

Case 388721 (Complaint ground: 388726, 388728)  
Contact Chris Littlewood  
9<sup>th</sup> October 2017



Dr Mark C. Wilson  
Department of Computer Science,  
University of Auckland

By email: [mc.wilson@auckland.ac.nz](mailto:mc.wilson@auckland.ac.nz)

Dear Dr Wilson

**Final opinion under the Official Information Act 1982 (OIA)  
Request for information concerning expenditure by New Zealand universities on  
electronic publications**

Thank you for your comments on my provisional opinion. **Enclosed** is my final opinion on your complaint.

I have formed the final opinion that:

- the universities were entitled to rely on sections 9(2)(b)(ii), 9(2)(ba)(ii) and 9(2)(j) of the OIA to withhold the component parts (make-up) of the total sums they each paid to the four publishers in 2013; and
- the universities were not entitled to rely on those provisions to withhold information relating to the names of, and a description of, the 'standard packages' they purchased from those publishers in 2013, and the total amounts each university paid in 2013 to each of the publishers.

I recommend that:

- the universities release the names, and a description, of the 'standard packages' they purchased in 2013 from each of the four publishers; and
- the total amounts each university paid in 2013 to each of the four publishers.

In its comments on my provisional opinion, the University of Waikato pointed out that your request for information to that university was more limited than that made to other universities, being limited to the cost of journal subscriptions. Accordingly, it is a matter for that university to decide whether on receipt of my opinion, it complies with all the recommendations set out in my enclosed opinion.

As required by section 30(2)(a) of the OIA, I have forwarded a copy of my opinion to the Minister of Education.

Under section 32(3) of the OIA, a public duty to observe an Ombudsman's recommendation is imposed on the universities from the commencement of the 21st working day after the date of that recommendation. This public duty applies unless, before that day, the Governor-General, by

Order-in-Council, otherwise directs. I have asked the universities to advise me by **Tuesday 7<sup>th</sup> of November** of the steps they will be taking to comply with my recommendation.

**Publication**

It is my intention to publish my opinion in this case on the Ombudsman's website, in accordance with rule 2(1)(b) of the Ombudsmen Rules 1989. I am willing to consider any comments you may wish to make in this regard, provided I receive your comments by the same date namely, **Tuesday 7<sup>th</sup> of November**.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Peter Boshier'.

Peter Boshier  
Chief Ombudsman

**encl** My opinion

# Request information concerning expenditure by New Zealand universities on electronic publications

<b>Legislation</b>	Official Information Act 1982, section 9(2)(b)(ii), 9(2)(ba)(ii), 9(2) and 9(2)(j) (see appendix for full text)
<b>Requester</b>	Mark Wilson
<b>Agencies</b>	various New Zealand universities
<b>Request for</b>	request information concerning universities expenditure on electronic publications
<b>Ombudsman</b>	Peter Boshier
<b>Case numbers</b>	388721, 388730, 388741, 388748, 388757, 388760, and 388764
<b>Date</b>	<b>9<sup>th</sup> October 2017</b>

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## Summary

Dr Mark Wilson, the complainant, requested a number of New Zealand universities to provide him with information relating to the amounts they paid to four publishers and what they received for that *'outlay'* (his expression). The universities' responses to his requests varied. Some universities advised Dr Wilson of the amounts they paid to two of the publishers and gave him a description of the standard packages they purchased; others refused to provide any information. Dr Wilson complained to me about the withholding by the universities of the requested information.

The universities relied on a number of *'good reasons'* under the Official Information Act 1982 (OIA), especially these three *'good reasons'*:

- section 9(2)(ba)(ii) (unreasonable prejudice to the universities' and the four publishers' commercial position);
- section 9(2)(b)(ii) (damage to the public interest if confidential information released); and
- section 9(2)(j) (prejudice or disadvantage future negotiations between the universities and the four publishers).

I received extensive submissions from the universities in support of their reliance on those provisions to withhold the requested information and from the publishers resisting release of that information. Certain publishers made submissions similar to those made by the universities relating to their reliance on section 9(2)(ba)(ii) and 9(2)(b)(ii).

For the reasons given in my opinion, I have formed the opinion that:

- a. the universities were entitled to rely on sections 9(2)(b)(ii), 9(2)(ba)(ii) and 9(2)(j) to withhold the component parts (make-up) of the total sums they each paid to the four publishers in 2013; and
- b. the universities were not entitled to rely on those provisions to withhold information relating to the names of, and a description of, the *'standard packages'* they purchased from those publishers in 2013, and the total amounts each university paid in 2013 to each of the publishers.

Under section 30(1) of the OIA, I have recommended that the universities release the information referred to in b. above.

## This opinion's scope

1. In this opinion, I provide my opinion on whether certain New Zealand universities<sup>1</sup> had 'good reasons' under the Official Information Act 1982(OIA) to refuse the requests of Dr Mark Wilson concerning their expenditure on electronic publication purchased from four publishers. It is given on the basis of the information made available to me during this investigation.

## Background

### The requested information

2. In 2014, the complainant requested the New Zealand universities to provide the following information:
  - how much universities paid to four commercial publishers (the four publishers), namely:
    - Reed-Elsevier (Elsevier);
    - Springer Nature;
    - Taylor & Francis; and
    - John Wiley and Sons
  - what exactly the universities obtained for 'that outlay' supplied by those publishers?<sup>2</sup>
3. In subsequent emails to the universities, the complainant indicated that he was seeking information about the total amounts the universities paid annually, for example, in 2013, 'in journal subscriptions' to the four publishers.

### Complaint and notification of complaint

4. In August 2014, the complainant complained to this Office about the universities' refusal to release information in terms of his request.

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<sup>1</sup> University of Auckland, Auckland University of Technology, University of Canterbury, Massey University, University of Otago, Victoria University of Wellington and University of Waikato. Lincoln University was not the subject of a request.

<sup>2</sup> The wording of the requests to the universities varied – on some occasions, the complainant did not explicitly request 'what exactly [the university] received for that outlay'. However, the universities accepted that the complainant was seeking that information. Accordingly, this investigation continued on that basis.

5. In March 2015, this Office notified the universities of the complaint, and asked them to explain why they withheld the requested information.

## Information released and withheld

6. The complainant indicated to this Office that he would be satisfied if the universities provided the following information:
  - the total amount the universities paid in 2013 to each of the four publishers; and
  - a list of electronic publications they purchased from each of the four publishers – in that respect, he indicated he would be satisfied if the universities provided a list of the ‘standard packages’ (his expression) they purchased.
7. The universities responses to the requests varied.
8. Two universities provided information about the total amount they spent in 2013 on purchasing publications from two of the four publishers. One university also provided information about the standard packages it purchased from the publishers, and referred the complainant to its website for further information about the publications purchased. Some universities refused to provide any information at all in response to the requests.

## Grounds relied on to withhold information

9. The universities, in their refusals to release the information requested, relied on a number of ‘good reasons’ under the OIA to withhold the information sought.
10. In correspondence with this Office, all the universities stated they were relying on these three ‘good reasons’ to withhold the requested information:
  - section 9(2)(ba)(ii) (unreasonable prejudice to the universities’ and the four publishers’ commercial position);
  - section 9(2)(b)(ii) (damage to the public interest if confidential information released); and
  - section 9(2)(j) (prejudice or disadvantage future negotiations between the universities and the four publishers)
11. Some universities relied on other ‘good reasons’ to withhold the requested information, including section 9(2)(i) (prejudice or disadvantage to the universities commercial activities), but, in the light of the opinion I have formed regarding the universities’ reliance on the three ‘good reasons’ identified above, it is unnecessary for me to form an opinion on whether their reliance on those other grounds was justified.

12. These three ‘good reasons’ read:

***Other reasons for withholding official information***

(2) *Subject to sections 6, 7, 10, and 18,<sup>3</sup> 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;*

...

(j) *enable [an] ...organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations); or*

13. Sections 9(2)(b)(ii), 9(2)(ba)(ii) and 9(2)(j) are all subject to section 9(1) of the OIA:

*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.*

14. Section 5 of the OIA reads:

***Principle of availability***

*The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in*

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<sup>3</sup> Sections 6, 7, 10 and 18 are not relevant to this investigation, and thus are not discussed in this opinion.

*accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.*

## Investigation

15. In the light of the varied responses of the universities to the requests, and the fact that, in essence, the request sought the same information, the focus of this investigation became, in summary, whether the universities are entitled to refuse to release the following information:
  - the amounts they each paid in 2013 to the four publishers; and
  - a list of the standard packages they purchased in that year from the four publishers.
16. This investigation proceeded on that basis.
17. After notification of the complaint, this Office had extensive correspondence with the universities to identify the *'good reasons'* they rely on to withhold the requested information, and the basis of their reliance on those *'good reasons'*. I also met with representatives of one of the universities to gain a better understanding of the issues raised by this investigation.
18. This Office also had extensive correspondence with the four publishers. The publishers were advised of the information the complainant sought and the *'good reasons'* the universities relied on to refuse the requests, and asked if they had any concerns about the information being released. To clarify certain issues, an investigator discussed with Springer Nature's General Counsel (Americas) that company's concerns about release of the requested information.

## Electronic publications and prices – some context

19. While some universities released certain information to the complainant, there appears to be no information publicly available or accessible by the public concerning the information requested. However, there is a significant amount of information available similar to that requested regarding universities in the United Kingdom and the United States of America.
20. To provide context to the requests, it is necessary to have some understanding about the electronic publications the universities purchase, and the manner in which they are sold to universities here in New Zealand and abroad.
21. The emergence of the electronic age has impacted on universities' purchase contracts with publishers (including the four publishers), their terms, and the way, in particular, the prices of electronic publications are calculated.

22. Before the electronic age, universities purchased texts and journals in 'hard copy' form. Speaking very generally, the amount they spent had a direct relationship to the number of the texts and journals they purchased, the retail prices for those items. While they may have paid less than the so-called recommended retail price on account of the amount of their expenditure with the publishers, that direct relationship still existed.
23. All universities indicated that to a certain extent, the prices they now pay for electronic publications had a relationship to the number and cost of 'hard copy' journals and texts they used to purchase. In discussion with one of this Office's investigators, Springer Nature agreed that there was such a relationship, but stated the relationship was becoming increasingly '*attenuated*'.
24. On the basis of information I have been provided confidentially by the universities, I am satisfied that there remains a strong relationship between the amounts the universities used to pay for hard copy journals and texts, and the amounts they now pay for electronic versions of the same or similar journals and texts.
25. There often appears to be no relationship between the number of students a university has and the number of occasions students access the electronic publications ('hits'), and the prices paid by that university for the electronic publications. In many instances, the emergence of the electronic age has not fundamentally changed the way the four publishers price their publications. When the universities negotiate renewals of their contracts with the four publishers every three or four years, the focus of those negotiations seems almost invariably to focus largely on the percentage increase to be applied to the prices charged under the expiring contracts.
26. The fact that universities frequently pay differing amounts for large and substantially similar suites of information, consisting of many electronic texts and journals – called in the trade '*big deals*' – also often relates to the prices the universities used to pay for the hard copy versions of the same electronic texts and journals contained in those '*big deals*'.
27. In an article entitled 'Big Deal Contract Project',<sup>4</sup> Dr Ted Bergstrom and others analysed the information available in the public domain and information they obtained from 'freedom of information' requests made to many universities and other sources about the amounts certain United States universities pay publishers for 'big deals', including the four publishers.
28. With reference '*to the problem of determining buyers willingness to pay*', the article's authors state:

*In return for a lump-sum fee, anyone accessing the internet from a subscribing institution would have an unlimited access to the publisher's entire portfolio of online journals. The tool that publisher used to estimate a*

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<sup>4</sup> <http://econ.ucsb.edu/~tedb/Journals/BundleContracts.html>, published online 16 June 2014, Proceedings of the National Academy of Sciences of the United States of America (PNAS).

*library's willingness to pay for its bundle was the history of the library's spending on print subscriptions. Contracts for bundled access to a publisher's entire journal list have come to be known as the 'big deal'.*

29. The article compared the cost of 'big deals' with the cost of publications provided by major non-profit publishers. They concluded that prices per citation of the commercial electronic publishers were many times the prices per citation charged by the non-profit publishers:

*The contracts we have seen show remarkable institution-specific price variations that cannot be explained by university characteristics such as enrollment (sic) and PhD production. Some institutions have been quite successful in bargaining for lower prices, whereas others may not have been aware that better bargains can be reached. Perhaps this variation explains publishers' desire to keep contract terms confidential.*

30. In the United Kingdom, there is a substantial amount of information in the public domain about the total sums paid by universities to the four publishers and other publishers,<sup>5</sup> which is regularly updated.
31. The dominance of the four publishers and another publisher, Sage Publications, in the academic fields of the universities here and overseas appears to be increasing.
32. The authors of an article, 'The Oligopoly of Academic Publishers in the Digital Era',<sup>6</sup> analysed about 45 million documents indexed in the 'Web of Science' over the period 1973 to 2013. On the basis of that analysis, they concluded:

*Combined, the top five most prolific publishers account for more than 50% of all papers published in 2013. Disciplines of the social sciences have the highest level of concentration (70% of papers from the top five publishers), while the humanities have remained relatively independent (20% from top five publishers)*

33. The authors detail the substantial profit margins the 'top five publishers', i.e. the four publishers and Sage Publications derive from their electronic publications – they estimate that the profit margins of Elsevier's Scientific Technical and Medical division on sales increased from 30.6 per cent to 38.9 per cent between 2006 and 2013. Elsevier's profits, for the firm as a whole, including that division, they state, reached 'an all-time high of more than' \$US2 billion in 2012 and 2013.
34. The authors also refer to similar 'high profit margins' earned by Springer Nature's Science and Business Media division in 2012.
35. The authors concluded:

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<sup>5</sup> [figshare.com/articles/Journal\\_subscription\\_costs\\_FOIs\\_to\\_UK\\_Universities/1186832](https://figshare.com/articles/Journal_subscription_costs_FOIs_to_UK_Universities/1186832)

<sup>6</sup> Vincent Lariviere and others, 'The Oligopoly of Academic Publishers in the digital capital era' <https://doi.org/10.1371/journal.pone.0127502>; published in PLOS one (June 2015).

*The possibility to increase profits [from electronic publishing] in such an extreme fashion lies in the peculiarity of the economics of scholarly publishing. Unlike usual suppliers, authors provide their goods without financial compensation and consumers (i.e. readers) are isolated from the purchase. Because purchase and use are not directly linked, price fluctuations do not influence demand. Academic libraries, contribute 68% to 75% of journal publishing revenues, are atypical buyers because their purchases are mainly controlled by budgets. Regardless of their information needs, they have to manage with less as prices increase. Due to the publisher's oligopoly, libraries are more or less helpless, for in scholarly publishing each product represents a unique value and cannot be replaced.*

36. The position in New Zealand appears to be very similar to that described by the authors. At the universities' expense, articles published in electronic journals are researched and produced. Universities here cannot survive without government grants and student fees. That is how they largely pay for the costs of electronic publications, the researchers, their research – the results of which are published in the electronic publications – the necessary peer-reviewing of that research before publication, and the facilities involved.
37. The electronic publishers' roles, in practice, are thus restricted mainly to publishing marketing and servicing electronic publications subsequent to the peer-reviewing process.
38. New Zealand universities, as appears to be also the case elsewhere, have become increasingly dependent on having access to electronic publications of the major publishers, including the four publishers', for research and publication of their research.
39. The cost of electronic publications purchased by the universities provided is a significant part of their library budgets. The total amount spent by all New Zealand universities in that respect is probably in excess of \$30 million. One university advised that their annual expenditure on electronic publications was in excess of 30 per cent of their electronic resources budget.

## Negotiation of electronic publication contracts

40. There are several entities in Australia and New Zealand involved in the negotiation of contracts with the four electronic publishers and other publishers:
  - a. The Council of Australian University Librarians (CAUL);
  - b. CAUL Electronic Information Resources Consortium (CEIRC); and
  - c. The Council of New Zealand University Librarians (CONZUL).
41. CONZUL negotiates with Elsevier on behalf of New Zealand Universities. CAUL, through CEIRC, negotiates with Springer Nature, Taylor & Francis and Wiley on behalf of Australian and New Zealand universities.

42. For its publications, Springer Nature negotiated with New Zealand universities an opt-in contract. New Zealand universities have the right to accept the terms of that opt-in contract – all New Zealand universities have accepted those terms. (Springer Nature invoices separately each university.) My understanding is that none of the New Zealand universities have attempted to negotiate a contract with Springer Nature with terms differing from the opt-in contract.
43. Based on information provided by the universities, this year several of their contracts with the four publishers and other publishers are due for renewal.
44. Universities are able to purchase individual publications from the four publishers. However, most of the publications they wish to purchase are within ‘big deals’. Based on information provided by the universities, it appears that it is not economic for universities to purchase electronic publications on a title-by-title basis, as the cost of a comparatively small number of titles from the publishers’ electronic list of publications exceeds the total cost of the many publications available under a ‘big deal’ contract. While there are differences in the electronic publications contained within ‘big deals’ and supplied to the universities, those differences do not appear to be significant. To a certain extent also, the publishers offer ‘big deals’ on a take-it or leave-it basis, and there appears to be not much room for the universities to negotiate about the content of such deals.

## Analysis and findings

45. I turn now to the universities’ submissions in support of their reliance on the three ‘good reasons’ relied on to withhold the information requested, and to the publishers’ submissions.

### Section 9(2)(b)(ii)

46. In support of their reliance on section 9(2)(b)(ii) to withhold the requested information, the universities made similar submissions.
47. While CAUL through CEIRC negotiates Australasian-wide contracts with Taylor & Francis, Springer Nature and Wiley, on the basis of information provided by the universities, it appears that the prices paid by universities here may differ as between Australia and New Zealand.
48. One of the universities described the process of negotiation with respect to Wiley, Taylor & Francis, and Springer Nature as follows:

*With respect to Wiley, Taylor & Francis, and Springer, these big-deals are negotiated by [CEIRC] and are Australasian-wide deals. Each member then decides to opt in or out and, if they opt in, an individual contract is generated.*

49. That university stated that, for all three of these publishers, the prices payable by participating universities are listed in a secure section of the CAUL website, and, in the case of Taylor & Francis, the contract schedule also contains a list of the price paid by all of the subscribing universities. The universities' negotiators have access to the prices paid to those publishers, but they do not release that information without the publishers' consent.

50. The universities do not know the prices other universities pay Elsevier.

51. Another university described the negotiation process as follows:

*Elsevier subscriptions are not negotiated in collaboration with CAUL. Taylor/Francis, Springer and Wiley do negotiate with CAUL, and the University has the opportunity to enter into agreements for electronic journal access with each of these publishers at the price agreed between CAUL and that publisher. However it should be noted that the publishers and CAUL do not negotiate for fixed prices, but rather a pricing formula, which is essentially a percentage increase on prior subscriptions prices. The subscription prices paid by the University ... to Taylor/Francis, Springer and Wiley are essentially determined by applying the price increases negotiated by CAUL and those publishers to the University's previous subscription prices with those publishers.*

52. The universities relying on section 9(2)(b)(ii) to withhold the requested information submitted in terms of that provision:

- they were 'the subject of the information', i.e. the costs paid for the publications and the terms of their contracts with the four publishers; and
- the release of requested information would likely be unreasonably to prejudice their commercial position.

53. In keeping with the Court of Appeal's interpretation of the phrase 'would be likely' appearing elsewhere in the OIA<sup>7</sup> to mean 'a serious or real and substantial risk to a protected interest, a risk that might well eventuate', the universities maintained that they were at risk of having to pay higher prices or losing their competitive advantage vis-a-vis overseas universities, and among themselves, if the prices they paid under their contracts with the four publishers were disclosed, assuming, e.g., they pay lower prices than overseas universities – the universities perceive that it is the case.

54. In my opinion, the universities' reliance on section 9(2)(b)(ii) founders on the interpretation they give to the expression 'commercial position' in that provision.

55. The expression 'commercial position' is not defined in the OIA. I adopt the interpretation given to 'commercial' by the commentary in the 'Official information legislation guide',

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<sup>7</sup> *Commissioner of Police v the Ombudsman* [1988] 1NZLR 385,391.

Part 2 (*Commercial information*).<sup>8</sup> As explained there, the word ‘commercial’ connotes a business, trade or activity being carried on with a view to a profit.

56. The provision of access to students, staff and others to electronic publications appears to be more consistent with the universities’ principal purpose, the provision of education, research and related activities, than with such activities carried with a view to profit – that purpose does not appear to have the necessary ‘commercial’ characteristic. As the High Court stated with regard to the meaning of the word ‘commercial’ in the Gaming and Lotteries Act 1977 (repealed) – that Act did not define that word:<sup>9</sup>

*The meaning of the word ‘commercial’ in the context of the [Gaming and Lotteries Act 1977] is not difficult to discern. It has its ordinary meaning. A commercial operation is simply one which is conducted for no other purpose than financial gain or profit.*

57. In correspondence with this Office, Wiley indicated that it would ‘defer’ to the universities about the releasing of the requested information. In other words, it appears that Wiley does not object to the disclosing of the total amount each university paid to it in 2013.
58. Taylor & Francis, in correspondence with this Office, was rather equivocal. Their senior sales manager (Australasia) stated:

*We do believe that each institution has the right to disclose information if it so chooses, and of its own free will.*

59. However, that comment needs to be read in the light of the statement of the Senior Sales Manager (Australasia) that the universities themselves do not wish to release their expenditure on Taylor & Francis publications.
60. In their submissions, Elsevier and Springer Nature, in definite terms, expressed their objection to the requested information being released. They submitted that their commercial position would be likely to be unreasonably prejudiced by the release of that information. As the thrust of their submissions in this respect was similar, I refer only to Springer Nature’s submissions:

*Like many commercial entities in a competitive marketplace, Springer Nature relies on the confidentiality of its pricing to negotiate terms that provide advantages both to us and to our institutional customers. The goal of our pricing strategy is to enable us to maintain commercial viability in carrying out our core mission of providing critical content, tools and services to institutions and their researchers, while also giving us flexibility to take an institution’s particular circumstances and needs into account in arriving at pricing terms. Public disclosure of our pricing information is likely*

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<sup>8</sup> See our website: <http://www.ombudsman.parliament.nz/resources-and-publications/guides/official-information-legislation> guides.

<sup>9</sup> *New Zealand Racing Industry Board v Attorney General* [2003] NZAR 85 at [44]

*unreasonably to prejudice our commercial position in two ways: First, when institutions in other markets become aware of commercial terms granted to a particular institution or group of institutions, our ability to negotiate commercial terms in those other markets in a flexible way is severely impacted. Second, when competitors learn of our confidential and often unique pricing models and strategies, and also gain information on our market share, it bestows upon them an unfair advantage, particularly in this case, where public disclosure is sought for pricing terms of only a limited number of publishers: Publishers whose pricing information is not disclosed would have a significant competitive advantage over those publishers whose pricing is disclosed.*

*While it is correct that information concerning amounts paid by certain institutions in the United States and the United Kingdom is publicly available as the result of the specific legal requirements in those territories (in the U.S., e.g., such requirements differ state by state), such information is available only for a limited number of institutions in each of those territories. As a result, it would be difficult or impossible to obtain an overall understanding of our pricing models and strategies in those markets from publicly available information, or to generalize from such information to pricing in other academic markets around the world, or in corporate markets. Importantly, because New Zealand universities are under a consortium license with common commercial terms, disclosure of our pricing information under the relevant agreement(s) would result in competitors obtaining information on our pricing strategies and models, and market share, for the New Zealand university market as a whole, a circumstance which is unprecedented in any other market.*

61. Unquestionably, the expression ‘*commercial position*’, in section 9(2)(b)(ii) captures the four publishers’ activities – they are in business to make a profit from, inter alia, the sale of their publications. But, to justify their reliance on section 9(2)(b)(ii) to withhold the requested information, the onus is on the universities to show that it is ‘*necessary*’ to withhold the requested information on the basis that there is ‘*a serious or real and substantial risk*’ that the publishers’ commercial position would be unreasonably prejudiced.
62. While a recent High Court decision<sup>10</sup> interpreted ‘*necessary*’ to mean **essential**, the Court relied on a dictionary definition of ‘*necessary*’<sup>11</sup> without reference to an earlier decision<sup>12</sup>

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<sup>10</sup> *Kelsey and others v the Minister of Trade* [2015] NZHC 2497, para 141 (Collins J).

<sup>11</sup> Della Thompson (ed) *The Concise Oxford Dictionary*, 9<sup>th</sup> ed, Clarendon Press, Oxford 1995.

<sup>12</sup> *Television New Zealand Ltd v Ombudsman* [1992] 1 NZLR 106, 118 (Heron J). In other contexts, the word ‘*necessary*’ has been interpreted as being ‘*reasonably necessary*’: see *Sterling Pharmaceuticals (NZ) Ltd v Boots Co (NZ) Ltd* [1991] 2 NZLR 233; see also the discussion in *Appeal by Brown* [1996] NZAR 465 (Maori Appellate Court) applying the interpretation of ‘*necessary*’ in *Television New Zealand Ltd v Ombudsman*.

of that Court that had reached the conclusion that ‘*necessary*’ meant **reasonably**, rather than **strictly**, necessary.

63. I prefer the earlier High Court interpretation, namely, that for any withholding grounds set out in section 9(2) of the OIA to apply, it must be **reasonably** necessary to withhold the information at issue under that provision.
64. The word ‘*prejudice*’ found in section 9(2)(b)(ii) and elsewhere in section 9(2) connotes, among other things, ‘*impair*’.<sup>13</sup>
65. As indicated above, there is a significant amount of information in the public domain, about how much a number of United States of America and United Kingdom universities pay annually to the four publishers. Springer Nature, in their submissions referred to above, submit that their commercial position would be unreasonably prejudiced by the releasing of the total amounts paid to them by the New Zealand universities. They there refer to ‘*a limited number of institutions*’ in the United States of America and United Kingdom making available such information, with the consequence –
- it would be difficult or impossible to obtain an overall understanding of our pricing models and strategies in those markets from publicly available information or to generalise from such information the pricing and other academic markets around the world, or in corporate markets.*
66. I am not persuaded by the universities’ and publishers’ submissions that their respective commercial positions would be prejudiced in terms of section 9(2)(b)(ii). Accordingly, I am of the opinion that the universities are not entitled to rely on section 9(2)(b)(ii) to withhold the total amounts paid to each of the four publishers.
67. However, on the basis that the component parts – the make-up – of the total amounts paid by each university to the four publishers are not in the public domain, I am of the opinion that the release of that information would be likely unreasonably to prejudice the publishers’ commercial positions in that their pricing strategies, especially relating to their ‘big deals’, would be jeopardised by being placed in the public domain. While there is a certain amount of information available in the public domain in the United States regarding the amounts paid by the universities for ‘big deals’, I accept the thrust of the publishers’ submissions that, the more information that is available in the public domain about prices of their ‘big deals’, the more likely it is that universities here and elsewhere may combine forces with a view to driving down prices they pay to the publishers, particularly for their ‘big deals’.
68. In respect of the request for information regarding the details of the publications provided by the four publishers to the universities, the complainant indicated that he would be satisfied if the universities released information concerning the ‘standard packages’, including the ‘big deals’ they purchased. Neither the publishers nor the universities have provided sufficient evidence to show that the publishers’ commercial

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<sup>13</sup> See footnote 10 above, para 120.

position would be prejudiced by the release of that information. It appears that there is nothing confidential about the fact that universities purchase 'big deals', e.g. purchase Elsevier's 'big deal' called 'Science Direct', a major collection of electronic texts and journals in various science fields, which their science students, researchers and staff usually have access to.

69. I am of the opinion, that the universities are not entitled to rely on section 9(2)(b)(ii) to withhold the names and descriptions of the 'standard packages' each purchase from the four publishers.

### **Section 9(2)(ba)(ii)**

70. Under their written confidentiality agreements with the four publishers, the universities are obliged to keep the terms of those agreements confidential, including details of prices set out in those agreements they pay to the four publishers.
71. The agreements obliging universities to keep confidential the terms of their agreements are expressed in sweeping terms. The confidentiality term of the Springer Nature agreements is typical and very similar to provisions found in the universities' agreements with the other publishers:<sup>14</sup>

#### ***Confidentiality***

*7.1 The License Agreement including these Terms and Conditions, (collectively, "Confidential Information") shall be kept and remain strictly confidential and shall not be disclosed to any third party except to (a) officers, accountants, attorneys, insurers, or others associated with the Parties hereto who have a need to know in order to execute this License Agreement, or (b) as required by law, pursuant to a properly issued subpoena, any order of any court, or other authority or governmental agency with the authority to request information regarding the License Agreement. If the Licensee is requested to disclose any Confidential Information, the Licensee shall immediately notify Springer of any such request, and shall take reasonable measures such as a protective order to ensure that the recipient of the Confidential Information keeps it confidential.*

*7.2 This obligation shall not apply to any information which at the time of disclosure is in the public domain or is made available at any time by an independent third party which has not obtained it directly or indirectly in breach of any confidentiality agreement with the party whose information was so disclosed.*

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<sup>14</sup> It appears that in the case of Taylor & Francis and Wiley, on occasion those publishers, according to the universities, did not have confidentiality clauses, but where that was the case, some universities submitted that they were under an agreement with those publishers not to release information concerning the prices they paid without those publishers' consent.

72. Some of the universities have released some information about the amounts they paid to Taylor & Francis and Wiley for their publications. Others have maintained in correspondence with this Office, that their confidentiality agreements with those publishers obliged them to keep confidential that information. Where universities have released information relating to the amount they pay to Taylor & Francis and Wiley, based on information provided by the universities, it appears that they had the consent of those publishers to do so.
73. Elsevier and Springer Nature have stressed to the universities that they will be in breach of their confidentiality agreements if they disclose any information relating to the prices they pay for Elsevier and Springer Nature publications without their consent.
74. I provide my opinion, with regard to the universities' reliance on section 9(2)(ba)(ii), on the basis that all universities are subject to agreements with the four publishers they pay to keep prices confidential.
75. However the confidentiality clauses of the agreements are worded, section 5 of the OIA is clear in its terms whether or not the information is released is to be determined here in accordance with the purposes of the OIA. Those purposes are set out in section 4 of the OIA:

***Purposes***

*The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—*

- (a) to increase progressively the availability of official information to the people of New Zealand in order—*
  - (i) to enable their more effective participation in the making and administration of laws and policies; and*
  - (ii) to promote the accountability of Ministers of the Crown and officials,—*

*and thereby to enhance respect for the law and to promote the good government of New Zealand:*

*...*

- (c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.*

76. Putting the matter in another way, the fact that parties have entered into confidentiality agreements, does not ultimately determine whether information, the subject of those agreements, should be released. Such confidentiality clauses cannot oust my ability to investigate a refusal to provide information about the terms of the agreements or, in this case, the amounts the universities pay the four publishers. Further, the OIA's purposes and section 9(1) must also be considered, which I address later in this opinion.

77. In terms of section 9(2)(ba)(ii), would the release of the prices paid to publishers ‘*be likely otherwise to damage the public interest*’?
78. The use of the word ‘*otherwise*’ in that provision, indicates that it applies to situations not within section (9)(2)(ba)(i), i.e. the release of information –
- Would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied.*
79. It is in the public interest that parties to the agreements – the universities and the four publishers – should be able to exchange information among their negotiators on a confidential basis during their negotiations, when the agreements periodically come up for renewal. However, submissions made by certain universities to that effect should be considered in the light of their reliance on section 9(2)(j)(prejudice or disadvantage to negotiations).
80. Some universities indicated that they feared reprisals from the publishers if they released the prices they paid without the publishers’ consent.
81. Those universities feared that the four publishers would exercise their rights under the agreements to give notice of termination for breaching their agreements to keep that information confidential, although I have been provided with no evidence that publishers have threatened such action. It is very possible that the publishers have not made those threats, simply because the universities have adhered strictly to their agreements, and not broken their obligations of confidence. As stated above, when certain universities have released certain information, apparently, the universities had the publishers’ consent to do so.
82. I accept that the universities’ fears are sincerely held. In terms of section 9(2)(ba)(ii), it is clearly in the public interest that universities should continue to receive access to electronic text and journals from the four publishers – if their agreements are terminated, the ability of researchers to research and publish and students’ ability to study would be at ‘serious or real or substantial risk’ of being impaired. It is in the public interest under section 9 (2)(ba)(ii) that such research should continue and the results of that research be published; students’ ability to study should not be impaired; and those activities should continue – they are a substantial part of the universities’ *raison d’etre*.
83. Generally, it is also in the public interest that parties to agreements should adhere to their agreements.
84. I am of the opinion that, subject to section 9(1), it is not in the public interest, under section 9(2)(ba)(ii), for information relating to the total prices paid to publishers to be released without the publishers’ consent, and where they did so, the universities were entitled to rely on that provision to withhold information relating to the prices.
85. Having regard, inter alia, to the information available elsewhere, and the knowledge that university staff and students have about the ‘standard packages’ their universities

purchase from the four publishers through accessing publications within those packages, the releasing of information about the names and descriptions of those ‘standard packages’ will merely confirm what is widely known in the academic world.

86. I am also of the opinion that the universities are not entitled to rely on section 9(2)(ba)(ii), to refuse to release information relating to the names and descriptions of the ‘standard packages’ they purchase from the four publishers.

## Section 9(2)(j)

87. Under section 9(2)(j), is it reasonably necessary for the universities to withhold the requested information so that they are able ‘*to carry on without prejudice or disadvantage, negotiations*’ with the four publishers?

88. As the High Court recently stated:<sup>15</sup>

*The insertion of the transitive verb ‘disadvantage’ in s 9(2)(j) of the [OIA] suggests a potentially less adverse outcome than one that is prejudicial. Any ‘unfavourable’ outcome could be considered a ‘disadvantage’.*

89. The word ‘*prejudice*’ in section 9(2)(j) connotes among other things ‘*impair*’.<sup>16</sup> Certain of the universities’ contracts with the four publishers are due for renewal. When these contracts come up for renewal, there will be negotiations between the publishers and the universities concerning the terms of the new contracts, especially their length and the prices to be paid.
90. It is clear that, at least collectively, the four publishers and another publisher dominate, in many fields, the electronic publishing market. There appears, as one commentator has expressed it, to be an ‘*oligopoly*’<sup>17</sup> in that market.
91. Based on information provided by the universities, and overseas research, it appears that our universities do not have much ability to negotiate with the four publishers, the prices they pay.
92. Section 9(2)(j) is concerned, in this case, with the potential ‘*prejudice or disadvantage*’ to the universities’ ability to negotiate new contracts with the four publishers. It is not concerned with any impact on the four publishers’ ability to negotiate contracts with the universities, and thus I put to one side the publishers’ submissions about the perceived impact on their potential ability to negotiate with the universities.
93. Despite the comparatively weak position of the universities vis-à-vis the four publishers they do have some ability to negotiate a possibly more favourable outcome – lower prices – if the prices they pay, especially to Elsevier and Springer Nature, are kept

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<sup>15</sup> See footnote 10 above, para 142.

<sup>16</sup> See footnote 10 above, para 120.

<sup>17</sup> See footnote 6 above.

confidential. (As mentioned above, it appears that certain universities have released some information about the amounts they pay to Taylor & Francis and Wiley).

94. One university stated, with regard to one of the four publishers:

*...As stated by [name deleted] the disclosure of the electronic journal subscription fee information to the public domain would likely result in pressure on pricing from the Higher Education sector in other territories. To expand on this point, the University understands that [name deleted] ability to offer substantial discounts from the list prices for its electronic journals to New Zealand tertiary institutions is substantially dependent on those discounted prices remaining confidential to those customers. If the discounted electronic journal subscription prices offered to New Zealand institutions entered the public domain, then those Higher Education sectors in other territories which pay greater subscription fees than the New Zealand institutions would likely use the New Zealand pricing information to pressure on [name of publisher deleted] in their own negotiations on electronic journal subscription pricing. In order to alleviate this pressure on their pricing from other territories' Higher Education sectors, [name of publisher deleted] would likely seek, in its negotiations with CAUL, to reduce the discounts offered to New Zealand tertiary institutions and bring its New Zealand pricing into parity with the most expensive electronic journal subscription fees paid by overseas territories' Higher Education sectors. The University's commercial position would certainly be prejudiced by any substantial increase in its [name of publisher deleted] electronic journal subscription fees.*

95. In respect of the same publisher that university referred to the fact that prior to the electronic age, it had a relatively limited collection of the publisher's journals, and, as it understands the position, it thus has been able to procure access to the publisher's electronic publications for prices lower than some universities here and in Australia. (I have summarised above the relationship between prices paid by universities for electronic publications to the number of 'hard copy' texts and journals they used to purchase).<sup>18</sup>

96. One university was satisfied that it was paying less than certain overseas institutions for their electronic publications. Especially taking into account the collective dominant position of the four publishers and another publisher in the market, that university, as did other universities, expressed their considerable concern about the impact on their future negotiations with publishers, if, without the publishers' consent, information was released about present prices. That university stated:

*If New Zealand universities typically pay less than counterparts overseas and publishers come under pressure to even out prices between markets. This could result in increased prices in New Zealand (thus prejudicing or*

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<sup>18</sup> See paras 20 to 29 above.

*disadvantaging the commercial position of New Zealand universities) and/or decrease prices elsewhere (thus prejudicing the commercial position of the publisher).*

97. Further, as the universities pointed out, they already have access to a certain amount of information provided by three of the four publishers to the CEIRC negotiators, which assisted the negotiators in their price discussions at the time of the renewal of their publication contracts.
98. From information provided by the universities in confidence, it appears that New Zealand universities do not always pay the same prices for access to electronic publications – e.g. the price is paid by universities for ‘big deals’ vary, and there is no discernible pattern in these prices.
99. On the basis of the information provided by the universities during this investigation, I am satisfied that it is reasonably necessary to withhold information relating to the terms of their present contracts with the four publishers, including the prices they pay under those contracts, as the release of that information would –
- impair (*‘prejudice’*) the universities’ ability to negotiate future contracts with the four publishers; and
  - *‘disadvantage’* the universities in those negotiations by undermining their ability to achieve a favourable outcome, taking into account the universities’ weak negotiating position.
100. Accordingly, I am of the opinion that, subject to section 9(1), the universities are entitled to rely on section 9(2)(j) to withhold information relating to the terms of their contracts with publishers, including the prices payable under those contracts.
101. However, I am of the opinion that the universities are not entitled to rely on section 9(2)(j) to refuse to release the names and descriptions of the ‘standard packages’ they purchase from the four publishers, for the same reasons I have given above.<sup>19</sup>

## **Section 9(1)**

102. I turn now to consider whether, in terms of section 9(1), there are other considerations, in the public interest, outweighing the three *‘good reasons’* relied on to withhold the requested information.
103. It is in the public interest that:
- parties to contracts adhere to their terms – that promotes certainty in the commercial world;
  - parties to the contracts have the ability to negotiate their own terms of contract, satisfying their own requirements, especially if those negotiations are truly at arm’s

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<sup>19</sup> See para 68 above.

- length negotiations, unless, e.g. legislation requires otherwise – in many cases, it is in the supplier’s and purchaser’s interests that the competitive character of the marketplace should be promoted.
- against those considerations, in this case, is to be weighed in the public interest the very significant public interest in promoting accountability and transparency on the universities’ part in their negotiations with the four publishers;
  - the universities are accountable for their expenditure of public money on the four publishers’ publications and are transparent in that respect; and
  - there is sufficient information available to enable an objective judgment to be formed on whether the universities are receiving value for the money spent on publications.
104. To be also weighed in the public interest, the universities submitted, is their need in today’s world to compete for student enrolments. In that regard one university stated:
- The ability [of universities] to compete for student enrolments and research income is largely influenced by the ability to attract and retain high-calibre research staff. For those teaching and research staff, access to the widest possible range of high-quality and high-impact research publications is important. Access to quality journals is therefore critical to a university’s ability to compete, and thereby to the country’s ability to have a vibrant tertiary sector.*
- Scholarly journals are also an essential resource for universities because teaching underpinned by research is a defining characteristic of a university.*
105. It is not in the public interest that, when the publication contracts come up for renewal, that the universities lose access to the four publishers’ electronic publications and the ability to publish results of research in those publications through the publishers’ refusal to renew those contracts on account of all the requested information being released. I accept the universities’ fears of that happening are credible. An undermining of that ability is likely to have a serious impact on universities here, as that university submits, and that is not in the public interest.
106. It appears that the position of New Zealand universities in their negotiations with the four publishers is comparatively weak, compared with the collective dominant position of the four publishers and one other publisher. In a word, they have little room to negotiate. I have especially taken that matter into account, in forming my opinion on the information that should be released.
107. The amount spent by the universities on publications provided by the four publishers is very significant, probably in excess of \$NZ30 million – a significant amount in New Zealand terms – but a miniscule amount in global terms for the four publishers, considering that, e.g., Elsevier recently had annual profits of \$US2 billion.

108. I am of the opinion that need for accountability and transparency on the universities part, especially relating to whether they are receiving value for money in their expenditure on the four publishers' electronic publications, in the public interest, outweighs the necessity to withhold under section 9(2)(b)(ii), 9(2)(ba)(ii) and 9(2)(j) some of the requested information. However, it is not in the public interest that all that information should be released.
109. To satisfy the public interest, in terms of section 9 (1), I am of the opinion that the universities should release the names, and a description, of the standard packages they purchased from each of the four publishers, and the amounts each paid in 2013 to each of the four publishers.

## Ombudsman's opinion

110. For the reasons set out above, I have formed the opinion that:

- the universities were entitled to rely on sections 9(2)(b)(ii), 9(2)(ba)(ii) and 9(2)(j) to withhold the component parts (make-up) of the total sums they each paid to the four publishers in 2013; and
- the universities were not entitled to rely on those provisions to withhold information relating to the names of, and a description of, the 'standard packages' they purchased from those publishers in 2013, and the total amounts each university paid in 2013 to each of the publishers.

## Recommendation

111. Under section 30(1) of the OIA, I recommend that:

- the universities release the names, and a description, of the 'standard packages' they purchased in 2013 from each of the four publishers; and
- the total amounts each university paid in 2013 to each of the four publishers.



Peter Boshier  
Chief Ombudsman

## Appendix 1. Relevant statutory provisions

### Official Information Act 1982

#### 4 Purposes

The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—

- (a) to increase progressively the availability of official information to the people of New Zealand in order—
  - (i) to enable their more effective participation in the making and administration of laws and policies; and
  - (ii) to promote the accountability of Ministers of the Crown and officials,—and thereby to enhance respect for the law and to promote the good government of New Zealand:
- (b) to provide for proper access by each person to official information relating to that person:
- (c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

#### 5 Principle of availability

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

...

#### 9 Other reasons for withholding official information

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

...

- (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—
  - (i) would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or
  - (ii) would be likely otherwise to damage the public interest;

...

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

...

## **12 Requests**

- (1) Any person, being—
- (a) a New Zealand citizen; or
  - (b) a permanent resident of New Zealand; or
  - (c) a person who is in New Zealand; or
  - (d) a body corporate which is incorporated in New Zealand; or
  - (e) a body corporate which is incorporated outside New Zealand but which has a place of business in New Zealand,—

may request a department or Minister of the Crown or organisation to make available to him or it any specified official information.

...

## **18 Refusal of requests**

A request made in accordance with section 12 may be refused only for 1 or more of the following reasons, namely:

- (a) that, by virtue of section 6 or section 7 or section 9, there is good reason for withholding the information:

...

### **30 Procedure after investigation**

- (1) Where, after making an investigation of a complaint made under section 28, an Ombudsman is of the opinion—

- (a) that the request made in accordance with section 12 should not have been refused; or
- (b) that the decision complained of is unreasonable or wrong or is otherwise a decision to which subsection (1) or subsection (2) of section 22 of the Ombudsmen Act 1975 applies,—

the Ombudsman shall, subject to subsection (3) of this section,—

- (c) report his opinion and his reasons therefor to the appropriate department or Minister of the Crown or organisation; and
- (d) subject to section 31, make such recommendations as he thinks fit; and
- (e) give to the complainant—
  - (i) a copy of his recommendations (if any); and
  - (ii) such other information as he thinks proper.

- (2) The Ombudsman shall also—

- (a) in the case of an investigation relating to a department or organisation named in Part 1 or Part 2 of Schedule 1 of the Ombudsmen Act 1975, send a copy of his report and recommendations to the Minister concerned; and
- (b) in the case of an organisation named in Schedule 1, send a copy of his report and recommendations to such Minister of the Crown as he considers appropriate.

- (3) Notwithstanding anything in this section, an Ombudsman shall not, in any report made under this section, make any comment that is adverse to any person unless the person has been given an opportunity to be heard.

- (4) Except as provided in subsection (1), nothing in section 22 of the Ombudsmen Act 1975 shall apply in respect of a decision that may be investigated and reviewed under section 28(1) or section 28(2) of this Act.

...

### **32 Recommendations made to department or Minister of the Crown or organisation**

...

- (3) Where a recommendation is made under section 30(1) to an organisation named in Schedule 1,—
- (a) a public duty to observe that recommendation shall be imposed on that organisation from the commencement of the 21st working day after the day on which that recommendation is made to that organisation unless, before that day, the Governor-General, by Order in Council, otherwise directs; and
  - (b) the public duty imposed by paragraph (a) shall be imposed not only on the organisation itself but also on—
    - (i) its governing body (if any); and
    - (ii) its members; and
    - (iii) every officer, employee, and body within that organisation to whom that recommendation is applicable; and
    - (iv) every statutory officer to whom that recommendation is applicable.