

Our ref 430371
Contact Aimee Bryant
25 August 2016



Mr David Jenkins
Chief Executive
NZPPA

By email: david@nzppa.co.nz

Dear Mr Jenkins

**Official Information Act investigation
Ministry of Business, Innovation and Employment
Request for information about Holidays Act, Parental Leave and Employment
Protection Act, Labour Inspectorate**

As you know, I am investigating your complaint about the decision of the Ministry of Business, Innovation and Employment to refuse your request for internal documentation relating to the Holidays Act 2003, and the Parental Leave and Employment Protection Act 1987.

I have now received a response from the Ministry, providing a report on its concerns and all the information at issue. Having carefully considered this material, I have formed the provisional opinion that the Ministry was entitled to partially refuse your request, on the basis that disclosure of some of the information would be likely to prejudice the maintenance of the law.

My role

As an Ombudsman, I am authorised to investigate and review, on complaint, any decision by which an agency subject to the Official Information Act 1982 (OIA) refuses to make official information available when requested.

My role in undertaking an investigation is to evaluate the grounds for refusing requests for official information in terms of the tests set out in the OIA, and to form an opinion as to whether the request was properly refused.

Background

You initially complained to this Office (our ref: 398839) about the Ministry's decision to withhold information from the following documents:

- Module B3 – Holidays and Other Leave – Trainers Manual; and
- Holidays Act 2003 – Resource Manual.

On 22 March and 23 March 2016, you made further requests to the Ministry for similar information, citing section 22 of the OIA:

Any MBIE document such as (but not limited too): a guide, training material, manuals and policy in relation to the auditing of payroll systems for the purpose of checking compliance with the Holidays Act 2003.

On 3 April 2016, you made another request, this time for the Trainers Manual and Resource Manual, with any updates that may have been made since the Ministry's previous disclosure. In addition, you sought *'any other training manual, policy or resource in regard to the Holiday Act used internally by staff'*, as well as that relating to the Parental Leave and Employment Protection Act 1987.

The Ministry responded to your March requests on 21 April 2016, advising that an extension to the time frame for response (until 20 May 2016) was required in order to enable *'consultation'*.

On 1 June 2016, the Ministry responded substantively to the March requests, and to the request of 3 April 2016. The Ministry advised that it did not consider your March requests to fall within the ambit of section 22 of the OIA, as the documents identified as within the scope of that request did not contain internal decision making rules.

The Ministry reviewed its earlier decision and provided you with a full copy of the Module B3 Trainer's Manual. It also provided the Holidays Act 2003 Resource Manual, updated and with further information disclosed. The following information was partially withheld:

- Holidays Act 2003 and Related Ministry Policies, Resource Manual, version 4.6;
- Holidays Act 2003 and Related Ministry Policies, Resource Manual, version 4.8;
- Service Centre Training, Holidays and Other Leave – Trainer's Manual (only one 9(2)(a) redaction);
- Parental Leave and Employment Protection Act 1987 – Resource Manual;
- Labour Inspectorate Investigation, Audit and Enforcement Manual, Chapters 11, 12, and 14;
- Labour Inspectorate Audit, eLearning Module 7;
- Labour Inspectorate Audit Tool;
- Audit Training Session.

Your complaint

On 2 June 2016, you made a further complaint about the decision made on your updated requests, as well as the Ministry's decision to extend the timeframe for response to those requests.

You consider that the Ministry's decision to extend the timeframe for response was unreasonable, given that the Ministry had earlier made a decision on substantially similar material, and the manuals were readily identifiable.

In respect of the redactions made to the material requested, you advised that you sought the information in order to better understand and advise of what is required in order to comply with

the Holidays Act 2003 and other legislation. You noted recent public interest in the difficulties encountered by employers attempting to administer those requirements.

Following this, I discontinued my investigation of your previous complaint, and on 3 June 2016 notified the Ministry of my intention to investigate this complaint, which encompassed all information withheld.

Information subject to this provisional opinion

My provisional opinion relates only to the following information, withheld by the Ministry on the basis of section 6(c) of the OIA:

- Audit Training Session, presentation, 30 September 2015
Redactions made on pages 7 and 10 -12.
- Labour Inspectorate Investigation, Audit and Enforcement Manual: Chapters 11 & 12
Redactions to 11.3; 11.5; 12.9.
- Labour Inspectorate Audit Tool
Redactions made on pages 1, 11 – 18 and in Appendix A.

This is the information for which I consider the Ministry had good grounds to withhold.

I have today written to the Ministry in respect of the remainder of the information withheld,¹ for which I do not – at this stage – consider there were good grounds to withhold. I have requested the Ministry's further comment on this information.

Comments by the Ministry

In respect of the information withheld under section 6(c) of the OIA, the Ministry has advised:

- release of information relating to the Labour Inspectorate's investigative techniques could prejudice the investigation and detection of future breaches. Disclosure of this type of information could allow parties to tailor their responses and the information that they make available;
- Labour Inspectors undertake 'significant enforcement functions' in relation to the Holidays Act and other legislation. They must be able to carry out enforcement functions using the investigation techniques developed by the Ministry.

Analysis

Section 6(c) of the OIA provides conclusive grounds for the withholding of information, if making available the information would be likely to '*prejudice the maintenance of the law, including the prevention, investigation, and detection of offences...*'. As a conclusive ground for withholding

¹ Excluding the staff names withheld on the basis of section 9(2)(a), which you have confirmed you do not seek.

information, the public interest factors favouring disclosure of the information, as employed by section 9(1) of the OIA, are not relevant.

Previous Ombudsmen have accepted that section 6(c) applies to law enforcement activities beyond the more obvious examples of Police investigation of criminal offences. In this case, I am satisfied that the information redacted by the Ministry, if disclosed, would be likely to identify investigative techniques that would allow individuals to obstruct the role of labour inspectors and avoid the detection of offences.

As a conclusive withholding ground, it is not necessary for me to consider whether there are any public interest factors in favour of disclosing the information. I note that you have also referenced section 22 of the OIA in your requests to the Ministry, however section 22 remains subject to section 6(c). Further, I am not of the view that section 22 would apply to this information, as it is guidance for labour inspectors in carrying out their enforcement functions, and is not related to internal decision-making rules.

Extension of timeframe for response

The Ministry has explained that, despite having previously considered a similar request, an extension of the timeframe for response under the OIA was necessary in order to allow consultation on the disclosure of information further to that previously supplied. In addition, your requests were wider in this instance, and the documentation that you seek is substantial. The Ministry was unable to complete this consultation in the timeframe provided, and was the Ministry's response was subsequently seven working days late.

In light of the fact that the Ministry was consulting in order to disclose further information, and a response has now been provided to you, I do not consider further investigation to be necessary, and this aspect of your complaint has been closed. The Ministry's decision to extend the timeframe would not appear to be unreasonable, and the subsequent breach of that timeframe has been brought to their attention.

My provisional opinion

In my provisional opinion, for the reasons set out above, the Ministry was entitled to partially refuse your request for information relating to Labour Inspectorate processes.

Your comments

I invite you to comment before I form my final opinion. If you do wish to comment, please respond by **15 September 2016**.

Yours sincerely



Judge Peter Boshier
Chief Ombudsman