



26 May 2020

James Lohead-Macmillan
fyi-request-12742-fd599318@requests.fyi.org.nz

Dear Mr Lohead-Macmillan

Official Information Request
Our Ref: SSCOIA 2020-0040

I refer to your official information request received on 30 April 2020 where you asked:

"Under the Official Information Act, I wish to request: All information held, including Legal Advice. I believe Legal Privilege may have been waived under section 66 of the evidence act, as major parts may have been disclosed by the Ministry of Education: (All documents in full please).

- 1) *"Free Kindergarten Associations" are State Sector Employers*
- 2) *"Free Kindergarten Teachers" are State Sector Employees.*
- 3) *Can a Ministry be a State Sector Employer of an independent Charity.*
- 4) *Where Free Kindergarten's sit within your list of State Sector Employers"*

Please find below our response to the specific questions you have asked, for ease of reference we have listed each question and our response to each directly underneath. It is important to note that our response to your questions are based solely on the legal situation as set out in the State Sector Act 1988 and its precursor legislation.

Are free kindergarten associations State Sector employers?

Free kindergarten associations are not automatically classed as State Sector employers. If a free kindergarten association both controls a free kindergarten ([as defined in section 348 of the Education Act 1989](#)) and employs one or more registered teachers to serve in that capacity in a kindergarten(s), then the free kindergarten association is the employer of one or more employees in the education service. Those employees would then be part of the State services.

Are free kindergarten teachers State Sector employees?

Free kindergarten teachers are not automatically classed as State Sector employees. If a registered teacher is employed to teach in a kindergarten or kindergartens by a free kindergarten association, that controls a free kindergarten as defined in section 348 of the Education Act, that teacher is an employee in the education service and part of the State services.

Can a Ministry be a State Sector employer of an independent charity?

A Ministry cannot be a State Sector employer of an independent charity. Kindergarten teachers who are part of the education service and the State services, as defined in the State Sector Act 1988, are not employees of the Ministry of Education. Their employer is the free kindergarten association (generally established formally as an incorporated society) that employs them.

Where do free kindergarten's sit within the list of State Sector employers?

Found at this link are the [organisations](#) that make up the State services. A free kindergarten as an organisation is not part of the State services. Some of their employees are part of the State services by virtue of their employment relationship, not by virtue of organisational form.

Background information

From as early as the State Services Remuneration and Conditions of Employment Act 1969, the “State services” (which it was referred to in the legislation, rather than the State sector) have included the Education service. At that time the Director-General of Education was the “employing authority” for the purpose of prescribing remuneration and conditions of employment in relation to the Education service.

Under the Act, the Education service was defined to include “employment in any teaching position under Parts III to VIII of the Education Act 1964”. In Part III of that Act, section 70 provided for the Governor-General to make regulations for a range of matters, including “(d) The conditions of employment of teachers employed in kindergartens and other institutions providing pre-school education”.

The State Services Remuneration and Conditions of Employment Act 1969 was repealed and replaced by the State Services Conditions of Employment Act 1977. The definition of the “State services” continued to include the “Education service”. The definition of the Education service was amended explicitly to “(b) includes employment – (i) as a teacher in a free kindergarten”.

The State Services Remuneration and Conditions of Employment Act 1977 was repealed and replaced by the State Sector Act 1988. When enacted, the State services continued to include the Education service, which continued to include: “(b) employment (i) as a teacher in a free kindergarten”. The big shift was that the State Services Commission, rather than the Director-General of Education, was responsible for negotiations under the Labour Relations Act 1987 for the conditions of employment for all employees of the Education service.

The State Sector Amendment Act 1989 made several amendments to the definition of the Education service, including a technical change to include “service in the employment of – (c) any kindergarten within the meaning of the Education Act 1964”.

The State Sector Amendment Act 1997 was very significant. It amended the definition of the Education service to repeal paragraph (c). Service in the employment of “(c) any kindergarten within the meaning of the Education Act 1964” was removed from the Education service. Consequently, the employees previously covered by the definition were no longer part of the State services.

The Employment Relations Act 2000 (ERA), which came into force on 2 October 2000, reinstated that group of employees into the Education service. The ERA inserted a new definition of the Education service into the State Sector Act that included “(b) service as a registered teacher in the employment of any free kindergarten association that controls a free kindergarten within the meaning of section 315(1) of the Education Act 1989”.

Consequently, the teachers covered by this definition are part of the State services. Section 348 is now the correct reference in the Education Act 1989. Under section 22 of the Interpretation Act 1999, the State Sector Act (which still refers to a replaced section 120 of the Education Act) should be read as referring to section 348 of the Education Act.

In summary, registered teachers employed in that capacity by a free kindergarten association are part of the State services, by virtue of being part of the Education service which is included in the State services. This has been the situation in law for at least half a century, apart from May 1997 to October 2000.

Our response

The State Services Commission (SSC) does not hold any documents that fall within scope of your request. The SSC administers legislation, however background policy in relation to kindergartens is a matter for the Ministry of Education. As provided for under the Official Information Act, when the information requested is not held by the department but is believed to be held by another department, under section 14 of the OIA, we should transfer your request to that department.

However, in your request to us, you advised that you did not want us to transfer your request to the Ministry of Education, therefore we are refusing that part of your request under section 18(e) on the grounds that the information does not exist at SSC.

If you wish to discuss this decision with us, please feel free to contact Ministerial.Services@ssc.govt.nz.

You have the right to seek an investigation and review by the Ombudsman of this decision. Information about how to make a complaint is available at www.ombudsman.parliament.nz or freephone 0800 802 602.

Please note that we intend to publish this letter (with your personal details removed) on the State Services Commission's website.

Yours sincerely



Nicky Dirks
Managing Principal – Ministerial Services
State Services Commission