

Our ref 473280 (Complaint ground: 473284)
Contact Catriona McDougall
18 February 2020



Mr Matt Nippert
Reporter
NZ Herald

By email: matt.nippert@nzherald.co.nz

Dear Mr Nippert

Official information Act investigation

TVNZ

Remuneration information for the highest paid staff by gender

I refer to your recent communications with Magnus O'Neill and Catriona McDougall regarding the above complaint.

You agreed that if privacy concerns were a barrier to releasing the requested information for the staff groups of 10 people, that you would accept the same information for staff groups of 20. TVNZ then released information relating to the top 20 staff of each group in December 2019, however the number of men and women in these groups was not included.

You indicated that TVNZ's release did not resolve the complaint noting that at the time of the request you had suggested TVNZ release information for a larger cohort of staff if it had privacy concerns, but it declined to do so.

I therefore decided to proceed to a final opinion in order to bring this investigation to a conclusion. I received your comments in December 2019.

I understand that in January 2020 TVNZ subsequently released the number of men and women in each group to you.

Having considered TVNZ's arguments and your comments, I have formed the opinion that TVNZ should not have refused your request given your offer to accept the same information for a larger group to address any privacy concerns. My reasoning is contained in the extract from my final opinion letter to TVNZ which I **enclose** in the Appendix.

Given TVNZ has now released the full information to you in respect of the groups of 20 staff, there is no need for me to make recommendations. I have now completed my investigation.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Peter Boshier', is written over a horizontal line.

Peter Boshier
Chief Ombudsman

Encl. Appendix 1: extract from final opinion letter to TVNZ

Appendix 1. Extract from final opinion letter of today's date to TVNZ

Background

On 25 January 2018, on behalf of the NZ Herald, Mr Nippert made a request for four items of information:

1. *Combined annual salary and other benefits paid to the ten highest-paid on-air presenters at TVNZ.*
2. *The above list broken down by gender: listing the number of the 10 who are women or men, and the average paid to each gender.*
3. *Combined annual salary and other benefits paid to the ten highest-paid employees who are not-presenters at TVNZ.*
4. *The above list broken down by gender: listing the number of the 10 who are women or men, and the average paid to each gender.*

TVNZ responded on 22 February 2018 advising that the total remuneration of its 10 highest paid employees was reported in its Annual Report in \$10,000 bands. TVNZ withheld the specific information sought under section 9(2)(a) of the OIA.

On 23 February 2018, Mr Nippert emailed TVNZ explaining that he had hoped asking for groups of 10 employees would ameliorate any privacy concerns, and asked TVNZ to advise him of the *'lowest possible number'* that would enable TVNZ to respond to his request without triggering privacy concerns.

On 26 February 2018 Mr Nippert received a call from Georgie Hill who advised him that this type of information would not be released. Mr Nippert then lodged the complaint with my office.

On 1 March 2018, Brent McNulty emailed Mr Nippert confirming Georgie Hill's advice that the information would not be released.

.....

Privacy concerns

Section 9(2)(a) applies if withholding the information is necessary to *'protect the privacy of natural persons, including that of deceased natural persons'*.

Previous Ombudsmen have accepted that when an individual and their exact salary can be identified from the information requested, this will typically give rise to a privacy interest requiring protection under section 9(2)(a) of the OIA.¹ However, deciding whether there is a protectable privacy interest is more difficult when the information requested does not explicitly identify an individual and their exact salary; for example, where aggregate or statistical information has been requested, such as in this case.

The key area of concern for TVNZ is the provision of a gender breakdown of average pay. The number of staff broken down by gender, combined with the average pay per gender for each

¹ Office of the Ombudsmen "Request for salary details of specific employees" (Case note, June 2018) retrieved from <www.ombudsman.parliament.nz>

group of 10 staff (items 2 and 4 of the original request), could reveal information that would enable a close approximation of an identifiable individual's salary. This is because once broken down by gender, the sample size for one gender in each group is relatively small.

TVNZ submitted that disclosure of the average pay of a small number of staff 'would make it very easy for those within TVNZ to identify each other's salaries, which would be a breach of privacy'. In relation to the presenters, TVNZ suggested that others in the wider industry might also be able to estimate likely salaries given how small the industry is and how often staff move employment between media companies. TVNZ also argued that the impact on the privacy of presenters would be compounded due to the inevitable media coverage of their likely salaries if the information was released.

The Privacy Commissioner suggested that there is a high privacy interest in the average remuneration amounts for presenters for the following reasons:

...I consider providing these numbers and the average salary by gender could reveal considerably more about presenters' salaries than under (1). Particularly for the [gender group], average salaries would be based on relatively small sample sizes that could be reduced further if a presenter isolated their own salary or other information they know.

Average figures under this item would be based on small numbers of presenters who may well be identifiable. I consider the individuals involved have a high privacy interest in this information that should be given a high weight in the circumstances.

In terms of the non-presenter group, the Privacy Commissioner suggested that:

...Providing these numbers and the average salary by gender could reveal some information about individuals' salaries, particularly if it is clear within the organisation who the group is likely to include. Particularly for the [gender group], average salaries would be based on relatively small sample sizes that could be reduced further if a senior employee isolated their own salary.

Without a specific role attributed to this information I consider the employees involved have a medium privacy interest that should be given a medium weight in the circumstances.

Mr Nippert accepts privacy concerns could arise:

I understand these concerns entirely, particularly over the ability to infer individual salaries from released data. I expect this would still be acute were there only two of one gender in the pool (given one person who knows their own salary could infer the other), so am happy to expand the pool to where there are three or more of each gender.....

I was initially sceptical that the size of the groups in this instance could enable someone to estimate a particular individual's remuneration. However TVNZ argues that release of this information, when combined with other information already known to colleagues, means it would be possible to work out the salaries of some individuals with reasonable accuracy.

It is not possible to know what pertinent information others within the organisation may already have. This makes it difficult for me to gauge the likelihood that individual salaries could be identified where small numbers of staff are involved. As the government expert on matters of privacy, I acknowledge the expertise of the Privacy Commissioner in these situations. The Privacy Commissioner's views indicate that there is a real likelihood.

I am also mindful of the standards set by Statistics New Zealand, the lead agency for government-held data, for preserving the confidentiality of personal information. These standards indicate that the sample size of the gender groups involved in the request for the top 10 staff is below the threshold that would normally be applied when publicly releasing this type of data.²

In light of these statistical reporting standards, and the Privacy Commissioner's views, I am satisfied that the small numbers involved do mean that there is a real prospect disclosure could reveal fairly accurate salary information about individuals. I therefore accept there is a privacy interest in this information that triggers the application of section 9(2)(a) of the OIA.

Prejudice or disadvantage to commercial activities

TVNZ also sought to rely on section 9(2)(i) of OIA to refuse the request. This allows for the withholding of official information *'to enable ... any department or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities'*.

TVNZ described the information as *'highly commercially sensitive'* and explained that if the information at issue was disclosed it would make *'TVNZ vulnerable to that talent being targeted by competitive media organisations'* that are not subject to the OIA.

I accept that, as a national television and digital media company, TVNZ is operating in a competitive market and is required by law to maintain its commercial performance.³ However, section 9(2)(i) does not permit the withholding of an entire class or category of information solely on the basis of any relative disadvantage between TVNZ and the private sector as a result of it being subject to the OIA. TVNZ needs to demonstrate how disclosure of the specific information would prejudice or disadvantage TVNZ in carrying out its commercial activities.

In responding to my provisional opinion TVNZ stated:

Disclosing the average remuneration of our top presenters would be damaging to TVNZ..... TVNZ's challenge is not about recruiting talent – it's about retaining talent. We have the most watched news shows in New Zealand in large part because we employ the best talent. Our primary competitor is privately owned and provides zero remuneration disclosure. No doubt Mediaworks would love us to openly disclose the requested information – it is akin to putting a price tag on our most critical talent. This would inevitably result in us losing our primary point of market differentiation to competitors, and drive labour cost inflation in a marginally profitable (cash flow negative) business.

² Stats NZ Microdata output guide (Fourth Edition 2016) retrieved from <https://www.stats.govt.nz/assets/Uploads/Integrated-data-infrastructure/microdata-output-guide-fourth-edition.pdf>

³ Sections 5 and 12(1) of the Television New Zealand Act 2003.

At the meeting with my staff TVNZ agreed that its commercial concern essentially relates to the same information that raises the privacy concern – the gender breakdown of average pay that could enable extrapolation of individual salary information, particularly among presenters. Nevertheless, I was ultimately not persuaded that there was a sufficient causal link between the release of information and a subsequent disadvantage to commercial activities. It seems to me that the risk of ‘poaching’ is already there, and I was not convinced that release of this information would appreciably increase that risk to the extent that withholding would be necessary on this basis.

Therefore, I am not persuaded that section 9(2)(i) of the OIA applies to the information at issue.

Public Interest

While I have not been persuaded that section 9(2)(i) applies in this case, I have accepted that section 9(2)(a) applies. As required by section 9(1) of the OIA, I must therefore go on to determine whether there are ‘*other considerations which render it desirable, in the public interest, to make that information available*’ and if so, whether those considerations outweigh the need to withhold the information.

Gender pay equity

The NZ Herald was seeking information about gender pay equity. Mr Nippert explained:

The information sought in this request is to be used as part of a report by the NZ Herald into [the issue] of pay equity ... the information will be used to inform the public about an important societal and economic issue...

There can be no doubt that the gender pay gap is a significant public issue, touching on core human rights. The Government has recognised the importance of this issue and in 2018 it announced a commitment to eliminating the gender pay gap within the public service, of which I note that TVNZ is a part.⁴

I have considered in particular the Gender Pay Principles that were introduced at the same time by the Minister for Women and the Minister for State Services.⁵ One of the five principles developed by the Gender Pay Principles Working Group is transparency.⁶

I gather that TVNZ is not currently required, unlike the core public sector organisations, to apply Gender Pay Principles and publish information about pay equity.⁷ However, the Gender Pay Principles Working Group signalled that the Principles are relevant beyond the core state sector.

⁴ Hon Chris Hipkins and Hon Julie Anne Genter ‘Government plan to fix women’s pay’ (Press release, 26 July 2018) retrieved from <www.beehive.govt.nz/release/government-plan-fix-women%E2%80%99s-pay>.

⁵ Hon Chris Hipkins and Hon Julie Anne Genter ‘Milestone reached for women in the state sector’ (Press release, 2 July 2018) retrieved from <www.beehive.govt.nz/release/milestone-reached-women-state-sector>.

⁶ Published by the Ministry of Women, retrieved from <women.govt.nz/work-skills/income/gender-pay-gap/gender-pay-principles>.

⁷ State Services Commissioner ‘Government Expectation of Employment Relations in the State Sector’ (3 April 2018) retrieved from <www.ssc.govt.nz/govt-expectations-pay-employment>.

At the time of the NZ Herald request, TVNZ did not publish any information about its own gender pay gap. This has now changed, as in its Annual Report for 2019, TVNZ published a percentage showing the gap in average pay between men and women for all its permanent employees.⁸ Nonetheless my role is to form an opinion on TVNZ's decision at the time that it was made. At that point there was no publicly available information about the gender difference in average pay at TVNZ.

The request also focuses on staff at the top of the remuneration structure. A key element contributing to a gender pay gap calculated on the average rate of pay across an organisation, will be the number of women represented in the higher paid roles.⁹

I consider there is a strong public interest in the disclosure of any information that promotes the transparency of a gender pay gap. In my view, the information at issue that is relevant to this public interest, is the number of men and women in the groups specified in the request, and the gender differential in pay, rather the amount of money spent on the remuneration of these particular staff.

Financial accountability

In the past Ombudsmen have adopted the approach that there is public interest in the disclosure of salary related information in order to promote the accountability of public sector agencies for spending public money.

TVNZ submits that it receives no direct public funding for operations, and the public funding it does receive, from New Zealand on Air and Te Māngai Pāho, is for specific programmes. That public funding only makes up approximately 5% of TVNZ's revenue. TVNZ notes that private media channels also receive public funding for programming at similar, sometimes higher, levels. On this basis TVNZ submits that accountability for spending public funds is not relevant to the information requested as the money spent on these salaries is not paid from the public purse.

Mr Nippert responds to this point with the following comments:

'Accountability for spending public funds' casts public interest far too narrowly. While TVNZ does not currently receive ongoing state support, its equity has been built over decades of public investment. Further, there is also an opportunity cost for the public in keeping it in state ownership, particularly when current government policy has decided it no longer has to produce a dividend. If the framers of the OIA did not want it applied to profit-making (or recently profit-making) SOEs, they would not have included them in the Act. This is not a reason for TVNZ (or any SOE) to avoid being subject to it...

⁸ TVNZ Annual Report 2019, p 22: https://images.tvnz.co.nz/tvnz_images/TVNZAnnualReport2019_digital.pdf

⁹ For example, Westpac NZ was surprised to find that its gender pay gap was 30.3% despite a strong focus on pay parity (paying men and women the same rate for equivalent roles). The Westpac gender pay gap reflects the fact that more men work in higher paid areas and women dominate the lower paid parts of the bank. See <https://www.stuff.co.nz/business/115838873/westpacs-gender-pay-gap-is-303-per-cent-says-chief-executive>

I agree with Mr Nippert's comments. I don't accept that a state entity only needs to be financially accountable in respect of the public funds it receives. The public interest guidance issued by my office reflects this:¹⁰

But we don't spend public money

Some agencies subject to the official information legislation don't spend public money in the sense that they are funded by tax-payer or rate-payer revenues. For instance, some entities may be funded through commercial revenues and others through stakeholders levies or tariffs. That does not mean that there is no public interest about their expenditure. ...

Some entities – for example, state-owned enterprises – may be accountable to the public as 'owners' rather than 'funders'. As the Privy Council has recognised:

A state-owned enterprise is a public body; its shares are held by Ministers who are responsible to the House of Representatives and accountable to the electorate. [It] carries on its business in the interests of the public.¹¹

As a Crown owned company TVNZ is subject to the financial reporting requirements in the Public Finance Act 1989 and the Crown Entities Act 2004. By making Crown owned companies subject to this level of scrutiny, Parliament has indicated that it is in the public interest that entities like TVNZ demonstrate appropriate financial management practices.

I consider that there is a public interest in the amount TVNZ spends on remuneration as this is a key part of its budget, and an area where the public would expect TVNZ to make sound financial decisions. However I don't see a high public interest in the additional release of the particular information requested. I am not persuaded that disclosure of the cumulative and average remuneration amounts for the top 10 staff, broken down in the manner requested, would promote better financial management.

TVNZ already publishes the number of staff paid over \$100,000 in \$10,000 bands in its annual report to meet its obligations under the Crown Entities Act. This provides the public with a good overview of how much staff are paid at the higher end of the pay scale.

Balancing protection of privacy with the public interest

I have concluded there is a real likelihood that release of the full information requested, in respect of the top 10 staff in the specified occupational groups, could lead to a fairly accurate estimate of the salaries for some individuals. I consider that section 9(2)(a) is engaged.

I also consider that there is a high public interest in transparency around the gender pay gap as regards the differential in pay and the numbers of men and women in higher paid positions, but a lower public interest in the monetary amount of that remuneration.

Balancing these considerations, I am of the opinion that there are two options for the release of the information requested that would recognise the interests to be protected:

¹⁰ Office of the Ombudsmen 'Public interest' (Guide, June 2017) retrieved from <www.ombudsman.parliament.nz>.

¹¹ *Mercury Energy Limited v Electricity Corporation of New Zealand* [1994] 2 NZLR 385 at 388.

- a. Releasing only the percentage differential in average pay, and the numbers of men and women in the top 10 staff of the occupational groups specified in the request, and withholding the monetary amounts to protect privacy; or
- b. Releasing the full information requested, including the monetary amounts, but for the top 20 staff in each occupational group rather than the top 10.

Opinion

I can confirm that it is my opinion that TVNZ should not have refused the request in full but should have released information in accordance with one of the above two options.
