

Request to Department of Internal Affairs for gambling venue cost guidelines

Chief Ombudsman's opinion

Legislation:	Official Information Act 1982, s 6(c), s 9(2)9g)(i) and s 9(2)(j) (see appendix for full text)
Agency:	Department of Internal Affairs
Ombudsman:	Dame Beverley Wakem DNZM, CBE
Reference number:	293592
Date:	June 2015

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Summary

The complainant requested the Department of Internal Affairs to provide him with a copy of a document entitled 'Class 4 Venue Costs: Licensing Process' (the guidelines). The Department refused to release that document to him in reliance on section 6(c) ("*the maintenance of the law*"), 9(2)(g)(i) ("*free and frank expressions of opinions*") and 9(2)(j) ("*prejudice or disadvantage to negotiations*") of the Official Information Act 1982 (OIA).

Under the Gambling Act 2003 (the 2003 Act), licensed venue operators are entitled to deduct their "*actual, reasonable and necessary*" expenses from gambling proceeds. The guidelines set out the "*upper limits*" as to what the Department considers are reasonable deductible expenses. The Department uses the guidelines as an alert – for example, an alert to investigate whether the expenses listed in venue operators' schedules of expenses returned to the Department are "*actual, reasonable and necessary*". The Department stresses the amounts in the guidelines are only indicative of the "*upper limits*". During my investigation, the Department released the guidelines with the indicative amounts deleted (the information at issue).

In reliance on section 6(c), the Department submitted the release of the information at issue would prejudice its ability relating to "*the maintenance of the law*", especially regarding expenses deducted from gambling proceeds detailed in the schedules. Its particular concern is that venue operators would deduct significantly higher expenses than is now the case. The schedules each contain 25 items of expenses. Given its limited resources, the Department considers the release of the information at issue would put at substantial risk its ability to ensure that deductions are appropriate.

The complainant submitted that section 6(c)'s examples of "*prejudice [to] the maintenance of the law*" – "*the prevention, investigation, and detection of offences, and the right to a fair trial*" determined the meaning of "*the maintenance of the law*". Accordingly, he submitted the expression "*the maintenance of the law*" was limited to criminal enforcement of the law and was not apt to include regulatory breaches of the law not attracting criminal sanctions. The complainant also contended that many venue operators make reasonable guesstimates of the "*upper limits*".

I formed the opinion that the expression "*the maintenance of the law*" in section 6(c) was not limited to the criminal enforcement of the law. The expression was wide enough to include, in certain circumstances, regulatory breaches of the law – for example, venue operators deducting excessive expenses from gambling proceeds. I accepted the Department's submission that there was a substantial risk that the release of the information at issue would cause venue operators to deduct significantly higher expenses than is now the case. Given the Department's limited resources, I am satisfied that the release of the information would impair its ability to check all the items in venue operators' schedules and thus "*the maintenance of the law*" under the 2003 Act. The guidelines efficacy as an investigatory tool would thus be undermined.

I formed the opinion that the Department was entitled to rely on section 6(c) to withhold the information at issue.

My role

1. As an Ombudsman, I am authorised to investigate and review, on complaint, any decision by which an agency subject to the OIA refuses to make official information available when requested.
2. My role in undertaking an investigation is to form an independent opinion as to whether the request was properly refused.

Background

Request and refusal

3. On 30 June 2010, the complainant wrote to the Department regarding a class 4 gambling venue costs exercise and requested “... *an internal summary document ... setting out what the Department considers reasonable and what will be sent back for a ‘please explain or reconsider’*”.
4. In a letter of 28 July 2010, the Department refused to release the “*internal summary document*” on the basis entitled to withhold that document in reliance on sections 6(c), 9(2)(g)(i) and 9(2)(j) of the OIA.

Information at issue

5. During my investigation, the Department provided the complainant with a copy of the “*internal summary document*” which is entitled ‘Class 4 Venue Costs: Licensing Process’, with a number of deletions made in reliance on section 6(c). The deleted information contains what the Department describes as being the “*upper limits*” of “*actual, reasonable and necessary*” expenses venue licensed venue operators under the 2003 may deduct from the proceeds. In this opinion, I refer to that document as ‘the guidelines’ and the deleted information as ‘the information at issue’.

Complaint

6. In a letter of 6 May 2013, the complainant made a complaint about the Department’s decision to withhold the information at issue. He stated:

“We do not accept that there may be grounds under section 6(c) to withhold this information. We do not accept that it is necessary to withhold the information in order to avoid prejudicing the maintenance of the law. Releasing the information is consistent with what the Department has done in the past. The information that will be disclosed is effectively the average benchmark data. The Department does not expect time and motion studies to

be undertaken at each venue. It is acceptable to look at average benchmarking data. Attached are two benchmarking reports that the Department has published and requested that societies use when completing a venue costs schedule. The information contained in the checklist should be no more than a convenient summary of the benchmarking data as set out in the various published reports. For example, the checklist details the average time taken to complete a hopper refill, cancel credit payment and a jackpot payment. There is no reason to withhold this basic information.

Societies that have claims above the average benchmark will know to double check that the claim is correct before it is submitted. If a society elects to proceed with a claim above the benchmark they will know that they will need to provide additional information to support the claim. This will assist to make the approval process more efficient.

Disclosure of the checklist will not change the legal requirement to ensure that all costs are actual, reasonable and necessary. Disclosure will help to identify claims that may be unreasonable, i.e. outside the benchmark average.

Considerable information has already been disclosed without any concern for prejudicing the maintenance of the law. Take for example, the wages rate information. Attached is a copy of the PowerPoint presentation ... on 9 February 2012. The presentation detailed the various wage rates claimed and categorised them into four bands (\$0 to \$14.99, \$15.00 to \$24.99, \$25 to \$34.99 and \$35+). The information that is withheld in the check sheet is not as detailed as the information that has already been disclosed in presentations to the industry.

Another example is the additional wage cost percentage. This sum is simply the total of the additional wage costs such as ACC levies, holiday pay, KiwiSaver etc. How would the disclosure of this information prejudice the maintenance of the law?

We ask that the full checklist now be disclosed."

7. In the light of my opinion on the application of section 6(c) to the information at issue, it is unnecessary to provide my opinion on whether section 9(2)(g)(i) and 9(2)(j) also apply.

Investigation

8. In a letter of 22 September 2010, this Office notified the complaint.
9. In a letter of 22 September 2010 and in subsequent correspondence, the Department provided to this Office a copy of the information at issue and its reasons for refusing the request.

10. In May 2013, the Department released to the complainant a redacted version of the guidelines.
11. In March 2014 and in subsequent correspondence, the complainant commented on the Department's reasons for withholding the information at issue.
12. In March 2014, after considering the information at issue, the Department's reasons for withholding it and the complainant's comments on those reasons, I formed a provisional opinion on the complaint and provided a copy of it to the complainant for comment.
13. In March 2014 and in subsequent correspondence with this Office, the requester commented on my provisional opinion.
14. I provided to the Department copies of the complainant's correspondence commenting on my provisional opinion.
15. In September 2014 and in subsequent correspondence, the Department commented on my provisional opinion and on the complainant's comments.

Analysis and findings

16. Class 4 venue operators are, under the 2003 Act, licensed to operate gambling machines, such as pokie machines, on the basis *"the net proceeds from the gambling are applied to, or distributed for, authorised purposes"* and the operator receives no commission for doing so and complies with certain rules.¹
17. Section 4 of the 2003 Act defines the expression *"net proceeds"* in part to mean:

"in relation to gambling, it means the turnover of the gambling (less prizes) plus interest or other investment return on that turnover plus any gain above the book value from the sale of gambling assets less –

 - a. *the actual, reasonable, and necessary costs, levies, and taxes incurred in conducting the gambling; and*
 - b. *the actual, reasonable, and necessary costs incurred in complying with whichever of the following apply to the gambling:*
 - i. *this Act or any other relevant Act:*
 - ii. *an operator's licence:*
 - iii. *a venue licence;*

..."

¹ Gambling Act 2003, s30.

18. The 2003 Act requires the “*net proceeds*” of class 4 gambling to be applied to an “*authorised purpose*”. These “*authorised purposes*” are set out in the venue operator licences. In respect of class 4 gambling, the expression “*authorised purpose*” is defined in section 4 of the 2003 Act to mean:

“(a) ...

- i. *a charitable purpose:*
- ii. *a non-commercial purpose that is beneficial to the whole or a section of the community:*
- iii. *promoting, controlling, and conducting race meetings under the Racing Act 2003, including the payment of stakes:”*

...”

19. In 2015, the Gambling Act 2003 was amended to place an obligation on societies to ensure their expenses are actual, reasonable and necessary.² There was no such requirement at the time the information was requested. As the complainant’s request was made before the enactment of that provision, I will consider his complaint in the light of the provisions of the 2003 Act in force at the time of his request.
20. The Department is responsible for determining whether to lay charges against those who commit offences under that Act. To that extent, it has a criminal law enforcement function within the expression “*the maintenance of the law*”. The Department is also charged with administering the 2003 Act – a function which includes ensuring that venue operators deduct from “*net proceeds*” of class 4 gambling only “*actual, reasonable and necessary*” expenses and otherwise comply with their obligations under that Act.
21. In September 2014, the Department explained its use of the guidelines:

“... The document [the complainant] has requested is an internal guidance document for officials not familiar with venue costs – it is, in effect, a data summary. The document is an analysis of data from the Benchmarking Report and the Colmar Brunton Survey, which also suggests how electronic monitoring data can be used to assess costs. Officials use the document in conjunction with the Reference paper and electronic monitoring data as a guide as to when to question individual claims.

*... **The data summary sets out ‘upper limits’ as to what can be considered reasonable for individual claims, but is not determinative.** It is not used for approving schedules. In order for the Department to approve a schedule, we must be satisfied that the society has met their obligation to only incur costs*

² Gambling Act 2003, s53A(c).

which are [actual, reasonable and necessary]. It is up to societies to convince the Department that they have met their obligations.

*... It is possible that some schedules which have been approved by the Department may contain costs which, despite being below the limits suggested by the data summary document and so not questioned by the Department, are still not [actual, reasonable and necessary]. It would not be feasible for the Department's officials to spend time individually checking each of the approximately 25 claims itemised in each schedule to ensure they are [actual, reasonable and necessary] ... **We are only questioning claims which are much too high. Most claims should be well under the levels listed in the document [the complainant] has requested.***

... On occasions, societies who have more than a few venues have argued that claims should be approved uniformly across venues – that is, if a claim for 1.5 hours for cleaning is approved for venue A, the Department should not question a claim for 1.5 hours in this category at any other venue. This approach of arguing over comparative costs rather than basing claims on conditions at the individual venues is not consistent with societies' obligations under the Act, and the Department is actively working to discourage this attitude amongst societies.

... The Department is concerned that releasing all aspects of the document [the complainant] has requested may result in societies using the document to inform the costs schedules they submit for their venues, rather than making case-by-case assessments of [actual, reasonable and necessary] costs as they are obligated to do. The Department feels that it too often encounters a 'what is the most we can pay' attitude towards venue costs and that too few societies remain consistently focussed on their obligation to minimise costs and only make payments which are [actual, reasonable and necessary].

... If societies had access to all aspects of this document, it could result in new de facto limits being applied to venues. That is, there is good reason to suspect that societies would adopt the highest payment possible in each category, based on what will not be questioned by the Department, rather than making their own assessments. This could result in payments of costs which are not [actual, reasonable and necessary], leading to a significant loss of net proceeds to the community. The Department believes that consideration of the net proceeds being provided to the community is the primary public interest consideration in this case as maximising net proceeds to the community is a central organising principle of the Gambling Act 2003." (Emphasis added.)

22. The Department advises that it enters venue operator expenses into a database. If those charges exceed the amounts in the guidelines, the database identifies that is the case.

23. On the basis of information provided by the Department, I accept that departmental officials use the guidelines to assist them in determining whether class 4 venue operator expenses submitted in returns to the Department are “*actual, reasonable and necessary*”, and are thus able to be deducted from gambling proceeds. Significantly, the guidelines set out the “*upper limits*” as to what the Department considers is reasonable for deductible expenses.
24. The Department provided in confidence examples of venue operators exceeding the “*upper limits*”. It was unable to provide me with an example triggering an investigation into whether a venue operator had committed an offence under the 2003 Act, but it submitted that is potentially one of its uses.
25. In the examples provided, the Department did not disclose the “*upper limits*” to venue operators, but indicated the charges were not “*actual, reasonable and necessary*” having regard to the guidelines.
26. I accept the Department’s submission that the guidelines are an investigatory tool to assist it in ascertaining whether venue operator expenses exceed the “*upper limits*” of deductible costs from the “*net proceeds*” of gambling, and ensuring, in accordance with one of the purposes of the 2003 Act, “*that money from gambling benefits the community*”.³ I note the Department advice that, in most cases, the “*actual, reasonable and necessary*” expenses of class 4 gambling venues should be well below the figures included in the guidelines.

Section 6(c) of the OIA

27. Section 6(c) provides good reason to withhold information where making it available would be likely:

“... to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial.”

28. In assessing whether section 6(c) applies to information, there are two important considerations which must be borne in mind. First, before I can form an opinion that section 6(c) applies to information, I must be satisfied that making available the information “*would be likely*” to prejudice the maintenance of the law. The Court of Appeal has interpreted the phrase “*would be likely*” to mean “*a serious or real or substantial risk to a protected interest, a risk that might well eventuate*”.⁴ Secondly, unlike the reasons for refusal set out in section 9(2) of the OIA, there is no statutory requirement to consider any countervailing public interest considerations favouring disclosure of the information at issue. By enacting section 6 of the OIA, Parliament has identified that there are certain considerations which, so long as the requirements of section 6 are met, require information to be withheld in the wider public interest.

³ Gambling Act 2003, s3(g).

⁴ *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, 391.

Application of section 6(c) of the information at issue

29. It is well settled that a statutory body exercising a discretion may have guidelines in appropriate cases to assist them in exercising their discretions. However, those guidelines must not be rigidly applied. Those entrusted with statutory discretions must not allow a fixed rule of policy to displace personal judgement:

“Decision-makers may adopt policies and guidelines but not immutable rules admitting of no exceptions.”⁵

30. The complainant has not provided any evidence that the Department rigidly applies the guidelines.

31. Former Ombudsman, Dr David McGee, interpreted section 6(c) as follows:⁶

“... In my view section 6(c) is confined to prejudice related to a law enforcement activity, and does not extend to prejudice to the carrying out of statutory functions of a more generic nature.

The wording of the paragraph – ‘the prevention, investigation and detection of offences and the right to a fair trial’ – strongly indicates that the nature of the ‘maintenance of the law’ envisaged by the section is that related to law enforcement and the justice system.

The context in which [section] 6(c) occurs in the Act bears out this interpretation. The other section 6 withholding provisions provide for material to be withheld where the resultant prejudice is of a particularly serious nature, such as danger to the security and defence of New Zealand (section 6(a)), danger to the safety of any person (section 6(d)) and serious damage to the economy of New Zealand (section 6(e)). Unlike the section 9 interests, which are subject to a public interest override, the consequences of release of materials covered by the section 6 interests are regarded as so serious that they amount to conclusive reasons in themselves for withholding the information.

I accept that section 6(c) is phrased rather loosely (‘maintenance of the law’) and thus ambiguously. I accept too that the reference to ‘the prevention, investigation and detection of offences’ certainly, and possibly also the reference to ‘the right to a fair trial’, are illustrative and not comprehensive examples of the paragraph’s scope. Nevertheless, I consider that the value being protected by section 6(c) is the carrying out of criminal law enforcement functions by public sector agencies, principally, but not exclusively, the Police.

⁵ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th Edition) (2014) at para 23.2.2 (p 964).

⁶ Case No 177569; opinion of Ombudsman Dr David McGee, 9 August 2010.

In particular, I do not accept that section 6(c) is engaged merely because a statutory process is being followed or a statutory duty is being carried out. In these circumstances one is observing or conforming to the law (something that we are all obliged to do) rather than maintaining it in the sense that (in my opinion) is required for section 6(c) to be engaged. Any other approach would result in section 6(c)'s application extending beyond the individually expressed good reasons for withholding information that are set out in section 9(2) and which are subject to a public interest withholding test. I do not accept that this is what was intended in the enactment of section 6(c). Such a wide application would be at odds not only with section 9(2) but with the other grounds for withholding contained in section 6."

32. Dr McGee in another opinion describes section 6(c)'s ambit as follows:⁷

"Section 6(c) is primarily a 'law enforcement' provision. The elucidatory words 'including the prevention, investigation and detection of offences', make this reasonably clear. That it has an application to matters before, or liable to come before, a court, is also made clear by the words 'the right to a fair trial'.

*The exact extent to which section 6(c) applies beyond these circumstances has never been definitively defined. **However (leaving aside legal proceedings), in my view the information to which it applies must have some connection with a process of enforcing the law by ensuring compliance or investigating non-compliance with legal rules or standards.** Further, the information in issue must be related to enforcing the law in such a way that its release would prejudice enforcement. (A further consideration would then be how 'likely' that prejudice would be to result from the release of the information.)"* (Emphasis added.)

33. Former Chief Ombudsman Sir John Robertson reflected on the approach to the application of section 6(c) in the light of the decision in *Commissioner of Police v Ombudsman*:⁸

"The concept has many connotations and applications which the Courts and others have been reluctant to define exhaustively. The Police advanced the view that the term 'maintenance of the law' in the Official Information Act must be viewed in the light of contemporary standards and that it would not be appropriate to attempt to offer a definition. I agreed with that assessment which reflected the experience with other parts of the Act where a case by case approach to withholding has permitted gradual development towards the interpretation of particular sections."⁹

⁷ W60137, opinion of Ombudsman Dr David McGee (29 October 2008).

⁸ See footnote 4.

⁹ Ombudsmen's 9th Compendium of Case Notes (July 1989) at p 109.

34. In a letter of 29 May 2015, the complainant defined the scope of section 6(c) as follows:

“8. Section 6(c) does not provide that information should be withheld if there is a possibility that someone may use the information to breach a rule or regulation. Section 6(c) provides that the information may be withheld if it would be likely to prejudice the maintenance of the law. The reference to the term ‘maintenance’ must be interpreted having regard to the following phrases ‘including the prevention, investigation, and detection of offences, and the right to a fair trial’. The ejusdem generis rule applies i.e. where general words follow enumerations of particular classes or persons or things, the general words shall be construed as applicable only to persons or things of the same general nature or kind as those enumerated.”

35. The complainant’s reliance on the ejusdem generis rule to assist in defining the word ‘including’ in section 6(c) is not appropriate. With reference to the use of that rule of interpretation with regard to the expression “not limited to”, the Court of Appeal stated:¹⁰:

“... the words ‘not limited to’ do not provided a very auspicious context for an argument that seeks a limited interpretation of a generic phrase.”

Similarly, the use of the word “including” in section 6(c) preceding the list of examples within the expression “the maintenance of the law”, indicates those examples do not define exhaustively that expression contrary to the complainant’s submission.

36. In *Commissioner of Police v Ombudsman*, the then Solicitor-General submitted on behalf of the Police that section 6(c) did not apply to the criminal law. In response to that submission, McMullin J stated:¹¹

“Some may question whether cl 6(c) of the Bill was intended to relate to criminal proceedings. But the plain words of cl 6(c) do not suggest that this was the case. The words in the Bill ‘including the investigation and detection of offences’ can refer to nothing if they do not refer to the workings of the criminal law. In fact, they were obviously written with criminal proceedings in mind. But any doubts there may be about that question were removed with the inclusion in the Act, of the further words ‘and the right to a fair trial’. These last words have as much, if not more, application to the criminal law than the civil law. Therefore, the processes of criminal discovery fall squarely within the words of s6(c) of the Official Information Act, however unsuitable an instrument it may be. That provision cannot be read down because of the

¹⁰ *Sky City Auckland Limited and another v The Gambling Commission* [2007] NZCA 407 at para [19]. The Court there was discussing the expression “limited to” in s12(2) of the Gambling Act 2003, which preceded a number of examples of “[a]n increase in the opportunities for gambling”..

¹¹ See footnote 4 at p 405.

practical difficulties which a case by case approach to each request for personal information will involve.”

37. McMullin J’s observations indicate the ambit of section 6(c) is not restricted to those matters falling within the expressions following the word *“including”*: ‘the tail does not wag the dog’. In other words, section 6(c) is not limited to breaches of the law attracting criminal sanctions.

38. The complainant referred me to the decisions in three recent High Court cases¹² concerning the appropriate interpretation to be given to section 106 of the 2003 Act which, as relevant, reads:

“(1) A corporate society must apply or distribute the net proceeds from class 4 gambling only to or for an authorised purpose specified in the corporate society’s licence.

(1A) To avoid doubt, the requirement in subsection (1) for a corporate society to apply or distribute the net proceeds from class 4 gambling is subject to the restriction in section 52A relating to the circumstances in which a corporate society may apply, rather than distribute, those net proceeds.

(2) A corporate society that fails to comply with subsection (1) commits an offence and is liable on conviction to a fine not exceeding \$10,000.”

39. The complainant relied on the High Court decisions in support of his submission that the incurring of expenditure which was not *“actual, reasonable and necessary”* is not an offence under section 106 and the High Court had rejected the Department’s submission to the contrary. With reference to the Department’s interpretation of section 106, France J stated:¹³

“[134] In brief the Secretary contends that any expenditure that is above what is ‘actual reasonable and necessary’ constitutes a breach of s 106. I do not accept that. Section 106 does not prevent the incurring of expenditure which exceeds the actual necessary and reasonable costs of the gambling operation. As discussed net proceeds is a label that can only be attached after the ‘reasonable and necessary’ analysis has been done. What s 106 does control is where net proceeds may be distributed – only to an authorised purpose. Authorised purpose is defined in s 4, and is the term used to cover the permissible recipients of gambling proceeds, i.e. life-saving, sports clubs, community groups etc. The particular authorised purposes available to a licence holder are recorded as part of the class 4 licence.

¹² *The Trillian Trust v The Secretary for Internal Affairs* [2015] NZHC 195 (17 February 2015); *Pub Charity v The Gambling Commission and The Secretary for Internal Affairs* [2012] NZHC 3530 (19 December 2012); and *The Secretary for Internal Affairs v Administration Management Services Limited* [2013] NZHC 3498 (19 December 2013).

¹³ *Ibid*, *The Secretary for Internal Affairs v Administration Management Services Limited*.

“[135] As has been pointed out, s 106 would otherwise be draconian to an unexpected extent. If any legitimate expense contained a degree of excess, then if the Secretary’s interpretation were right the consequence would be immediate exposure to potential cancellation of all venue licences and the class 4 operators’ licence, as well as a criminal conviction and exposure to a fine of \$10,000. These sanctions make perfect sense if the targeted conduct is seen as illegitimate distributions of community funds to unauthorised recipients. They make no sense if the only error is a miscalculation of whether a legitimate expense was also reasonable in its quantum. It follows that this specific challenge would not have succeeded.” (Emphasis added.)

40. In his letter of 28 March 2014, with reference to the High Court decisions, the complainant stated:

“9. In summary, if a society was to make a payment that is not [actual, reasonable and necessary costs], this is not a formal breach of the Gambling Act 2003, but is an administrative matter that the Department can take into account under section 52 when considering whether to renew a class 4 operator’s licence. If a society was incurring costs that are not [actual, reasonable and necessary], the Department would decline to renew its licence due to a failure to maximise the net proceeds from the class 4 gambling and to minimise the operating costs of that gambling.”

41. The complainant’s opinion on the effect of the High Court decisions is perhaps too restrictive. For example, if a society makes a regular practice of deducting from “net proceeds” expenses significantly greater than “actual, reasonable and necessary” expenses, arguably, the society may be applying the “net proceeds” to other than “an authorised purpose”. However, I accept that, in terms of the High Court’s interpretation of section 106 of the 2003 Act, the mere deduction of an expense from the “net proceeds” that is not “actual, reasonable and necessary” is insufficient to constitute an offence under the 2003 Act.

42. The Secretary of the Department must refuse to grant a class 4 operator’s licence unless the Secretary is satisfied that the applicant satisfies the criteria in Section 52(1). That provision in part reads:

“(a) the gambling to which the application relates is class 4 gambling; and

(b) the applicant’s purpose in conducting class 4 gambling is to raise money for authorised purposes; and

...

(d) the applicant will maximise the net proceeds from the class 4 gambling and minimise the operating costs of that gambling; and

- (e) *the net proceeds from the class 4 gambling will be applied to or distributed for authorised purposes; and*
- (f) *the applicant is able to comply with applicable regulatory requirements; and*
- ...
- (i) *there are no factors that are likely to detract from achieving the purpose of this Act; and*
- ..."

43. Under section 58 of the 2003 Act, the Secretary may suspend or cancel a class 4 operator's licence if the operator is not complying with section 52.
44. If the exceeding of the "upper limits" in the guidelines of "actual, reasonable and necessary" expenses triggers a departmental investigation into whether the "net proceeds" of class 4 gambling are applied to "authorised purposes", the use of the guidelines for that purpose is clearly within the expressions "investigation, and detection of offences" in section 6(c). In *Commissioner of Police v Ombudsman*, the Court of Appeal stated that "Police investigation methods"¹⁴ could be appropriately withheld in certain circumstances under section 6(c).
45. But does the expression "the maintenance of the law" include an investigatory tool, such as the guidelines, used by the Department to assist it in the investigation of statutory or regulatory breaches by venue operators not attracting criminal sanctions?

Section 27(1)(c) Privacy Act 1993

46. Section 27(1)(c) provides that an agency may refuse to disclose any personal information it holds on the same basis as that provided in section 6(c).
47. With reference to the expression the expression "the maintenance of the law" in section 27(1)(c), the High Court recently stated it is "certainly is not confined to criminal law enforcement".¹⁵
48. Privacy Law & Practice in New Zealand¹⁶ provides examples of the Privacy Commissioner's applying the withholding ground in section 27(1)(c) "beyond the sphere of criminal proceedings and beyond public sector agencies". The approach of former Privacy Commissioners in those examples appears to be consistent with an interpretation of the expression "the maintenance of the law" as being not limited to criminal law enforcement.

¹⁴ See footnote 4 above at p 384, for example.

¹⁵ *Geary v New Zealand Psychologists Board* [2012] 2 NZLR 414, 428 at para [62].

¹⁶ Paul Roth (editor), loose leaf edition, LexisNexis, Wellington, para [PVA 27.7(c)].

49. There is force in a comment of the Complaints Review Tribunal that a too expansive interpretation of the expression “*the maintenance of the law*” in section 27(1)(c) may potentially convert that withholding ground “into an amorphous ‘catch-all’ provision”.¹⁷
50. I prefer an interpretation of the expression “*the maintenance of the law*” in section 6(c) which applies, albeit in limited circumstances, beyond the sphere of criminal enforcement proceedings. In my opinion, that expression also applies to the actions taken by the Department to ensure that venue operators comply with their obligation to charge only “*actual, reasonable and necessary*” expenses and the matters referred to in the part of section 52(1) referred to above.
51. In his letter of 29 May 2015, the complainant states:
- “3. ... we do not agree that the disclosure of the document would result in costs being incurred that are not actual, reasonable and necessary... .. Such a suggestion is premised on the assumption that gaming society officers would suddenly ignore their fiduciary duties and place their career in jeopardy (due to the risk of being deemed to be an unsuitable key person) and place their society’s licence in jeopardy by now starting to make venue payment claims that are false. In light of the duties that society officers hold, and the risk of administrative action against both themselves and their society, there is not a serious or real or substantial risk that a breach of the law would occur if the full document was disclosed.
4. Further, most of the information that is not disclosed (the upper threshold limits) is already known to society staff. Over the last six years society officers in New Zealand have submitted thousands of venue costs schedules for approval. It quickly becomes apparent by looking at the claims that are not questioned, and the claims that are questioned, where the threshold boundaries lie.”
52. I am not persuaded that the complainant’s submission that “*society officers*” may be able to make a reasonable guesstimate of the “*upper limits*” of the amounts indicated to be acceptable expenses in the guidelines justifies the release of the information at issue.
53. It is not the fact that there is some risk that venue operators may charge significantly higher amounts for “*actual, reasonable and necessary*” expenses, as the Department submits, that has persuaded me that it is entitled to rely on section 6(c) to withhold the information at issue. That risk is insufficient on its own to justify relying on section 6(c). Rather, it is the “*serious or real or substantial risk to a protected interest, a risk that might well eventuate*”,¹⁸ the “*the maintenance of the law*”, that justifies the Department’s reliance on section 6(c) to withhold the information at issue.

¹⁷ *O v N* (No 2) (1996) 3 HRNZ 636, 644.

¹⁸ See footnote 4.

54. I accept the Department's submission that it does not have the resources to check each of the 25 items in the schedule of expenses deducted from gambling proceeds which venue operators must submit to the Department. The release of the guidelines and the substantial risk of venue operators deducting significantly greater expenses from gambling proceeds would impair the Department's ability to ensure venue operators deducted only "*actual, reasonable and necessary*" expenses.
55. I am satisfied that, if the information at issue is released, there would be a substantial risk to the Department's ability to ensure the "*the maintenance of the law*" under the 2003 Act at least in the following respects:
- a. the use of the guidelines as an alert as to whether venue operators are charging in excess of "*actual, reasonable and necessary*" expenses;
 - b. the use of the guidelines by the Department as an alert as to whether venue operators are applying the "*net proceeds*" of class 4 gambling to "*authorised purposes*"; and
 - c. the potential use by the Department of the guidelines as a trigger to investigating whether venue operator expenses are so excessive as to attract the sanction of the criminal law, for example, in respect of the misapplication of gambling proceeds to unauthorised purposes.
56. Accordingly, I formed the opinion that the Department was entitled to rely on section 6(c) to withhold the information at issue.

Ombudsman's opinion

57. For the reasons set out above, I am of the opinion that the Department was entitled to withhold the information at issue in reliance on section 6(c) of the OIA.

Dame Beverley Wakem DNZM, CBE
Chief Ombudsman

Appendix 1. Appendix: 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.

6. Conclusive reasons for withholding official information

Good reason for withholding official information exists, for the purpose of section 5, if the making available of that information would be likely—

- (a) to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or*
- (b) to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by—*
 - (i) the Government of any other country or any agency of such a Government; or*
 - (ii) any international organisation; or*

- (c) *to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or*
- (d) *to endanger the safety of any person; or*
- (e) *to damage seriously the economy of New Zealand by disclosing prematurely decisions to change or continue government economic or financial policies relating to—*
 - (i) *exchange rates or the control of overseas exchange transactions:*
 - (ii) *the regulation of banking or credit:*
 - (iii) *taxation:*
 - (iv) *the stability, control, and adjustment of prices of goods and services, rents, and other costs, and rates of wages, salaries, and other incomes:*
 - (v) *the borrowing of money by the Government of New Zealand:*
 - (vi) *the entering into of overseas trade agreements.*

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—*
 - ...
 - (g) *maintain the effective conduct of public affairs through—*
 - (i) *the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty; 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*
 - ...