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Spencer Woodman

By email: fyi-request-25513-9d5e8104@requests.fyi.org.nz
Ref: H2024035220

Tēnā koe Spencer

Response to your request for official information

Thank you for your request under the Official Information Act 1982 (the Act) to the Ministry of Health | Manatū Hauora (the Ministry) on 25 January 2024 for information regarding vaping regulations.

On 22 February 2024, the Ministry extended the due date for responding to your request pursuant to section 15A(1)(a) of the Act, as the request necessitates a search through a large quantity of information.

To avoid any delays in communicating a decision on your request, the Ministry provided you with a partial response on 21 March 2024 to parts of your request, namely question 1(c) and 2(a)-(h).

The remainder of your request is responded to below:

“1. Who was the decision maker, and who or which company provided legal advice surrounding the interpretation of 50mg nicotine strength that resulted the in Ministry of Health losing a court case and costing the tax payers \$249,267.50.

b. Who was the decision maker that made the call to refuse a meeting with the affected vape retailer which would have saved the tax payers \$249,267.50?

d. What is the total cost for this legal battle to the tax payer? Including compensation to the other party.”

Cabinet is the decision maker for all government policies.

Legal advice for the Smokefree Environments and Regulated Products Act and its Regulations came from several sources including but not limited to: Health Legal, Crown Law, and private law firms.

All government legislation and regulations are drafted by the Parliamentary Counsel Office who may provide legal advice in relation to drafting matters.

Your questions mischaracterise the proceedings, and financial aspects of the case brought against the Ministry. ALT New Zealand Ltd, VEC Ltd and Myriad Pharmaceuticals Ltd (together, the applicants) brought proceedings against the Director-General of Health in March 2023

regarding the interpretation of clause 15 of schedule 5, of the Smokefree Environments and Regulated Products Regulations 2021. At the time, clause 15 read “The strength of nicotine salt in a vaping substance must not exceed 50 mg/mL”. At issue was whether clause 15 regulated the strength of nicotine in nicotine salt (as the applicants contended) or of the nicotine salt itself.

The amount of \$249,267.50 was paid to Crown Law by the Ministry between 27 March 2023 and 7 November 2023, for legal services rendered in relation to defending proceedings brought against it by the applicants. This amount was not a payment for costs awarded by the courts, no costs have been decided.

The Ministry accepted the ambiguity in clause 15 and conceded the point on statutory interpretation. The Ministry took steps to clarify this ambiguity for stakeholders by making a legislative amendment to clause 15. The Ministry, through counsel, notified the court of this intention via Memorandum of Counsel on 23 June 2023. The focus of the proceedings then changed to a substantive action for judicial review of the amended regulation and the lawfulness of the amendment process. The high court found in favour of the Ministry’s amended regulation on 21 December 2023.

You can read the full decision here <https://www.courtsofnz.govt.nz/cases/alt-new-zealand-ltd-v-attorney-general->

The applicants have appealed this decision, and this will be heard before the Court of Appeal when a date becomes available.

“3. It was previously communicated by the Ministry of Health that vape machines were required to have removable batteries. However, on January 24, 2024, there was a shift in the interpretation of the legislation, indicating that merely having removable battery packs was no longer sufficient, and the batteries themselves must now be removable.

a. The specific details and reasoning behind the initial requirement for vape machines to have removable batteries.”

The information you have requested is publicly available at the following links:

Removable batteries in vaping devices: www.health.govt.nz/our-work/regulation-health-and-disability-system/vaping-herbal-smoking-and-smokeless-tobacco-products-regulation/information-manufacturers-and-importers-notifiers/removable-batteries-vaping-devices

Cabinet and consultation material: Smokefree environments and the smoked tobacco regulatory regime:

www.health.govt.nz/about-ministry/information-releases/release-ministerial-decision-making-documents/cabinet-and-consultation-material-smokefree-environments-and-smoked-tobacco-regulatory-regime

b. The reasons for the Ministry of Health's change in interpretation, specifically necessitating the removal of the batteries themselves.

c. Any studies, assessments, or expert opinions considered in making this interpretation adjustment.

d. Any consultations or feedback sought from industry experts, or the public regarding this change.”

We understand these questions to be on the understanding that there has been a policy or interpretation change by the Ministry on removable batteries between when the requirements

were introduced and 24 January 2024. There hasn't been a policy or interpretation change on removable batteries, the Ministry has provided clear guidance to the sector on what meets the definition of a removable battery under the regulations. We cannot supply the documents you've requested in questions 3(b), 3(c), and 3(d), section 18(e) of the Act, as the information requested does not exist.

"4. Please provide all relevant documentation, reports, or guidelines that outline the responsibilities and roles of individuals or entities involved in the legislative process."

On 5 and 11 March 2024, the Ministry asked you to clarify which legislative process this part of your request is referring to.

As we have not received a response from you to date and the information requested is not made with due particularity required by section 12, the Ministry is unable to respond to your request confidently or comprehensively. However, we remain willing and engaged to respond on any refined request you may wish to make.

I trust this information fulfils your request. If you wish to discuss any aspect of your request with us, including this decision, please feel free to contact the OIA Services Team on: oiagr@health.govt.nz.

Under section 28(3) of the Act, you have the right to ask the Ombudsman to review any decisions made under this request. The Ombudsman may be contacted by email at: info@ombudsman.parliament.nz or by calling 0800 802 602.

Please note that this response, with your personal details removed, may be published on the Manatū Hauora website at: www.health.govt.nz/about-ministry/information-releases/responses-official-information-act-requests.

Nāku noa, nā



Dr Andrew Old
Deputy Director-General
Public Health Agency | Te Pou Hauora Tūmatanui