



# Chief Ombudsman's opinion on OIA complaints about the refusal of Covid-19 vaccine contracts

<b>Legislation</b>	Official Information Act 1982, ss 9(2)(b)(ii), 9(2)(ba)(ii), 9(2)(c),
<b>Requester</b>	A group of 17 requesters
<b>Agency</b>	Minister for COVID-19 Response, Ministry of Health, Minister of Finance
<b>Request for</b>	Copies of the Government's contracts with Pfizer/BioNTech, Janssen, Oxford/AstraZeneca and Novavax for the supply of COVID-19 vaccines
<b>Ombudsman</b>	Peter Boshier
<b>Case number(s)</b>	560655, 566252, 569072 et al
<b>Date</b>	19 June 2023

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## Summary

The Ministry of Health, Minister for COVID-19 Response, and Minister of Finance received multiple OIA requests for copies of the contracts between the Government and pharmaceutical companies for the supply of Covid-19 vaccines. These requests were refused on the grounds that release would unreasonably prejudice the commercial position of the companies, and that the contracts were subject to confidentiality obligations and release would therefore be likely to otherwise damage the public interest (sections 9(2)(b)(ii) and 9(2)(ba)(ii) of the Official Information Act 1982 (OIA)).

The Chief Ombudsman investigated a group of 17 complaints he received about these refusal decisions. He formed the opinion that there were good reasons under sections 9(2)(b)(ii), 9(2)(ba)(ii) and 9(2)(c) of the OIA to refuse the requests for full, or redacted, copies of the contracts, however the public interest in transparency and accountability required the release of summary information in aggregate form which summarises the nature of the commitments made by the Government across all the contracts.

The Ombudsman recommended that the Ministry of Health work with officials from Pharmac and Treasury, and in consultation with the COVID-19 vaccine suppliers, to develop a summary statement for public release by **18 September 2023**.

## Background

1. I received complaints from 17 different requesters about the refusal of their requests for copies of, or information from, the Government's contracts with suppliers of the COVID-19 vaccines. These refusals cited sections 9(2)(b)(ii) and 9(2)(ba)(ii) of the OIA as providing good reason to withhold the information.
2. These complaints span requests made to the Ministry of Health, the Minister for COVID-19 Response, and the Minister of Finance. The majority of requests were for the contract with Pfizer/Biotech, however there were also requests for copies of the contracts with Janssen, Oxford/AstraZeneca and Novavax.
3. I have already formed an opinion on the refusal of information about vaccine prices and delivery schedules. This was published as a case note on my website in December 2021.<sup>1</sup> In that opinion, I concluded that section 9(2)(ba)(ii) provided good reason to withhold this information. My opinion on the decisions to withhold the contracts is published in full and deals with the remaining information in the contracts, and does not revisit the withholding of vaccine prices or delivery schedules.
4. During my investigation, and before providing my final opinion, I reviewed the vaccine supply contracts. I received comments, and additional information from the Ministry of Health, the Minister of Finance and the Minister for COVID-19 Response.<sup>2</sup> I received written comments from the vaccine suppliers about the impact release of these agreements might have, including their views on the release of summary information. I also received comments from the requesters at various stages of my investigation, and in response to my provisional opinion.
5. Having carefully considered the comments provided from all parties, I formed my final opinion.

## Analysis

### **Would release of the contracts be likely to unreasonably prejudice the commercial position of vaccine companies?**

6. Section 9(2)(b)(ii) of the OIA applies if making the information available '*would be likely unreasonably to prejudice the commercial position of the person who supplied, or is the subject of, the information*'. The intent of the section is to protect the commercial interests of third parties, assuming those parties have a commercial position. There is no

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<sup>1</sup> <https://www.ombudsman.parliament.nz/resources/requests-vaccine-pricing-and-contracted-delivery-schedules>

<sup>2</sup> The separate Ministerial portfolio for COVID-19 Response, last held by Minister Verrall, ceased following the Cabinet reshuffle announced on 31 January 2023. From 1 February 2023, Minister Verrall responded in her capacity as the Minister of Health.

dispute in this instance that the vaccine companies have a commercial position. My view on the application of the section in this case therefore turns on whether I am satisfied that release of the contracts (minus the price and delivery information) would be likely to prejudice the commercial position of these companies, and if so, whether this prejudice would be unreasonable.

7. A number of requesters proposed that any commercially sensitive information could be redacted, and that the majority of the contract could then be released without giving rise to any prejudice. One suggested that much of a company's contract document was likely to be generic, and therefore largely a duplicate of agreements reached with other countries some of which, it was claimed, are now available on the internet. In these circumstances, it was argued, how could release of at least the generic elements of the contracts, cause commercial prejudice?
8. The Minister of Finance explained that the terms and conditions of the contracts are of high commercial sensitivity. The details are current and will remain so as long as negotiations and purchases are ongoing. Release of the contracts would provide a comprehensive picture of the terms of New Zealand's vaccine purchases, which would then become accessible by other countries as well as other pharmaceutical suppliers. In the Minister's view this would likely prejudice a vaccine company's negotiations with other countries and might impact its relative negotiating position compared to other suppliers. The Minister noted that the release of this information would likely result in damage beyond adverse publicity and damaged business relationships. It would potentially impact the conditions a vaccine company could include in its supply contracts internationally and the prices it could charge certain governments.
9. In order for me to better understand what commercial prejudice, if any, would arise from the release of the contracts without pricing or delivery information, I asked the vaccine companies directly. All of the companies confirmed that, in their view, release of the contracts even without the pricing and delivery information, would cause unreasonable commercial prejudice. Revealing this information would give insight into a company's vaccine strategy, its agreements and relationships with third parties, its negotiating position, and a host of other information that would be valuable to competitors, and is not otherwise available. The primary concern is that release of this information would seriously undermine the negotiating position of a company in relation to its competitors, not only regarding COVID-19 vaccines, but also in general.
10. I have reviewed all the agreements at issue, and the contracts vary both in structure and how they operate. I have considered the suggestion that companies would have used generic clauses or template structures for their agreements, and the claim that versions of these contracts are publicly available. While some companies agreed that there were heavily redacted contracts with some governments or entities in the public domain, others did not confirm this was the case. The majority were clear that there were no full versions of their contracts available online legitimately. All the companies were emphatic that their contracts had terms and conditions that were heavily negotiated

with each country, including New Zealand, and that as a result the contracts include distinct terms and conditions not necessarily replicated elsewhere.

11. I appreciate that it is sometimes possible to release commercial contracts with the sensitive information redacted, and that sometimes commercial agreements use generic templates - parts of which would not necessarily cause any prejudice to the contractual parties if released. However the situation here is not comparable. The negotiation process, and the final agreements arrived at, were the product of a unique set of circumstances facing both New Zealand, and the world: a global pandemic of significant proportions; the arrival of a range of newly developed vaccine options to combat the virus; and fierce competition between countries to ensure access to these vaccine options for their populations. It is also common knowledge that the pharmaceutical industry is highly competitive, and I can see that release of any portion of a company's contract for COVID-19 vaccines would be of intense interest to its competitors. While a lay person might not appreciate the significance of a particular clause, or the wording used, I accept that a competitor in the same industry could glean a great deal more from that information and use it to their advantage.
12. I am persuaded then that release of the full contracts, even with redactions, would be likely to unreasonably prejudice the commercial positions of the vaccine suppliers, and that section 9(2)(b)(ii) applies to them.

### **Would release in spite of the Government's contractual promises of confidentiality be likely to damage the public interest?**

13. As noted, I have already formed the opinion that section 9(2)(ba)(ii) of the OIA provided good reason for the refusal of COVID-19 vaccine price and delivery information.<sup>3</sup> This section applies where withholding is necessary to protect information which is subject to an obligation of confidence, and its release '*would be likely otherwise to damage the public interest*'.

### **Obligation of confidence**

14. Each contract contains comprehensive confidentiality provisions. The practical effect of these provisions is that they create an express obligation of confidence in relation to the full agreements.
15. I understand that it is common for government contracts with pharmaceutical companies to contain confidentiality clauses. Of course, while it is open to the Government to enter into agreements that include confidentiality obligations, this does not mean that it can contract out of the OIA. It is an implied term of any contract that the promises in the contracts are subject to statutory obligations. Any contractual promise of confidentiality

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<sup>3</sup> See fn 1, above.

does not absolve the Government from the obligation to release official information in response to a request unless there is a good reason, under the OIA, to withhold it.<sup>4</sup>

16. Nevertheless, the Government clearly considered it necessary to commit to maintaining confidentiality in so far as possible. I am advised that in the contracts for COVID-19 vaccines, the confidentiality provisions were the result of considered negotiation between the parties. It is clear that if the Government had not been prepared to agree to conditions of confidentiality, this would likely have stalled negotiations, and may have meant no agreement could be reached on the supply of vaccines. I am satisfied then that an obligation of confidence exists for the purposes of section 9(2)(ba)(ii) of the OIA.
17. At this point it is appropriate to discuss the impact of the inadvertent release of information from the contracts last year. On 2 February 2022, Newsroom published information about how much the Government had agreed to pay for the Pfizer, AstraZeneca, Novavax and Janssen vaccines, the number of doses covered by the advance purchase arrangement, along with information about delivery schedules.<sup>5</sup> This information was mistakenly included in a bundle of information being released to Newsroom from the COVID-19 Response Minister.
18. Under the OIA, my investigation and review of a refusal of information is limited to considering the circumstances at the time of the original refusal. However, where subsequent events could potentially alter the position significantly, it is pertinent for me to ask whether the original reason for refusal can still stand.
19. I asked the Ministry of Health whether it was still necessary to withhold the contracts now that arguably some of the most sensitive information was in the public arena as a result of the Newsroom article. In its response, the Ministry noted that the inadvertent release was limited to a small subset of information contained in the full contracts, and that the media outlet that had received the information had informed the Ministry it would not be publishing anything further (the main article already having been published by that point).
20. In light of the Ministry's response, I am satisfied that the obligation of confidence still exists, and that the inadvertent release has not changed the situation in this respect.

### Would release likely otherwise damage the public interest?

21. The Ministry of Health maintains that release of the agreements, or any information from them, would be likely to erode New Zealand's reputational standing with suppliers and lead to trust and confidence issues in New Zealand's relationship with pharmaceutical companies. The Ministry said that release of the contracts, despite the obligation of confidence:

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<sup>4</sup> *Wyatt Co (NZ) Ltd v Queenstown Lakes District Council* [1991]2 NZLR 180.

<sup>5</sup> <https://www.newsroom.co.nz/govt-paid-3650-per-dose-of-pfizer-vaccine>

*..could have significant downstream impacts on New Zealand's ability to access COVID-19 vaccine products in the form of diminished prioritisation in delivery schedules, diminished or delayed access to new products, and a diminished influence of our negotiating efforts with suppliers. Outcomes such as these would have a real impact on New Zealand's ability to provide the public with timely access to the most effective COVID-19 vaccines during a global pandemic and reduced security of supply.*

22. The Ministry's concerns do not appear to be overstated. For example, the Ministry explained that the unintended release of information in 2022 was not without consequence. Suppliers expressed their concerns and disappointment to the Government about the mistake. The release eroded the level of trust in the Government's commitment to keep information confidential, and it was made clear that this could have implications for broader pharmaceutical/therapeutic supply in New Zealand. Any threat to New Zealand's reputation as a high-trust trading partner therefore has implication for New Zealand's access to therapeutic products more generally. The Ministry said:

*The loss of reputation and ability to maintain and deliver our commercial responsibilities could put New Zealand's future ability to purchase essential therapeutic products at risk, and result in higher prices for the Crown.*

23. Ministry officials and the COVID-19 Response Minister considered it necessary to write to, and meet with vaccine suppliers to discuss what information had been mistakenly released, and confirmed that measures were being taken to avoid any repeat. Naturally, those communications involved further assurances that the Government was committed to honouring its promises of confidentiality.
24. The comments I received from all the vaccine suppliers were unequivocal, and confirm the Ministry's submissions. They consider that they ought to be entitled to rely on promises of confidentiality and that this is a fundamental aspect of any agreement to supply medicines, whether COVID-19 vaccines or otherwise.
25. I have previously noted that New Zealand's relative bargaining position as a smaller country heightens the risk that disclosure of confidential information would likely result in suppliers being less inclined to prioritise existing commitments or enter into future agreements. This was again confirmed in comments from the Ministry and vaccine suppliers.
26. Based on the comments and information provided to me I accept that release of the full agreements would be likely to damage the public interest in accessing, as a priority, high demand medicines from pharmaceutical producers. The implication is that release of the contracts without the agreement of the vaccine suppliers, would have seriously jeopardised New Zealand's ability to secure COVID-19 vaccines during the height of a global pandemic. Obviously it is in the public interest for the New Zealand population to have access to vaccines, whether during a pandemic or otherwise. I am therefore of the view that section 9(2)(ba)(ii) applies to the contracts.

## Is withholding necessary to avoid prejudice to public health measures?

27. Before I move on to the public interest considerations favouring release, I think it is important to briefly discuss another withholding ground which is rarely used, but is pertinent in the context of a pandemic.
28. Section 9(2)(c) of the OIA provides good reason to withhold information where this is necessary to ‘avoid prejudice to measures protecting the health or safety of members of the public’.
29. In discussing the reasons for recommending what ultimately became section 9(2)(c) of the OIA, the Committee on Official Information (commonly known as the Danks Committee) commented in paragraph 42 of its General Report:

*While at first thought public health and safety might seem to demand openness, decisions in this area could also involve a difficult balancing of interests. The Government has statutory powers to take action to protect public health ... The premature disclosure of information about steps to be taken to contain an epidemic, for example, could in some circumstances undermine their effectiveness. ...*

30. In its Supplementary Report on the issue the Committee further commented:

*The protection of the public health and safety will often call for disclosure, but some measures such as immediate measures to control an epidemic or disaster may be prejudiced by disclosure.*

31. Section 9(2)(c) is about protecting ‘measures’ and the relevant measure in this instance was the Government’s vaccine roll out plan to offer COVID-19 vaccinations to the whole population.
32. The information provided to me that I have already discussed above, indicates that there was a very real risk that release of the contracts with vaccine suppliers would have, at the very least, delayed New Zealand’s ability to obtain COVID-19 vaccines. This would have had a significant and detrimental impact on the Government’s vaccination roll out plan.
33. The majority of requests for information relating to contracts with suppliers of COVID-19 vaccines have revolved around the application of commercial and confidentiality withholding grounds. However, section 9(2)(c) is, in my view, equally applicable.

## Public interest in release

34. I accept that sections 9(2)(b)(ii), 9(2)(ba)(ii) and indeed 9(2)(c), apply to the information at issue, however these sections only provide ‘good reason’ for withholding if the reason for withholding is not outweighed by other public interest considerations in favour of release (section 9(1) of the OIA).

35. Any information about the Government's response to the COVID-19 pandemic will of course be of interest to the New Zealand public, given that everyone was affected by the pandemic and the various strategies adopted in response. The national vaccination programme naturally triggered an intense interest in the information about the vaccines, and the companies that make them. While I acknowledge this, my role is to consider what the public interest is in release of the actual contracts themselves.
36. There is an overarching public interest in promoting the transparent conduct of public affairs. Transparency is an essential part of ensuring a government is accountable for its decision-making. As the Danks Committee on Official Information noted: <sup>6</sup>

*...access of citizens to official information is an essential factor in making sure that politicians are accountable for their actions. Secrecy is an impediment to accountability, when Parliament, press and public cannot properly follow and scrutinise the actions of government or the advice given and the options canvassed. Divisive suspicion of government and its advisors is encouraged when decisions are made without recognisably comprehensive public presentation of how they have been arrived at.*

37. The need for transparency and accountability is especially acute in a time of crisis, such as a global pandemic. This was a period when the Government was wielding extraordinary executive powers in order to respond to the rapidly changing circumstances. The Government's decisions, including its decisions around vaccine purchases, impacted all New Zealanders. Effective democratic accountability relies on the public having access to accurate information about these decisions.
38. Requesters are concerned about the lack of transparency regarding the contents of these contracts. They question the Government's decision to accept terms and conditions that restrict its ability to tell the New Zealand public what it has agreed to. The observation was made that having such high levels of secrecy logically leads to a loss of trust in the decision-makers and fuels suspicion around what precisely the Government has promised in these agreements.
39. This is apparent to me from the nature of the comments I have received from various requesters, which range from speculation about possible 'anti-competitive' clauses promising a period of exclusivity to one vaccine company, to concerns about whether state assets have been 'taken as collateral' or whether 'sovereign resources' have been 'assigned'.
40. All the requesters raised concerns about the financial liabilities (aside from cost of the vaccine itself) that may have been accepted by the Government. In particular, requesters have asked specifically about indemnity information, and the extent to which the Government has agreed to meet liabilities for adverse events and what the financial implications of that are.

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<sup>6</sup> Committee on Official Information. *Towards Open Government: General Report*. (December 1980) at 14.



41. In addition, a number of requesters were, and still are, highly concerned about the safety and efficacy of the vaccines given the speed at which they were developed and the reduced number of clinical trials. They consider there will be clauses that provide further information on this issue, including warranty clauses and exclusions from liability.
42. These comments, I think, demonstrate that there is a high public interest in greater transparency regarding what the Government committed to in these particular vaccine contracts. I agree that there are strong public interests here both in the accountability of Ministers and public officials for their decision-making when negotiating and entering into these contracts, and in the promotion of responsible and prudent financial management.
43. Nevertheless I do not consider that these public interest considerations outweigh the reasons for withholding to the extent that the entire contracts should be released, even with redactions. As regards the safety and efficacy of the vaccines, it is Medsafe's role, as the regulator for new medicines, to assess this, and Medsafe has published information about its assessment on its website. I have also been provided with a number of documents by the Ministry of Health and Treasury, which demonstrate the careful and rigorous consideration given by officials to the terms and conditions of each contract during the negotiation stages. The Minister of Finance also gave a statement to the House each time an indemnity was granted, in accordance with the Public Finance Act.
44. The mere fact that careful assessment was carried out by public officials in various capacities, does not, in the absence of any substantive information being made publicly available which reveals the nature and degree of that assessment, fully meet the public interest in disclosure. Otherwise the public are obliged essentially to take it on trust that public officials adequately discharged their functions. Unfortunately, reports indicate that trust in government institutions has declined significantly since the pandemic in many democracies, including New Zealand.<sup>7</sup>
45. I have concluded that the way to address the public interest in accountability and transparency is by way of releasing summary information about the contracts that informs the public about the Government's decision-making, and the contractual liabilities committed to, without revealing the precise details of the terms and conditions in individual contracts.
46. It is important to stress that this outcome should not be viewed as a precedent for the disclosure of similar information in the future from government contracts for medicines or treatments. My conclusion in this case is very much informed by the strength of the public interest arising from the unique circumstances of the COVID-19 global pandemic.

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<sup>7</sup> *Addressing the Challenges to Social Cohesion*, June 2023, Koi Tū, Te Centre for Informed Futures, University of Auckland

## Chief Ombudsman's opinion

47. I have formed the opinion that there were good reasons under sections 9(2)(b)(ii), 9(2)(ba)(ii) and 9(2)(c) of the OIA to refuse the requests for full, or redacted, copies of the contracts, but that the public interest in accountability required the release of some summary information.
48. I consider that the concerns about the potential harms associated with release can be addressed by releasing the summary information in aggregate form, which summarises the nature of the commitments made by the Government across all the contracts.

## Recommendation

49. I recommend that the Ministry of Health work with officials from Pharmac and Treasury, and in consultation with the COVID-19 vaccine suppliers, to develop a summary statement to cover the following:
  - a. A description of the approach and evaluation steps adopted for potential COVID-19 vaccine purchases, which addresses the use of Advance Purchase Agreements, and explains any differences in approach taken due to the urgency of the circumstances in the context of the global pandemic.
  - b. A high level summary of the kinds of terms agreed to across all the contracts in relation to the following issues:
    - i. Confidentiality commitments
    - ii. Indemnities / exclusions from liability
    - iii. Warranties
    - iv. Safety and efficacy
    - v. Donations to other nations
    - vi. Clauses relating to supply, and obligations to purchase

This summary should, as far as possible, include the matters set out in my letter of 22 December 2022 to the Ministry and Ministers.
  - c. Clarification on matters of concern raised by the requesters; such as whether any terms sought exclusivity, or to limit New Zealand's ability to purchase other COVID-19 vaccines or treatments, or whether any terms had the effect of 'assigning sovereign resources' or taking state assets as collateral.
  - d. The total cost, in aggregate, of the financial liabilities the Government assumed at the point of signing the contracts (these figures were estimated by Treasury in its reports to the Minister of Finance on its assessment of the indemnity requests).

50. I recommend that the Ministry release this statement directly to the requesters, and publish it on the Ministry's website by **18 September 2023**.

Peter Boshier  
Chief Ombudsman

*This opinion is published under the authority of the [Ombudsmen Rules 1989](#). It sets out an Ombudsman's view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.*

## Appendix 1: Relevant statutory provisions

### Official Information Act 1982

#### 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) ... this section applies if, and only if, the withholding of the information is necessary to...
  - b) protect information where the making available of the information...
    - (ii) would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; or ...
  - (ba) protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information...
    - (ii) would be likely otherwise to damage the public interest;
  - (c) avoid prejudice to measures protecting the health or safety of members of the public; ...