurer by virtue of its public ownership, plus*
- *provision for any additional costs and risks that would be transferred to the private sector partner under a PPP. These risks need to be added as a cost to the PSC because the public sector party would bear the cost of any risks that occur under conventional procurement.*

The discount rate that is used to bring these costs to a common basis is critical. Small changes in the discount rate can have a significant impact on the total value of the PSC. When comparing the bids in the competitive tender with the PSC, it is important to ensure that the same discount rate is used for both. If the bidders' cost of capital is known, then that is probably a better discount rate for this purpose than the general government discount rate set out in Treasury guidance.

...

The PSC is a valuable tool for ensuring that:

- *all project risks have been identified and costed*
- *project go/no-go decisions are made on the best possible information, and*
- *bids are evaluated against a common benchmark.*

20. Under a 'Probity and Process Deed' entered into with the Department for the ASCF, the shortlisted respondents to the RFP agreed to keep confidential the RFP information.

Request for information

21. In a letter of 12 April 2011 to the Department, Mr Rashbrooke requested the following information:

A complete and unredacted version of the first business case relating to the prison at Wiri ... entitled 'Business Case: Prison Capacity Supply and Procurement 2010 – 2019'.

A complete and unredacted version of the second detailed business case for the prison at Wiri.

Department's response to request

22. With a letter of 22 July 2011, the Department (Christine Stevenson, Deputy Chief Executive) forwarded to Mr Rashbrooke redacted versions of the First Business Case and the Second Business Case.

23. In her letter of 22 July 2011, Ms Stevenson stated:

You have indicated that the reason for your request lies in finding out how the PPP methodology compares to other methods of procurement. Accordingly, whilst we have withheld certain information (see below), we have tried to provide as much information as possible on this subject. I refer you, for example, to section 9; Procurement Options. As outlined in the preceding contextual section the Business Case: Prison Capacity Supply & Procurement 2010-2019 looked at six options made up of various components for meeting capacity demand. Other matters not relating to the proposed prison at Wiri and the PPP methodology have not been provided, as they are not considered to be within the scope of your request.

I have withheld extracts of each business case in accordance with the OIA in order to:

- *Enable a Minister of the Crown or any department or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities [section 9(2)(i) of the OIA]*
- *Enable a Minister of the Crown or any department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations) [section 9(2)(j) of the OIA]*

Each business case notes the relevant section of the OIA that applies to the extract that is being withheld...

Complaint

24. In September 2011, Mr Rashbrooke complained to this Office. He stated:

... In both cases, the omission on grounds of commercial confidentiality seems completely unjustified. When the business case was being drawn up, there was no company involved in or tendering to build the prison. The figures that have been omitted do not refer to any specific company whatsoever. They are, rather, the department's estimate of what a notional company might charge to build the prison.

Therefore, there is no company pricing information or other secrets that could be disclosed by releasing this information. I cannot see how releasing the information would 'prejudice or disadvantage' any commercial negotiations. Rather, it would help accountability and scrutiny of public spending in this area. It is very much in the public interest to see these figures, because they will allow the public to compare the department's estimate of what it should cost to build the prison against the actual cost as delivered by the selected private company.

As regards the initial business case, the situation is more complex. For a start, huge chunks of the document - dozens of pages - have been omitted without any explanation. Virtually every page has large and unexplained omissions, making the document almost impossible to interpret usefully. These omissions are too numerous to list.

In its letter of 22 July, the department notes: 'You have indicated that the reason for your request lies in finding out how the PPP methodology compares to other methods of procurement'. This is true. However, the letter then goes on to say: 'Other matters not relating to the proposed prison at Wiri and the PPP methodology have not been provided, as they are not considered to be within the scope of your request'.

This appears to be a substantial distortion of my request. My letter to the Department clearly stated my request to see 'a complete and unredacted' copy of the business case. And, crucially, many sections concerning other options for prison building are directly relevant to a comparison with PPP; the department's decision to omit them represents a serious failing to comply with my request. Furthermore, as stated above, the department has made the document almost impossible to interpret by omitting vast sections of it.

In particular, it is concerning that the Department has redacted all figures concerning their estimate at the time of the likely cost of the prison. This is extremely important information, because the public has a right to know if the prison ends up costing more than was initially thought, and if so, why.

Again, s9(2)(i) and (j) are cited, and, as with the detailed (stage two) business case, this seems completely unjustified. Again, there was no actual company involved and therefore no commercial secrets to disclose. Again, it is in the public interest to make this information available.

Investigation

25. In November 2011, this Office notified Mr Rashbrooke's complaint to the Department.
26. In January 2012, staff of this Office met with Corrections Department staff to discuss the complaint. After that meeting, the Department, in August 2012, released to Mr Rashbrooke further information (previously withheld) contained in the First Business Case and Second Business Case.
27. In December 2012, in response to the further information released by the Department, Mr Rashbrooke advised that he wished this Office to continue to investigate his complaint. He stated:

The Department [in August 2012] sent me an electronic copy of [the First Business Case] with far fewer redactions than previously. However, they have continued to redact all mentions of the capital cost of the proposed new prisons. Therefore they cannot in any way be said to have answered the substance of my initial request ... which was for a full and unredacted copy of the business case, specifically so that I can compare the cost of PPP procurement with other forms of building a new prison.

The Department have not provided any detailed rationale for the continuing redactions, beyond citing the parts of the OIA that they claim apply, so I am none the wiser as to why they continue redacting the key sections.

28. As a result of several further discussions with this Office's staff, the Department released to Mr Rashbrooke additional information.

29. In November 2015, the former Chief Ombudsman, Dame Beverley Wakem, advised the parties of her provisional opinion and sought comments. Both the Department and the complainant provided comments.
30. On Dame Beverley's ceasing to hold office as Chief Ombudsman, I assumed responsibility for this investigation.

Analysis and findings

Information at issue

31. In May 2013, after receiving the additional information released to him, Mr Rashbrooke advised that, in summary, he was now seeking:

... [the Department's] estimates, in the [Second Business Case], of how much they thought the new PPP prison would cost (both capital and operating costs).
32. In essence, the information the Department withheld in respect of the Second Business Case related to the affordability threshold for the ASCF and the estimated costs of building that prison under the conventional design and build model. The information withheld included information derived from the use of the PSC model.
33. In a press release issued in September 2012, the Corrections Minister, Hon Anne Tolley, stated that the Government had saved \$170 million by using the PPP model for ASCF. She advised that the total cost of the contract for the ASCF was \$840 million. Accordingly, there is in the public domain the Department's own estimate of \$1,010 million (the contract price of \$840 million plus \$170 million savings) of providing custodial services at Wiri under a conventional design and build model for a period of 25 years, the period of the ASCF PPP.
34. In September 2012 media releases, Fletcher Construction referred to the contract price for designing and building the ASCF as being approximately \$300 million.
35. The Department advises it has not released publicly the amount of the affordability threshold included in the RFP for the ASCF, Fletcher Construction's actual contract price for the Auckland Prison refurbishment, and the PSC information set out in the Second Business Case. Among the component parts of the Department's estimates for ASCF and the Auckland Prison are estimates of:
 - a. the capital costs of building the prisons;
 - b. the net present value of the capital and operating costs;
 - c. the discount rate used in calculating the net present value of those costs;
 - d. the payments to be made to the PPP provider; and

- e. other costs largely derived from the PSC model for the prisons in connection with the Department's comparative cost benefit analysis of the PPP and conventional design and build models.
36. As the Second Business Case replaced the First Business Case in respect of ASCF, it is only necessary for me to consider whether the Department was entitled to withhold the unreleased information contained in the Second Business Case.

Grounds relied on to withhold information

37. The Department relied on sections 9(2)(i) and 9(2)(j) of the OIA to withhold the information at issue.
38. In the light of the opinion I have formed regarding the Department's reliance on section 9(2)(j) to withhold the information at issue, it is not necessary for me to provide an opinion on the Ministry's reliance on section 9(2)(i). (The text of section 9(2)(i) is set out in the appendix.)
39. Section 9(2)(j) of the OIA provides:
- (2) *Subject to sections 6, 7, 10, and 18, this section applies if, and only if, the withholding of the information is necessary to—...*
 - (j) *enable a Minister of the Crown or any department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations);...*
40. Section 9(2)(j) is subject to section 9(1) of the OIA, which reads:
- (1) *Where this section applies, good reason for withholding official information exists, for the purpose of section 5, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.*

Application of section 9(2)(j)

41. To meet projected increases in the prison population and existing needs, it is apparent from my Office's discussions with the Department that it is likely it will have to consider building new prisons or upgrading existing prisons.
42. At the time of Mr Rashbrooke's request, the Department partly relied on the potential effect on its negotiations concerning the refurbishment and rebuilding of Auckland Prison to withhold the information at issue.
43. As was the case with the procurement process for the ASCF, the Department did not release to the successful tenderer, information derived from using the PSC model

relating to Auckland Prison and its estimate of the costs of maintaining Auckland Prison under conventional design and build and PPP models.

44. In commenting on the provisional opinion, the complainant stated:

... my desire [is] to understand how estimates of the cost of building the prison changed over time. ... this cost inflation is a common failing on the part of PPP projects internationally.

I know this because I have reported on it in the UK. And the point that follows logically from that is that such information - the kind of information that the Department is withholding - must have been, and was, released in the UK, otherwise I could not have reported on that kind of story. Clearly, the British authorities do not believe that releasing this information prejudices future negotiations in the way that the Department believes. Since our major international counterparts are releasing this kind of information, the Department's refusal seems all the more untenable.

45. The complainant provided no information in support of his contention that the United Kingdom practice in releasing particulars of estimates differed from the New Zealand practice.
46. The Department submits that releasing details of the information at issue would prejudice or disadvantage the Department in future procurement negotiations in relation to upgrading existing prisons or building new capacity, whether a PPP model or the conventional design and build model is used. On that basis, the Department relies on section 9(2)(j) to withhold the requested information.
47. The expression 'negotiations' in section 9(2)(j) includes future negotiations.
48. The process the Department followed in calling for, and evaluating, tenders relating to the ASCF and Auckland Prison was complex and lengthy. By New Zealand standards, the amounts involved in those contracts are very significant.
49. The use of the PSC model enables the Department to assess the cost of providing prison facilities under a conventional design and build model. Its use thus enables the Department to evaluate whether the bids of tenderers (the respondents to RFPs) are favourable.
50. In respect of the ASCF, the Minister of Corrections released information enabling the Department's total estimates to be calculated of providing custodial services for 25 years under the conventional design and build model and the custodial PPP models, i.e. \$1,010 million and \$840 million respectively.

51. The Department has not released the component parts of those estimates² derived from using the PSC model, nor is that information in the public domain.
52. The question I have to address, in terms of section 9(2)(j), is whether the withholding of the information in the Second Business Case is ‘*necessary*’ to enable the Department ‘*to carry on, without prejudice or disadvantage, [future] negotiations*’.
53. An earlier High Court decision³ interpreted ‘*necessary*’ to mean **reasonably**, rather than **strictly**, necessary. More recently, however, the High Court⁴ (without reference to the earlier decision) interpreted ‘*necessary*’ to mean **essential**. In the later decision, the High Court relied on a dictionary definition of ‘*necessary*’.⁵
54. I prefer the earlier High Court interpretation, namely, that for section 9(2)(j) (or any withholding grounds set out in section 9(2) of the OIA) to apply, it must be **reasonably** necessary to withhold the information at issue under that provision.
55. As the High Court recently stated:⁶
- the insertion of the transitive verb ‘disadvantage’ in s 9(2)(j) of the [OIA] suggests a potentially less adverse outcome than one that is prejudicial. Any ‘unfavourable’ outcome could be considered a ‘disadvantage’.*
56. The word ‘*prejudice*’ found in section 9(2)(j) connotes, among other things, ‘*impair*’.⁷
57. In discussions with this Office, the Department submitted that, in future negotiations regarding prison projects, there was a real possibility that a tenderer, with knowledge of the component parts of the Departments’ estimates of costs for the ASCF, would pitch its tendered costings close to the Department’s. It further submitted that this is especially likely to be the case if a respondent to the RFP for the ASCF participated in the RFP and negotiation process for another prison project.
58. Generally, the Department contended that, if the information at issue was released, it would make it far more difficult for the Department to achieve a favourable outcome for prison projects. Respondents to RFPs, with the information at issue, would have a real insight into the Department’s negotiating strategy.

² See para 35 above for the component parts, being information derived from the PSC model set out in the Second Business Case.

³ *Television New Zealand Ltd v Ombudsman* [1992] 1NZLR 106, 118 (Heron J). In other contexts, the word ‘*necessary*’ has been interpreted as being ‘*reasonably necessary*’: see *Sterling Pharmaceuticals (NZ) Ltd v Boots Co (NZ) Ltd* [1991] 2 NZLR 233; see also the discussion in *Appeal by Brown* [1996] NZAR 465 (Maori Appellate Court) applying the interpretation of ‘*necessary*’ in *Television New Zealand Ltd v Ombudsman*.

⁴ *Kelsey and Others v the Minister of Trade* [2015] NZHC 2497, para 141 (Collins J).

⁵ Della Thompson (ed) *The Concise Oxford Dictionary* 9th ed, Clarendon Press, Oxford 1995.

⁶ *Kelsey and Others v the Minister of Trade*, note 5, paragraph 142.

⁷ *Kelsey and Others v the Minister of Trade*, note 5, paragraph 120.

59. I accept the Department's submission that releasing the information at issue would impair (*'prejudice'*) the Department's ability to negotiate a favourable outcome for its future prison projects. The release of that information would also *'disadvantage'* the Department in such future negotiations—an undermining of the Department's negotiating ability in those circumstances would be an unfavourable outcome and thus *'disadvantage'* it.
60. Accordingly, subject to the countervailing public interest in terms of section 9(1), it is necessary for the Department to withhold the information at issue to protect the interest described in section 9(2)(j).

Application of the public interest test

61. There is, in terms of section 9(1), a public interest in promoting accountability and transparency in respect of the Department's negotiated outcomes for prison projects. The release by the Minister of Corrections of information enabling the Department's total estimates of the costs of providing the ASCF to be calculated under the conventional design and the custodial PPP models goes some way to satisfy the public interest in those respects. Admittedly, whether or not the Department achieves a favourable outcome relating to the ASCF may not be known until the end of the PPP contract in 25 years time, but that issue is not the subject of this opinion.
62. I am not persuaded that the public interest in terms of section 9(1) in making available the information at issue outweighs the Department's protected interest under section 9(2)(j). In fact, it is in the public interest that the Department's negotiating ability in regard to future prison projects is not undermined.

Ombudsman's opinion

63. For the reasons set out above, I have formed the opinion that the Department was entitled to rely on section 9(2)(j) of the OIA to withhold the information at issue.

Appendix 1: Relevant statutory provisions

9 Other reasons for withholding official information

- (1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.
- (2) Subject to sections 6, 7, 10, and 18, this section applies if, and only if, the withholding of the information is necessary to—

...
 - (i) enable a Minister of the Crown or any department or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities; or
 - (j) enable a Minister of the Crown or any department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations); or