

# Investigation of refusal to provide information about staff working on vaccine approvals and immunisation programmes

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<b>Legislation:</b>	Official Information Act 1982, ss 9(2)(a), 9(2)(g)(ii)
<b>Agency:</b>	Ministry of Health
<b>Request for:</b>	Information about Ministry of Health staff working on vaccine approvals and immunisation programmes
<b>Ombudsman:</b>	Professor Ron Paterson
<b>Reference:</b>	295849
<b>Date:</b>	August 2015

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## Summary

The requester made several requests for a range of information related to vaccine approval processes, including details of Ministry of Health staff working on vaccine approvals. Her request for information about staff was refused under section 9(2)(a) of the Official Information Act 1982 (OIA) in order to protect the privacy of natural persons. Based on the information before me I have formed the opinion that section 9(2)(a) and section 9(2)(g)(ii) provided good reason to refuse parts of the requests, but that the balance of the requested information should be supplied.

## Background

1. In November 2009, and March and May 2010, the requester lodged four detailed requests to the Minister of Health about the vaccine approval processes for the MeNZB, Gardasil and H1N1 vaccines, and the influenza immunisation programme. The requester sought a range of information in each request. This opinion deals with her requests for information about Ministry of Health staff.
2. In her four requests, the requester sought the following information about staff:
  - a. names, qualifications, job titles and salaries (within a \$2,000 band) of Medsafe staff involved in the evaluation and approval process for the MeNZB and Gardasil vaccines;
  - b. names, job titles and salaries (within a \$2,000 band) of Ministry of Health staff responsible for the information materials provided to the public on MeNZB and Gardasil, Cevlapan and the influenza immunisation programme;
  - c. employment history of Medsafe<sup>1</sup> staff in the 12 months before and the 12 months after the approval of the MeNZB and Gardasil vaccines;
  - d. whether staff who worked on the MeNZB and Gardasil vaccine approval processes were still employed by Medsafe at the time of the requester's request, and if so what are their current job titles and salaries and have these changed since the vaccine approval process — were they promoted or demoted; and
  - e. if any staff who worked on the MeNZB and Gardasil vaccine approval processes are no longer employed by Medsafe is this because their employment was terminated — and if so what were the reasons. If not, what were their reasons for leaving. The requester wanted the names of new employers, if known.

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<sup>1</sup> Medsafe is the New Zealand Medicines and Medical Devices Safety Authority. It is a business unit of the Ministry of Health.

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3. Supply of the information was declined in reliance on section 9(2)(a) of the OIA (individual privacy).

## Investigation

4. The Minister of Health was notified of this complaint and investigation in September 2010 by former Ombudsman David McGee.
5. The Minister referred Dr McGee's notification to Medsafe given the focus of the requester's requests, and Medsafe's preparation of the initial responses. Medsafe replied to Dr McGee's notification, and assumed responsibility for responding to the Ombudsman's investigation.
6. A meeting was held with relevant Ministry of Health (including Medsafe) staff in November 2010, to discuss the Ministry's stance on release of information about staff.
7. In March 2011, Dr McGee wrote to Marie Shroff, the Privacy Commissioner at the time, to consult on the application of section 9(2)(a) to the staff related information. Advice was received from Ms Shroff in May 2011.
8. Over the next few months the focus of Dr McGee's investigation was on another aspect of the information requested by the requester, which primarily involved scientific data submitted by applicants for vaccine approvals. Dr McGee formed a final opinion in respect of that information (against release) in December 2011.
9. Regrettably, no progress was made in respect of the remainder of the information by the time of Dr McGee's retirement in May 2013.
10. Following Dr McGee's retirement I took over responsibility for this case. The requester confirmed that she wished the investigation to continue.
11. In August 2014 I asked the Ministry to review the staff related information and consider whether it would be possible to release further information to the requester. I referred the Ministry to a December 2012 opinion of Dr McGee's on a complaint about PHARMAC's decision to withhold the names of staff.<sup>2</sup> The Ministry responded in November 2014 declining to release further information, and raising additional arguments against release.
12. In February 2015, I advised the Ministry of my provisional opinion that some of the requested information ought to be released.

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<sup>2</sup> Available at <http://www.ombudsman.parliament.nz/resources-and-publications/opinions/official-information-opinions>.

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13. I met with Ministry staff members in June 2015 to discuss their objections to the release of staff related information. I then formed a further provisional opinion which was sent to the requester for comment in early June 2015.
14. The requester responded with her comments in early July 2015.
15. After I received the requester's comments, I sought comments from the current Privacy Commissioner, John Edwards, to ensure that I had the benefit of up-to-date comments from the Privacy Commissioner. Mr Edwards provided his comments to me in August 2015.

## Comments from Medsafe during investigation

16. In October 2010, Dr Stuart Jessamine, Group Manager, Medsafe, explained the basis of the Ministry's reliance on section 9(2)(a) to withhold the requested information:

*"The enquirer requested extensive information on individual staff employed by the Ministry (including Medsafe) such as names, job titles, salaries (to within \$2,000), work history and subsequent career development.*

*Medsafe employs approximately 60 staff and the enquirer was informed of the type of staff employed. The assessment of medicines is performed on a team basis with several staff reviewing an application prior to a recommendation being made to the Minister of Health's delegate. The decision to grant approval is published in the New Zealand gazette along with the name of the responsible Ministry staff member.*

*All recommendations for consent are reviewed by senior managers and this robust system of peer review ensures consistency in the evaluation process.*

*Ministry staff must comply with the State Services Commission Code of Conduct which outlines employment policies. This Code ensures that conflicts of interest are managed which appears to be the major concern expressed by the enquirer.*

*Apart from the names of senior staff, the Ministry does not release information about its staff. The Ministry does not believe it is in the public interest to have the names of evaluators and advisors identified. The Ministry also does not believe that the public needs to know staff salaries to gain confidence in the decision making process.*

*In this specific instance, the Ministry considers that its staff may be harassed by the anti-vaccine lobby group if they are identified to the enquirer who is seeking information on behalf of Uncensored Magazine. It is important for the New Zealand public that Ministry officials can perform their tasks without fear of improper harassment or improper pressure."*

17. During the investigation, the Ministry advised that it was willing to release the names of staff for all those working on the vaccine evaluation and approval process down to the level of team leader, but that the names of advisors/assessors should be withheld.
18. Later in the investigation, the Ministry emphasised its primary concern to be about staff being exposed to harassment if their names were released.
19. The Ministry's concerns about the impact of releasing staff names are succinctly expressed in a letter in March 2015 from Phil Knipe, Chief Legal Adviser:

*"... the Ministry's concern is that once the information is released and made available by [the requester] on anti-vaccine campaign platforms. The staff identified may be likely to be the target of abuse and harassment by more aggressive and abusive factions within the anti vaccine lobby ...*

*Without details of Ministry of Health staff, these factions currently post their threatening and intimidating messages online. The Ministry has already produced examples of the aggressive and abusive feeds posted on the Ministry's twitter site. The Ministry has grave concerns that once detailed information about staff is released, the focus of this aggression and abuse will become individual staff members.*

*Currently the Ministry employs six staff who have the necessary experience and qualifications to undertake assessments of the quality components, and only four staff who can assess the safety and efficacy components. Each assessment requires a lead assessor and must be peer reviewed.*

*Exposure of staff to abuse is likely to give rise to retention and recruitment issues. This is already arising in discussions with Medsafe staff.*

*The Ministry would like to highlight the risk to the future of medicine and vaccine approvals were staff to refuse to assess vaccines or other contentious medicines such as biosimilars or paediatric medicines due to concerns over their safety or their family's safety. Should this occur, New Zealand would not be able to approve these medicines or vaccines, leading to patients missing out on new therapies and protective vaccinations."*

20. In June 2015, I met with Ministry officials whose names are covered by the request, including staff at the advisor/assessor level. Individual staff members expressed their concerns about the potential impact of release of their names, when associated with a particular vaccine or medicine that has generated controversy.
  21. At the meeting, the Ministry indicated that there would be no objection to providing the names of staff who work at Medsafe, without any further accompanying information.
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## Comments from the requester during investigation

22. In her complaints, the requester set out her reasons for challenging the refusal of the staff related information. On the issue of the refusal of staff names, the requester commented:

*“I find this refusal to provide the names of the Medsafe staff member(s) who authorised the use of the MeNZB vaccine to be unacceptable considering that Medsafe is owned by the Ministry of Health; therefore Medsafe staff member(s) who made the decision are effectively public servant(s) and should be identifiable to the public so that they can be held accountable for their actions.*

...

*If people who are employed in a subsidiary of the Ministry of Health (Medsafe) on which New Zealanders rely to perform the vital public service of analysing the available information on drugs and vaccines to ascertain whether or not they are sufficiently safe to be marketed in NZ can hide under a cloak of anonymity, how does this promote their accountability to the public whom they are supposed to serve?”*

23. In relation to one of her requests for information about salaries, the requester commented:

*“Ministry of Health employees are public servants. If they are responsible for producing documents that are published for the public by the Ministry of Health their names and job titles should be available on request. As for their salaries, this is a lesser matter, but I believe the public is entitled to know how much people are paid to do these jobs. After all, ordinary taxpayers provide the money that pays their wages. Moreover, the salaries of other people who are employed directly or indirectly by the Ministry of Health such as doctors, nurses, cleaning and clerical staff etc employed in the public health system are no secret. Why should the approximate salaries of people working in the Ministry of Health itself somehow deserve to be held in confidence?”*

24. The requester was asked whether she would be satisfied with receiving an anonymised version of the staff information requested. The requester indicated that she was particularly interested in the names of the staff involved and any information relevant to her concerns that staff could have been influenced by the pharmaceutical industry. The requester explained that, if she received the names of staff, she would research them on the internet.
25. As a result of the further concerns raised by the Ministry about release of staff names, I contacted the requester in April 2015 to see whether she would accept a conditional release of staff names, on the proviso that she would not subsequently publish their names. The requester advised that she did not wish to be constrained by such a condition:

*“ ... [E]ven though I would like to know the names of the staff responsible for the approvals, release of the names on the condition that I kept the names anonymous would have set a highly undesirable precedent in terms of any future requests by any other journalist for the names of staff involved in providing advice on many issues, not just those relating to vaccine or other pharmaceutical drug approvals.”*

26. The requester also made the following general comments in terms of the public interest in the release of the staff names:

*“The reason that I focused on the evaluation and approval of the MeNZB and Gardasil is that there have been significant problems with these vaccines.*

*The MeNZB vaccine was tested here in NZ and two children who were part of the trials of the vaccine died. The cause of death for these children has not been publicly disclosed ... (I am aware of reports of deaths of children who had been vaccinated with MeNZB after the vaccine was approved for use but have not been able to get details of the deaths as the sources were third hand.) Despite the deaths of children who participated in the trials, and the lack of phase three trials and efficacy data the vaccine was used in mass vaccination programmes in NZ schools.*

*In the case of Gardasil, the manufacturer’s datasheet shows that there was a serious flaw in the conduct of the trials of the vaccine. A saline placebo is an appropriate placebo to use in vaccine trials as sterile saline is unlikely to cause significant adverse reactions beyond the stress and local trauma to the tissues involved in administering the injection.*

*However only a small minority of people who participated in the Gardasil vaccine trials received a saline placebo; most received an injection containing the vaccine’s adjuvant (amorphous aluminium hydroxyphosphate sulfate). Aluminium adjuvants have been linked to the development of autoimmune conditions in both human and animal studies. ....*

*Therefore, the use of an aluminium adjuvant solution as a ‘placebo’ in a vaccine trial could easily be anticipated to make the data from the trial basically useless when evaluating the rate of autoimmune problems in vaccine and ‘placebo’ recipients. In fact, the way that the data is presented in Gardasil’s datasheet (in most cases the reporting of the ‘placebo’ arm of the trial does not differentiate between those participants who received sterile saline and those who received the vaccine adjuvant) makes it impossible to properly compare the side effects in the participants who received the vaccine with those who received the saline placebo.*

*On this basis (unless the Medsafe staff had access to much better data that they have not put into the public domain or made available following OIA requests), Gardasil should not have been approved for use in NZ as it would have been impossible to properly assess its safety profile.*



*For this reason, I think that the name(s) of the Medsafe staff who assessed Gardasil as fit for use do need to be made public. (Or if the Ministry of Health has better data then this should be put into the public domain.)”*

## Relevant OIA grounds of refusal

### Section 9(2)(a)

27. Subject to the public interest override in section 9(1), section 9(2)(a) of the OIA provides good reason for withholding information about natural persons if, and only if, the withholding of the information is necessary to *“protect the privacy of natural persons, including that of deceased natural persons”*.
28. The question is whether and to what extent it can be said to be *“necessary”* to withhold the particular information at issue to protect the privacy of the individuals and whether, in any event, the public interest in the information outweighs their privacy interest.

### Section 9(2)(g)(ii)

29. Section 9(2)(g)(ii) provides good reason for refusal, subject to the countervailing public interest in disclosure, *“if, and only if, the withholding of the information is necessary to:*

...

*maintain the effective conduct of public affairs through –*

...

*(ii) the protection of such Ministers, members of organisations, officers, and employees from improper pressure or harassment;”*

30. Successive Ombudsmen have noted that *“improper pressure or harassment”* is something more than ill-considered or irritating criticism or unwanted publicity.
31. Nor is it sufficient to assert that there is a general risk that releasing the information at issue will cause employees to become exposed to improper pressure or harassment. There must be some reason for believing that release of the particular information in question will lead to improper pressure or harassment of those employees, which will place the effective conduct of public affairs at risk.

### Section 9(1)

32. Even if section 9(2)(a) or 9(2)(g)(ii) are found to apply, section 9(1) provides that if the public interest in the release of the information outweighs the interest to be protected, the information must be released.

## Names of officials

### PHARMAC opinion

33. In the course of this investigation, I referred the requester and the Ministry to an opinion of former Ombudsman David McGee which involved the issue of release of the names of officials working at PHARMAC in circumstances that appeared analogous to this case.<sup>3</sup> Dr McGee stated:

*“PHARMAC argued that ‘less senior’ staff who do not have decision-making responsibility have a privacy interest to protect. The names of Board members, the Chief Executive, and other members of the PHARMAC Management Team were all released, as it is these individuals who are responsible for the advice tendered, and decisions made, in the course of PHARMAC’s activities.*

*On initial consideration of the material available to me, I saw no justification for such a distinction. The names of officials should, in principle, be made available when requested. All such information normally discloses is the fact of an individual’s employment and what they are doing in that role. Anonymity may be justified if a real likelihood of harm can be identified but it is normally reserved for special circumstances such as where safety concerns arise.*

*PHARMAC states that the release of the staff names would disclose that they worked on the dabigatran project, as opposed to only revealing their role. Previously, when staff names have been released they have been subject to disparaging public criticism. For that reason, most of the PHARMAC staff do not consent to the release and some were very concerned that release would have a detrimental effect on their work.*

*I acknowledge that in some cases anonymity may be justified if some harm can be identified which does not meet the threshold for withholding under another ground, such as section 9(2)(g)(ii) which deals with improper pressure or harassment. The possible harm in this case appears to be the risk of negative reporting. But it is important to bear in mind that the PHARMAC staff whose identities were redacted undertook a senior advisory role. While they were not the decision-makers, they provided technical advice which was relied on by the PHARMAC Board when assessing the dabigatran proposal. These PHARMAC staff are already generally in the position of attracting public criticism. They contribute to what are often contentious decisions about the*

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<sup>3</sup> Available at <http://www.ombudsman.parliament.nz/resources-and-publications/opinions/official-information-opinions>.

*resourcing of pharmaceutical medicines. The roles of PHARMAC staff are readily ascertainable and it is likely that their involvement in projects could be deduced. PHARMAC staff were expressing their expert views in their official capacities. This reduces the strength of any privacy interest in their identities.*

...

*Overall, I am not persuaded that it is necessary to withhold the identity of PHARMAC staff members in order to protect their privacy. I also consider that there is a strong public interest in openness and transparency when developing PHARMAC funding decisions. Even if the release of PHARMAC staff names would result in some infringement of privacy for the purposes of section 9(2)(a), I am inclined to the view that their names should be identified on request for reasons of accountability.”*

## Analysis and findings

### Section 9(2)(a)

34. In consulting the Privacy Commissioner in March 2011, Dr McGee indicated that he saw no basis for withholding staff names under section 9(2)(a), and invited the Commissioner’s comments. The former Privacy Commissioner, Marie Shroff, responded as follows:

*“I understand the position of the Ombudsmen on the wider issue regarding names. However, the request by [the requester] while broad in nature, is specific in the context within which she expects names to be released. For example, among many, she requests the names of staff involved in approval processes for the MeNZB and Gardasil vaccines. I consider that in these situations the ‘backroom’ staff can expect a degree of privacy and that their names ought not to be released. We would usually consider that the final decision maker ought to open to scrutiny and not expect privacy to protect his or her name from being released as official information. The Ministry has described the decision making approach as one of research followed by peer review at a level of appropriateness, followed by an approval by the Deputy Director-General of the Ministry directorate within which Medsafe operates.*

*I would expect the release of the name of the administrative peer reviewer who last approved the reports and perhaps the name of the Deputy Director-General. I consider that accountability and openness about decision making are public interests that would override their privacy interests.*

*However, for those who worked under the two aforementioned decision makers, I consider that their privacy is of a higher value and is not overridden by public interest considerations.”*

35. I am not persuaded that less senior staff have a higher privacy interest in their names solely by virtue of their place in an organisation's hierarchy, nor that such advisors can accurately be described as "*backroom*" staff. They are not clerical or administrative staff. Their technical expertise appears to be integral to the vaccine evaluation and approval process and a key input to the decision-making process.
  36. I note that in the PHARMAC opinion, Dr McGee envisaged the release of the names of junior staff, although on the facts in that case, the requested information related only to senior staff. I consider that if officials work in the public service, even in a junior advisor or analyst role, in principle their names should be publicly available.
  37. In this case, release of the requested information would reveal that the named staff member worked for Medsafe, and the nature of their work, including the particular vaccine approvals on which an individual staff member worked.
  38. In the PHARMAC case, Dr McGee did not accept that revealing the individual worked on the dabagitrin decision would bring privacy concerns into play, nor that the likelihood of public criticism created a valid expectation of anonymity. I agree with this general position, however a number of circumstances distinguish the present case.
  39. Due to the passage of time between the request and the particular vaccine approvals involved, a number of staff covered by the request had already left the Ministry by the time the requester requested the information. In relation to those staff who have departed, there is no obligation, or even the ability in many cases, for the Ministry to consult those individuals about release of their names.
  40. At the time staff were working on the vaccine approvals and associated publicity materials, they did so on the understanding that their involvement in a particular application would not be known by the general public. The Ministry's practice had been to release names of staff from a managerial level upwards.
  41. The Ministry considers that the association of an individual staff member's name with a controversial vaccine or medicine approval will likely expose that individual to offensive or threatening communications or conduct from people aligned with the "anti vaccine" lobby.
  42. The Ministry also submits that if the names of staff at the assessor/analyst level were to be released, the likely harassment would deter staff from taking positions as assessors, or at least from working on applications and approvals for controversial vaccines, and in some cases would result in staff resignations. Given the small numbers of staff involved, this would prejudice the ability of Medsafe to perform its assessment function in relation to new medicines, thereby placing the effective conduct of public affairs at risk.
  43. I note that in the PHARMAC case, Dr McGee considered there may be occasions where anonymity might be justified if a harm could be identified which does not meet the threshold for withholding under section 9(2)(g)(ii). The suggestion is that section 9(2)(a) could be a basis for refusing staff names in such a case.
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44. I doubt that there will usually be anything inherently private or personal about the nature of the specific work an individual is employed to do for a government agency, or in having one's name associated with that piece of work. Nonetheless, I accept that if release of that information is likely to lead to some subsequent action or conduct that would intrude on an individual's privacy, section 9(2)(a) may apply.
45. However, for the reasons set out below, I consider that section 9(2)(g)(ii) is clearly made out in the current case, and more closely addresses the harms about which the Ministry is concerned.

### Section 9(2)(g)(ii)

46. The Ministry's arguments that staff would be harassed if their names were released, and the consequent detrimental impact on Medsafe's work, are more appropriately considered in terms of section 9(2)(g)(ii). The question is whether the Ministry has provided sufficient evidence to substantiate its claims.
47. The Ministry provided examples of situations in Australia where the lobby group Australia Vaccination Network was reported to have sent accusatory and emotive emails to politicians who had taken a pro-vaccination stance publicly, and to have directly contacted parents of children who had publicly spoken on the benefits of vaccines after the loss of a child to a preventable disease.
48. The Ministry provided a page from its own twitter feed about the flu vaccine which contained abusive comments. Examples include the following:

*"[\*\*\*] OFF YOU BLOODY USELESS LOT NOBODY NEEDS YOUR CONTAMINATED VACCINES DIVERTING TAXES TO CORPORATIONS"*

*"ALL the Vaccines Are Contaminated – head of vaccines at [pharmaceutical company and doctor's name] [\*\*\*] YOU FRAUDS!"*

*"YOU COMPLETE AND UTTER PSYCHOS CAN JUST BRUSH THIS OFF CAN'T YOU! MAYBE IT'S A [\*\*\*]ING CONSPIRACY THEORY, RIGHT? [\*\*\*]WITS!"*

49. When I asked whether the Ministry had any examples of communications received by individual staff members, I was given an example of an email, one of 20 such emails, sent by an opponent of the Gardasil vaccine to a Ministry spokesperson on immunisation at her individual work email address:

*"Hi [name]*

*I understand that you have been on the radio praising the Gardasil vaccine. I know for certain that you are aware of the mountains of very serious side effects of this vaccine from around the world, including DEATH.*

*[Name]. What is it going to take to stop this murder that you are absolutely guilty of?*

*How to we stop you and the medical profession from killing more children in the name of profits and power.*

*It is DISGUSTING [name], and the intelligent people of New Zealand and around the world need to find a way to get the message out that vaccines KILL people, they damage lives, and they [\*\*\*]king don't work.*

*You are an evil woman [name], and need to be stopped from promoting your garbage."*

50. In reference to this email the requester agreed that the recipient of this email may have found it upsetting, but she submitted:

*"... Despite the tone of the email, it does raise some valid points. There are many anecdotal reports of injuries following Gardasil in girls and young women (both in NZ and overseas) that can be read on the internet. There is also peer reviewed research which documents the serious new health problems in Gardasil recipients.*

...

*If Ministry of Health spokespeople do not acknowledge the real risks of injury from Gardasil when they are discussing the vaccine in the media then I think it is likely that they could continue to act as a 'lightning rod' for the frustrations of people who may have been in some way adversely affected by the vaccination programme."*

51. It is undeniable that the impact of the internet, and the rise of blogs and social media forums, has created fertile ground for the posting of intemperate comments, many of which are anonymous. Some individuals vent in an aggressive or unpleasant manner.
52. It would be a mistake to accept that this context will always justify the refusal of information that would otherwise be released. Public servants and the agencies they work for need to be reasonably robust.
53. However, where such commentary is aggressive or abusive, occurs more than once, and is targeted at named individuals, it is the type of conduct that qualifies as "harassment" in terms of section 9(2)(g)(ii).
54. The requester suggested that the remedy for receiving unwanted communications of this nature is to use a "block sender" option on their emails, and if the message was perceived as threatening, to report the matter to the Police.
55. These options may mitigate the impact of harassing behaviour, however they do not negate the fact that harassment is occurring. Nor do these options prevent personal attacks against named individuals on web pages or social media and the potential ongoing effects of such activity on the individual concerned.
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56. The examples provided by the Ministry confirm that the conduct of some individuals associated with the anti-vaccine lobby towards Ministry staff amounts to harassment. While there is no suggestion that the requester would be likely to engage in this type of conduct herself, I consider it likely that others would, if the names of individual staff associated with vaccine approvals or advocacy for vaccines became known.
57. The requester questioned whether Ministry staff genuinely hold concerns for their safety and wellbeing, or whether this is a “*ploy*” designed to influence my decision on the release of staff names. She suggested that the abusive communications may not have originated from the anti vaccine movement, and could even have been generated by staff or people connected to them.
58. I do not accept the requester’s speculations. When I met to consult with affected Ministry staff directly, I was left in no doubt that staff perceive themselves to be genuinely at risk of aggressive, anti-social conduct that would make them seriously consider whether they wish to continue working in their current positions if their names were to be released. Some expressed concerns for the safety and welfare of their families.
59. The requester was sceptical about the suggestion that the safety and welfare of staff members’ families would be at risk, in the absence of any evidence that this had already occurred. In my opinion concerned Ministry staff should not have to wait and see whether their fears (based on past experience of some staff being harassed) turn out to be true.
60. On balance, I consider that the evidence provided by the Ministry supports the conclusion that release of the requested information would be likely to lead to staff being specifically targeted in a manner that would amount to harassment in terms of section 9(2)(g)(ii).
61. I accept that the risk of harassment would deter staff from taking up positions as assessors, or from working on particular approvals, and that this would prejudice the ability of Medsafe to act effectively as a regulator of medicines.
62. It follows that I accept section 9(2)(g)(ii) applies to names of staff involved in the vaccine approvals and publicity materials for immunisation, where release of those names would be associated with particular vaccines or medicines.<sup>4</sup>

### **Section 9(1)**

63. Section 9(1) of the OIA requires that I consider whether the public interest nevertheless outweighs the reasons for refusal in this particular case.

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<sup>4</sup> I note that the current Privacy Commissioner indicated that he considered that the risk of harassment in this highly charged area would justify the withholding of the names of junior staff.

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64. The primary public interest consideration raised by the requester is the need for the Ministry to be accountable for the decisions made on various vaccines and medicines, and for materials promoting their use.
65. I appreciate that individual advisors and assessors contribute to the decision-making process, however the overall responsibility for the approval of a particular medicine rests with the Minister of Health and his delegates, all of whose names are publicly available.
66. As far as the public being aware of the scientific basis on which the decision of the Minister or his delegate was based, the Ministry advises that the relevant scientific evidence is published on its website.
67. I understand that the evaluation reports prepared by assessors have also been made available on request.
68. In these circumstances, I cannot see how release of the name of the particular assessor involved would increase the level of accountability for the approval decision.
69. I am not persuaded that the public interest in being accountable for the decisions made on vaccines and medicines outweighs the need to protect the names at issue in this case. I reach this conclusion notwithstanding the requester's claim that deaths and injuries have been linked to the Gardasil vaccine.

## Salary information

### General principles

70. I accept that salary information linked to an identifiable individual does involve privacy interests that may require the protection of section 9(2)(a). Where an individual is not readily identifiable, privacy concerns are unlikely to arise.
  71. Where the request is for salary information in relation to identifiable or named individuals, the weight to be attributed to any privacy interest will depend on what has been requested. Disclosure of the exact salary of an individual is clearly more intrusive than giving a salary band or pay scale for the role. The wider the salary band, the less likely the precise salary will be revealed.
  72. The expectations of public sector staff about their salary or salary bands being publicly released, and the possible consequences or impact of disclosure on the individual, are relevant factors in determining the weight of the privacy interest in salary information.
  73. Where section 9(2)(a) applies, section 9(1) requires assessment whether the public interest considerations outweigh the need to withhold information to protect individual privacy. There are several aspects to the public interest in information about salaries in the public sector.
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74. One factor is the salary level. The higher the salary, the higher the public interest in release of information, given the expenditure of public funds.
75. A relevant contextual factor is the statutory reporting requirements for Crown entities.<sup>5</sup> These provide for reporting the number of employees who were paid more than \$100,000 in \$10,000 bands. For central government agencies, the State Services Commission reports annually on the number of public servants paid above \$100,000 in \$10,000 bands.<sup>6</sup> Some agencies also publish this information in their own annual reports.
76. The Local Government Act 2002 also requires the number of staff with annual remuneration of \$60,000 or above to be reported in \$20,000 bands.<sup>7</sup>
77. The monetary thresholds adopted for reporting purposes are a reasonable indication that the size of salary has reached a level where there is a legitimate public interest favouring release of fairly narrow salary bands above the identified threshold.
78. The level of responsibility of the staff member concerned is also a factor to consider when assessing the public interest in release of salary information. The greater the level of responsibility for financial expenditure and decision-making, the greater the public interest.
79. The title and seniority of the position within the hierarchy of the organisation will often give an indication about the responsibility of the role. Usually the more senior the role, the more responsibility the staff member will have for managing other staff, budgets and the outputs of the organisation.
80. Accountability for policy decisions usually sits at a senior level. However, where an individual's role contributes significantly to the decision-making process, or has the ability to influence the outcome of the decision, that is a relevant factor increasing the public interest in release.
81. A further relevant factor is whether the individual has a public facing role, ie is authorised to speak or give information to the public or to relevant sector groups on behalf of the agency. Principal or chief advisors are examples of such roles.
82. It is not possible to exhaustively list all of the public interest factors that may be relevant in the circumstances of a particular case. Examples from past cases include where there are current controversies or serious allegations, where normal procedures have not been followed or where an individual appears to have been paid significantly more than the usual salary for the particular position.

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<sup>5</sup> Crown Entities Act 2004, s 152(1)(c).

<sup>6</sup> The latest report from the State Services Commission on public sector remuneration can be found at [www.ssc.govt.nz/rem-senior-state-sector-staff-to-30june14](http://www.ssc.govt.nz/rem-senior-state-sector-staff-to-30june14).

<sup>7</sup> Clause 32A, Schedule 10.

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## Analysis and findings

### Section 9(2)(a)

83. The former Privacy Commissioner commented on the request for salary information in this case as follows:

*"I agree with your position on the disclosure of salaries generally. Chief Executive salaries ought to be released. Those earning over \$100,000 ought to be reported within bands of \$10,000. However, if the cohort within this group is such that the method of reporting effectively discloses the identity of an individual, consideration ought to be given to reporting that could mitigate the outcome, such as reporting in wider bands.*

*I do not support that general naming of staff and the release of their individual remuneration details. Such details for all but Chief Executives is considered by current society to be highly personal and private. ...."*

84. The current Privacy Commissioner confirmed that salary information is still considered by many people to be sensitive and personal to them.
85. Following the general approach of previous Ombudsmen, and taking into account the former and current Privacy Commissioner's views, I accept that there is a relatively strong privacy interest in salary information within narrow bands, when associated with the names of individuals. Accordingly, I accept that section 9(2)(a) applies to the specific salary information the requester sought where it is linked to a name.
86. However, where the specific salary information sought is not linked to a name, is there a privacy interest at all?
87. The number of staff involved is small. It would be possible, at least for other staff in the Ministry, to identify the particular individuals concerned if their salaries (within the requested \$2,000 bands) and positions were released. The current Privacy Commissioner commented on this aspect as follows:

*"I also agree that release of salary band information about individuals in a small organisation is not a perfect mechanism for preserving privacy, as details can relatively easily be tied to identifiable individuals by an informed person."*

88. I consider there is a slight privacy interest in salary information at the level of detail requested which may trigger the protection of section 9(2)(a). Accordingly I turn to consider whether there is an overriding public interest in release of the information.

### Section 9(1)

89. Based on the information provided by the Ministry, some of the positions were paid at a rate considerably higher than \$100,000, were at a senior or management level, and contributed significantly to or had responsibility for the decision-making process on the

various vaccine approvals at issue. In my opinion these factors taken together raise the public interest sufficiently to require release of some salary information, even if this can be related to a named or identifiable staff member.

90. I consider that an appropriate balance between the need to protect the privacy of these individuals, and the public interest considerations outlined above, would be for the salaries of the relevant staff to be released in \$10,000 bands in relation to those staff who, at the time, were paid over \$100,000.
91. This departs from the former Privacy Commissioner's position. However I am conscious that since 2002 reporting requirements for central government and Crown entities make no allowances for reporting in wider bands where individuals may be able to be identified. In respect of the statutory obligation on Crown entities, particularly smaller Crown entities, Parliament must have envisaged circumstances where the role or person attracting each level of salary could be deduced.
92. In relation to the Medsafe staff in less senior positions, with lower levels of responsibility for decision-making, and whose remuneration falls below the level that would usually be publicly reported, the public interest in release of salary information is less strong. I suggest that an appropriate balance would be for the Ministry to release the salary ranges<sup>8</sup> for these positions. This information is readily available to prospective employees in the public sector, and should be available under the OIA.
93. The current Privacy Commissioner agrees with my assessment of the balance of the privacy interest and the public interest in this case on the following basis:

*"Salary information is personal to the individual to whom it relates, and many people would consider it sensitive information. However there is also a public interest in knowing how public money is spent. Drawing a line between junior and senior staff and releasing salary range information about junior staff as you have suggested is a reasonable way to address this tension."*

94. The Commissioner noted that his views were *"influenced in this case by the fact that the privacy and sensitivity of salary information is affected by the effluxion of time."* He considered that information about an individual's current salary is likely to be *"significantly more sensitive"* than information about their salary five years ago. Thus his views may differ in another case where the salary information at issue is current.

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<sup>8</sup> Salary ranges for roles in the public sector are usually significantly wider than \$10,000.

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## Other employment information

### Section 9(2)(a)

95. Aside from the issue of staff names and salaries, the requester requested that the Ministry provide qualifications of some staff, as well as information about previous employers and the employment history of officials following their work on the vaccine approval process, including whether staff had been promoted or demoted or had left the Ministry.
96. The requester's request for information on qualifications was limited to the staff who worked on the vaccine evaluation and approval process. In my view, where the qualifications that staff hold are a prerequisite for the position in which they are employed, there can be little if any privacy interest to protect. Furthermore, there is a public interest in the Ministry being accountable for ensuring its staff have the relevant qualifications for the positions they hold. Accordingly, I consider relevant qualification information ought to be released.
97. The remaining employment related information the requester requested is generally considered very personal to employees and attracts the protection of section 9(2)(a) if related to an identifiable individual. There is also a question whether the information is in fact held by the Ministry in relation to all of the employees covered by the request.
98. The Ministry has identified whether the staff captured by the request still work at the Ministry, and some instances where the position was disestablished where those were the reasons for the role ending. I am satisfied that those aspects of the information — namely whether or not the staff who were in those roles continued to work at the Ministry (at the time of the request) and the information about some roles having been disestablished — could be released without raising any privacy concerns. However, I consider that the section 9(2)(a) applies to the remainder of the information.

### Section 9(1)

99. The primary reason the requester gives for wanting this information relates to her concern about *“whether there is a revolving door between the Ministry of Health and Medsafe and the pharmaceutical industry in NZ as there is in the USA”*. The requester considers the detailed employment information she is seeking would enable her to research this issue more thoroughly.
  100. The public interest consideration raised here is whether the Ministry staff assessing and evaluating proposed vaccines and medicines are doing so independently and free from bias. The requester's concern is that staff may have been unduly influenced by the pharmaceutical industry.
  101. The Ministry advises that the assessment process is performed on a team basis with several staff reviewing an application prior to a recommendation being made. All
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recommendations for consent are further reviewed by senior managers (whose names are available) and this “robust” system of peer review ensures consistency in the evaluation process. Ministry staff are subject to the State Services Commission Code of Conduct through their employment conditions and policies, which is designed to ensure that conflicts of interest are managed.

102. The requester does not accept this is sufficient in light of the Ministry’s advice (at the time of her original request) that Medsafe does not maintain a register of staff interests.
103. There is extensive guidance material available from the State Services Commission and the Controller and Auditor-General on managing conflicts of interest in the public sector.<sup>9</sup> The lack of a register of interests does not mean that potential conflicts are not being managed. As noted in the Auditor-General’s guidance for managing conflicts of interest:

*“An interests register can help public entities identify when a conflict of interest might arise so that steps can be taken to manage it. However, such a register is no more than a tool to help members, officials, and public entities in their efforts to identify and manage conflicts of interest before they create problems. An interests register is not a substitute for disclosing and dealing with specific conflicts of interest as and when they arise ....”<sup>10</sup>*

104. A register relies on individuals volunteering information about potential conflicting interests, as does any policy requiring staff to declare such conflicts when they arise. There is nothing in the requester’s submissions that leads me to conclude that the Ministry’s processes for identifying conflicts were deficient.
105. Accordingly, I see no basis for concluding that there is a public interest that outweighs the need to withhold some of the detailed employment information requested in order to protect the privacy of the individuals involved.

## Ombudsman’s opinion

106. In my opinion, for the reasons set out above the Ministry was entitled to refuse the request for the following information under sections 9(2)(a) and 9(2)(g)(ii):
- a. the names of officials at the level of advisor/assessor in association with a particular vaccination approval process or immunisation programme;
  - b. the salaries of all staff covered by the request in \$2,000 bands; and
  - c. individual employment information including performance related information and employment histories prior to and post working on particular vaccine approvals.

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<sup>9</sup> See the resources on the State Services Commission website <http://www.ssc.govt.nz/node/3716>

<sup>10</sup> Managing conflicts of interest: Guidance for public entities 2007 available at [www.oag.govt.nz/2007/conflicts-public-entities/](http://www.oag.govt.nz/2007/conflicts-public-entities/)

107. I consider that the Ministry ought to release the following information:

- a. salaries in \$10,000 bands for each position identified in the request where the salary was above \$100,000 and the salary range for positions paid below \$100,000;
- b. a list of qualifications of staff working on the specific approvals identified in the request associated with the position held but not with any names; and
- c. information about whether staff continue to work for the Ministry or positions that have been disestablished.

Professor Ron Paterson  
Ombudsman

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