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28 November 2014

Ministry of Business, Innovation and Employment
Employment Relations Policy, Labour Environment
PO Box 1473
WELLINGTON 6140

Attention: Carmel Peoples

By email: carmel.peoples@mbie.govt.nz

Dear Carmel

Comment on proposed changes to employment relations regulations

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Employment Relations Amendment Bill Implementation Consultation Document (consultation document).

The consultation document outlines proposed amendments to three sets of regulations that need updating to comply with or accommodate amendments to the Employment Relations Act 2000 (Act), introduced by the Employment Relations Amendment Act 2014 (Amendment Act), which are due to come into force on 6 March 2015.

Employment Court Regulations 2000

This submission addresses Proposal Two of the document, relating to proposed amendments to the Employment Court Regulations 2000 (Regulations).

The consultation document states that there is a need to consider whether changes to the Regulations are required. The purpose of any changes would be to ensure that the policy objectives of protecting certain categories of confidential information (including a third party's privacy in situations such as restructuring or redundancy) are not undermined.

Section 4(1A)(c)(i) of the Act currently requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of its employees to provide to the affected employees access to relevant information about the decision.

Under new section 4(1B), introduced by the Amendment Act, an employer will not be required to provide such access to confidential information:

(a) that is about an identifiable individual other than the affected employee if providing access to that information would involve the unwarranted disclosure of the affairs of that other individual:

(b) that is subject to a statutory requirement to maintain confidentiality:

(c) where it is necessary, for any other good reason, to maintain the confidentiality of the information (for example, to avoid unreasonable prejudice to the employer's commercial position).

"Confidential information" is defined in new section 4(1D) as meaning information that is "provided in circumstances where there is a mutual understanding (whether express or implied) of secrecy".

Regulation 44, Employment Court Regulations 2000 – objections to disclosure

Regulation 44 currently allows a party to object to disclosure of a document or class of documents by giving notice in the prescribed form.

Such notice is required to state the grounds of objection. Under regulation 44(3), the only grounds upon which objections may be based are that the document or class of documents:

(a) is or are subject to legal professional privilege; or

(b) if disclosed, would tend to incriminate the objector; or

(c) if disclosed, would be injurious to the public interest.

The consultation document states that although concerns about the privacy of a natural person or the confidential nature of information are not specific grounds for objection, they are capable of being considered under the 'injurious to the public interest' ground of objection. The Law Society notes that it is unlikely privacy concerns would be interpreted as falling within the "injurious to the public interest" ground of objection, although breach of confidentiality might.

The consultation document proposes that regulation 44 be amended to include privacy as a specific ground for objecting to the disclosure of documents, to align with the requirements of the new section 4.

It is difficult to see how creating a privacy objection to disclosure would align regulation 44 with the new section. What is needed instead is a provision that enables objection to documents that "if disclosed, would breach the Act, the Official Information Act 1982, or the Privacy Act 1993."

Any amendment to regulation 44 would need to be carefully drafted so as to avoid confusion and stay within the terms of the relevant statutes, which are:

- the Act (as amended by the Amending Act: new sections 4(1B) – (1D));
- the Official Information Act 1982 (OIA); and
- the Privacy Act 1993 (Privacy Act).

New section 4(1C) preserves the obligations of employers under the Official Information Act and the Privacy Act. The "good reasons" for employers withholding information under both laws – including that it would "involve the unwarranted disclosure of the affairs of another individual/person" – will continue to apply.[1]

The reasons for withholding information under the Act as amended are quite narrow: withholding personal information about a third party will be justified *if* that information is "confidential information" (as defined in new section 4(1)(D)) *and* providing access to the information would involve "unwarranted" disclosure of the affairs of that third party.

Accordingly, the proposal to amend the regulation to include "privacy" as a ground for objecting to the disclosure of documents does not accurately address the statutory requirements. An employer will have an obligation to disclose the document under new section 4 and the other legislation unless the document is "confidential information" and its disclosure would involve an "unwarranted disclosure" of the affairs of another person.

[1] Section 29(1)(a) Privacy Act, section 27(1)(b) Official Information Act.

We note however that there is a jurisdictional difficulty, in that the Employment Court does not have the jurisdiction to determine breaches of the Official Information Act or the Privacy Act. The Ombudsmen and the courts of general jurisdiction deal with the former, and the Human Rights Review Tribunal has originating jurisdiction over the latter.

Assessing the withholding issue when only one of the parties knows the contents of the relevant information

The consultation document notes in relation to the new withholding rights in section 4: "This option may run the risk that information important to a proceeding may not be available to all parties. We would be interested in your views about other options available to better balance the objectives of protecting confidential information with ensuring that parties in litigation have appropriate information available to them."

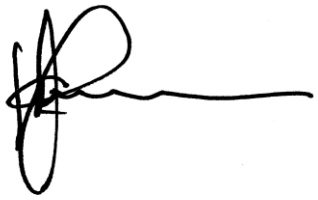
This is an issue that has faced other courts and tribunals, where the holder of information declines to release information and the party seeking it is largely in the dark as to whether or not the withholding party has proper grounds. This has been addressed in other jurisdictions (and in New Zealand) by the court itself examining the information in some cases, and also by requiring the withholding party to submit to the court and the other party an index of the withheld information and the grounds for withholding it. In the US this is called a "Vaughn Index".

In 2006, the concept of the "Vaughn Index" was introduced to the Human Rights Review Tribunal in its Privacy Act jurisdiction, in *Dijkstra v Police* (2006) 8 HRNZ 339 (see Appendix A to that decision, attached, at paragraphs 11-17).

Another suggestion to address the issue of how to protect confidential information while at the same time ensuring that a party is not left entirely uninformed on the question of whether the other party has proper grounds, is to hold proceedings *in camera* so that the court can decide for itself whether there are good grounds for withholding. However, this approach has its disadvantages (as set out in paragraph 8 of Appendix A to *Dijkstra v Police)*, the main one being that it creates an uneven playing field because the complainant is left out of the process.

This submission has been prepared with assistance from the Law Society's Employment Law Committee. If you wish to discuss this submission, the Committee Convenor Michael Quigg can be contacted through the Committee Secretary, Jo Holland (ph (04) 463 2967) or by email jo.holland@lawsociety.org.nz).

Yours sincerely



Chris Moore
President

[From *Dijkstra v Police* (2006) 8 HRNZ 339]

APPENDIX A

MEMORANDUM OF THE PRIVACY COMMISSIONER

1. This memorandum is to confirm that the Privacy Commissioner anticipates that her position at the hearing of this matter will be in accordance with the position already communicated by her to the parties: that the Defendant had a proper basis for withholding information from the Plaintiff under ss 27(1)(c), 29(1)(a), and 29(2)(b) of the Privacy Act 1993.

2. Given the evidential difficulties in reviewing denied access claims such as this, the Privacy Commissioner would like to assist the parties and the Tribunal by providing some discussion of the issues involved and some information as to how such matters are handled in other jurisdictions.

The Law

3. Although the burden of proof in civil cases normally lies on the plaintiff, in cases where the defendant is relying on an exception to the information privacy principles (here, principle 6), the burden of proof lies on the defendant to show that the exception applies. Section 87 relevantly provides for this in the following terms:

> ***Proof of exceptions***
> *Where, by any provision of the information privacy principles or of this Act ..., conduct is excepted from conduct that is an interference with the privacy of an individual, the onus of proving the exception in any proceedings under this Part lies upon the defendant.*

Therefore, when the Defendant in this matter has declined to disclose personal information to the Plaintiff, and that decision is upheld by the Privacy Commissioner, the burden is upon the Defendant to prove *de novo* in the Tribunal that the information concerned satisfies one or more of the good reasons for refusing access under the Privacy Act.

4. Furthermore, case law indicates that any exceptions provided for under human rights legislation such as the Privacy Act must be interpreted narrowly, since there is a presumption that rights granted to individuals are intended to be enjoyed to the widest possible extent: see, for example, *Coburn v Human Rights Commission* [1994] 3 NZLR 323. The right in the present case is expressed in principle 6(1)(a), which provides: "Where an agency holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled ... to have access to that information." The Tribunal, therefore, must be satisfied that the limitations placed by the Defendant upon the Plaintiff's entitlement are no wider than strictly required.

Evidential difficulties facing the parties in denied access cases

5. While the law is clear in setting out the rights of the respective parties in denied access cases, it is silent as to how the matters that need to be proved can be proved in the circumstances, or how the Tribunal should approach this issue. The adversarial process is not entirely suited to determining denied access cases. These cases turn largely on factual issues that only the party seeking to withhold information is in a position to address. This contrasts with ordinary legal proceedings where both parties more or less have the same factual information concerning the matters at issue. The factual issues in denied access cases centre around the question whether the material contained in withheld documents falls within particular statutory categories that are exempted from disclosure. As the plaintiff is not in a position to know the precise contents of the information withheld, he or she is unable to argue whether or not it does in fact fall under the required statutory exemption. In addition, it may often be the case that only

part of a document is protected from disclosure by a statutory exemption, but the exemption is claimed for the whole document. At the same time, however, it can be difficult for the Defendant to give evidence on the details as to why material must be withheld if such evidence would betray the very interests that the withholding party is seeking to protect. This means that the Tribunal must have some way of deciding the issue fairly while at the same time upholding the parties' respective rights during the process: the plaintiff's right to have access to personal information, and the defendant's right (also grounded in the public interest) not to grant access to information that is entitled to be withheld.

Possible approaches for discharging the s 87 onus

6. Given that s 87 of the Privacy Act places the burden of proof on the party that is seeking to withhold personal information, how is this burden to be discharged in a way that meets the requirements of both parties and the Tribunal?

7. One obvious method is to submit the material in issue to the Tribunal for examination *in camera*, so that the Tribunal can decide for itself whether or not the exemptions claimed are good. This is the practice of the Canadian Federal Court under the Access to Information Act 1985, and this sort of procedure was followed by the Complaints Review Tribunal (as it then was) in *M v The Ministry of Health and New Zealand Police* (Decision No 44/96, 29 October 1996), followed in *Cable v NZ Insolvency and Trustee Service* (Decision No 10/99, 6 May 1999, at p 5). In the recent case of *O'Neill v Health & Disability Commissioner (Decision No 2)* (Decision No 15/2005, HRRT 02/02, 26 May 2005), the Human Rights Review Tribunal similarly dealt with a denied access claim "on the papers", with the defendant submitting the relevant documents for the Tribunal to examine for itself whether there was a proper basis for withholding.

8. There are, however, a number of shortcomings to this sort of procedure. One is that the plaintiff is left out of the process. Not only that, but the Plaintiff will be unable to present any sort of argument that corresponds in its force or detail to that of his or her adversary as to why the material should not fall under an exemption. In other words, such a process takes place on an uneven playing field between the parties. Another shortcoming is that such an examination can be burdensome, if not overwhelming, for the Tribunal if it must go through a great number documents in some detail. Moreover, there is always the risk that the Tribunal might unwittingly disclose information that it ought not to.

9. The process proposed to be used in the present proceeding is for the Tribunal to have resort to the withheld documents only if that is necessary to determine the issue. The evidence thus far filed for the Defendant consists of the brief of evidence of the Detective Inspector who reviewed the relevant files for the Defendant. He proposes to give evidence as to his belief that the information withheld by the Defendant has been withheld on a proper basis (para 10). On its own, this evidence is unlikely to be satisfactory for the Defendant to discharge its evidential onus under s 87 unless more details are provided as to the specific nature of each of the documents concerned; the specific grounds relied upon for withholding each document; and whether each document must be withheld in its entirety, or whether the statutory exemption applies to only part of a document.

10. Paragraph 5 of the brief of evidence submitted on behalf of the Defendant refers to a schedule of documents that was prepared by the Detective Inspector. It may be that a sufficiently informative schedule of withheld documents, with redactions made to that schedule as are necessary to protect information that falls under the statutory exemptions, would be a good middle ground between, on the one hand, the bare sworn assertion that there are proper grounds for withholding, and on the other hand, inspection of the documents by the Tribunal. The preparation and submission of detailed schedules to the court in denied access cases is standard practice in the United States and Australia. This has the advantage of providing the plaintiff and the court with sufficient information in most cases to evaluate the information concerned. It also gives the plaintiff, who may never get to see the information concerned, a better insight into why material must be withheld.

11. The approach under the Freedom of Information Act 1966 in the United States involves the preparation of what is called a "Vaughn Index", so-called after the case of *Vaughn v Rosen* 484 F 2d 820, a decision in the Federal Court of Appeal for the District of Columbia Circuit. The Court there sent a denied access case back to the lower court with a recommendation that the withholding agency be required to prove that it was entitled to withhold the information by preparing an itemised index, correlating each withholding with a specific legislative exemption and justification for that exemption. This decision led to the standard practice that plaintiffs in freedom of information cases will file a motion for a *Vaughn* index, which is a special type of pre-trial motion for discovery that is made when the complaint is filed.

12. The Court in *Vaughn v Rosen* sought to devise a remedy for two recurring problems in freedom of information litigation: (1) the disadvantage of the plaintiff, who typically does not know what documents the agency is withholding or why they are being withheld, and (2) the burden on courts of *in camera* inspections to determine disclosability. The District of Columbia Circuit's solution was to order the government to produce a detailed analysis of the exempt status of withheld documents, indexed to the actual withheld documents or portions thereof.

13. The principal purposes of the index are (1) to provide as much public information as possible to the requester of the information and thereby enhance the adversarial nature of the proceedings, and (2) to shift the burden of analysing and characterising requested documents from the courts to the agency, where the legislature intended this burden to lie (as with our s 87). The effect of the motion, if granted, is to require the withholding agency to provide a detailed, and usually public, justification for its decision and to delay until after the justification has been presented the court's decision on whether to undertake *in camera* review.

14. The learned commentary on American freedom of information law by Burt A Braverman and Frances J Chetwynd, *Information Law*, (1985, Practising Law Institute, New York City) volume 1, pages 549-550, describes the contents of a Vaughn index as follows:

> *A Vaughn index should consist of two elements. The first is a listing of the documents or portions of documents that the agency seeks to withhold. The second is a specific explanation of why each identified document or portion is asserted to be exempt, referencing applicable exemptions and explaining how each exemption applies to the document. Courts differ on the degree of detail necessary in a Vaughn index -- one court may reject an index that another would accept.*
>
> *For documents that consist of separable parts, the agency must specify in detail which portions are segregable, preferably by an index that cross-references manageable segments of the document to the government's justification for withholding. Courts also differ on the degree of disaggregation required in identification of segregable portions. One court has stated that where a particular withholding involves more than one subject or more than five pages, subdivision is advisable; generally, an ad hoc approach is followed. In cases where massive amounts of documents are involved, a selective indexing is acceptable.*

15. A *Vaughn* index can take a number of different forms: it can be a straight affidavit, a narrative document, an affidavit with a chart or index detailing the withholdings attached, or a combination of any these examples. Whatever the form it takes, a *Vaughn* index serves the same purpose: to give a meaningful justification for any withheld materials so that a court can decide if the agency's withholding of material has a proper basis.

16. In his article "Inside the Process of Preparing a Vaughn Index" (September 29, 2003, LLRX.com, at http://www.llrx.com/columns/foia2.htm), Scott A Hodes, a specialist practitioner in freedom of information law, writes:

> *The types and size of the withholdings will often dictate the format the declaration takes. For instance, if only a few pieces of information are withheld, a simple affidavit justifying them will*

most likely be more than adequate. However, a case involving hundreds, or even thousands of documents, and probably thousands of redactions will require more than a small affidavit. As the amount of work involved in a large Vaughn is a huge strain on an agency's legal and FOIA resources, the agency will seek to provide a justification for only a sample of the withheld material. Additionally, the agency may seek to provide a coded Vaughn. A coded Vaughn involves giving each redaction a specific code and then providing a justification for each code, rather than specifically pointing out where each redaction is on a certain page. The coded documents are then attached to a declaration, which is a general affidavit describing and justifying the redaction categories. A coded Vaughn can be done with a sample of the withheld material to provide a manageable size to the Vaughn. The bottom line is that agencies don't like preparing Vaughns and will do whatever it takes to make the final product as small and simple as possible.

Regardless of the format of the overall declaration, the most important thing in preparing a Vaughn is to adequately and meaningfully describe and justify the withheld documents. The person who will be the declarant must ensure that the redactions are properly described. Many agency declarants utilize a staff, often paralegals, to assist in the preparation of the declaration. A good trick for declarants is to read a draft declaration before reviewing the underlying withheld material. This enables agency personnel to see the case from the perspective of the plaintiff and the court. If the declarant can make no sense of something in a declaration, then the agency will know that there is a problem and a target for attack by the plaintiff. After review of the index, the declarant must then review the withheld material.

17. In Australia, the Administrative Appeals Tribunal has issued a practice direction regarding the documentation that a withholding agency must lodge in cases under the Freedom of Information Act 1982 (Cth), where a decision to withhold information is being reviewed. That practice direction requires the withholding agency to file a schedule that lists the documents concerned sequentially by number, and the following details (unless it involves the disclosure of information that is claimed to be exempt) must be provided in respect of each document:

    a. the date of the document;

    b. the person or persons by whom the document was created and, where applicable, the person or persons to whom it was directed;

    c. a sufficient description of the nature of the contents of the documents so as to provide a prima facie justification for the ground or grounds of exemption relied upon;

    d. where applicable, a statement as to the ground or grounds of public interest relied upon in support of the claim of exemption;

    e. where the claim of exemption relates only to part of the document, a concise indication of the part or parts involved (eg, para 6 or part para 6);

    f. where a document is no more than a copy of another document for which exemption is claimed, it should be so identified. The claims of exemption do not need to be repeated in respect of the copy document.

Paul Roth
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