



Request for names of clusters that COVID-19 cases were linked to

Legislation	Official Information Act 1982, s 18(c)(i); Health Act 1956, s 92ZZG(2); Ombudsmen Act 1975, ss 13, 22
Agency	Bay of Plenty District Health Board
Ombudsman	Peter Boshier
Case number(s)	524594
Date	5 August 2020

Section 18(c)(i) OIA applied—release would be contrary to s 92ZZG(2) Health Act 1956—discretion to use or disclose contact tracing information for the ‘effective management of infectious diseases’—exercise of discretion reviewed under the Ombudsmen Act 1975—decision not to exercise discretion was not unreasonable

Background

A news organisation requested the names of the COVID-19 clusters that cases in the Bay of Plenty district were linked to. The District Health Board (DHB) confirmed that three of the 47 cases of COVID-19 were tied to recognised clusters, but withheld the names of the clusters for privacy reasons, as release may have revealed private information about the three individuals. The requester complained to the Ombudsman.

Investigation

The DHB had relied on the privacy withholding ground (section 9(2)(a) of the Official Information Act 1982 (OIA)). However, in the Chief Ombudsman’s view, section 18(c)(i) of the OIA was more relevant. That section provides that a request may be refused where the making available of the information requested would be contrary to the provisions of a specified enactment.

The relevant provisions

The relevant provision in this case was section 92ZZG(2) of the Health Act 1956, which falls under Part 3A, Subpart 5. Part 3A concerns the management of infectious diseases. Subpart 5 concerns contact tracing.

The purpose of contact tracing is to obtain information about the contacts of persons who have or are suspected of having infectious diseases, in order to:¹

- enable relevant health officials to identify the source of the disease;
- make the contacts aware that they too may be infected (thereby encouraging them to seek testing and treatment); and
- limit the transmission of the infectious disease.

Section 92ZZC details the obligations on individuals to provide information to contact tracers ‘*about the circumstances in which the infectious disease may have been transmitted to, or by, the individual*’.

Section 92ZZG(2) is correlated, and provides clear protection for individuals who provide information to contact tracers:

92ZZG Duty of confidentiality

...

- (2) *Despite anything in the Privacy Act 1993, information provided or obtained by a contact tracer under this Part may not be used or disclosed by anyone except for the effective management of infectious diseases, but nothing in this section limits the right of an individual to access or disclose information about him or her under that Act or any other Act. (emphasis added)*

Application of section 18(c)(i)

The DHB confirmed that the information at issue was obtained by a contact tracer under Part 3A of the Health Act, and so was covered by the duty of confidentiality in section 92ZZG(2). This meant it could not be released unless it was necessary to effectively manage the disease, or it was being released to the person it was about (which it was not in this case).

The Medical Officer of Health explained that in his opinion release of the information at issue to the requester was not necessary for the effective management of the disease. It is very unlikely that anyone at any risk of exposure to COVID-19 from these clusters would have become aware of it through the release of this information. Rather, their awareness and subsequent decisions to seek testing or treatment would have occurred through contact tracing or through other information that had already been released.

¹ See s 92ZY Health Act.

The Chief Ombudsman accepted that release of the information at issue to a news organisation, in circumstances where it was not necessary for the effective management of the outbreak, would be contrary to the duty of confidentiality in section 92ZZG(2) of the Health Act.

The Chief Ombudsman therefore accepted that section 18(c)(i) of the OIA applied.

Discretion to release

The Chief Ombudsman noted that Part 3A of the Health Act provides broad discretion to its statutory officers to determine what information should be released to effectively manage the relevant disease.

The relevant officials had decided not to exercise that discretion in this case and the Chief Ombudsman decided to investigate, under the Ombudsmen Act 1975, whether that decision was unreasonable.

The Chief Ombudsman accepted that there was a difficult balance to be drawn between:

- releasing too little information for the public to understand and mitigate the risk of catching and spreading COVID-19; and
- releasing too much information that discloses the identity of individuals and potentially reduces people's willingness to reveal information to contact tracers.

The Chief Ombudsman also noted that it was not his role to decide what information should be released to effectively manage COVID-19. That is the role of the Director-General of Health and the statutory officers empowered by the Health Act.

Provided that the relevant officials turn their minds to whether disclosure of the information is necessary for the effective management of COVID-19, and there are no indications that this process has been conducted in an insincere or ill-considered way, then the Chief Ombudsman will find their professional judgement to be highly persuasive (being one that draws upon many years of experience in the field of infectious diseases and how they are effectively managed). This is a highly specialised area of knowledge, and often concerns very finely balanced decisions being made under pressure.

The Chief Ombudsman accepted that officials had adequately considered whether releasing the cluster names would be for the effective management of COVID-19. There was no sign the process had been done in an insincere or ill-considered way. He therefore concluded that their decision not to exercise the discretion to release in this case was not unreasonable.

Outcome

The Chief Ombudsman formed the opinion that:

- the DHB was entitled to refuse the request under section 18(c)(i) of the OIA, because release would be contrary to section 92ZZG(2) of the Health Act; and

- the DHB's decision not to exercise the discretion to release the information '*for the effective management of infectious diseases*' was not unreasonable.

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