

8 December 2021

Dear

On 2 October 2021, you emailed the Ministry of Social Development (the Ministry) requesting, under the Official Information Act 1982 (the Act), the following information:

1. *What legal authority does MSD have to further add to the definition of "ordinarily resident"*
2. *What are the rules MSD uses for defining "ordinarily resident"*
3. *Minutes of any policy meeting or reports relating to the creation of MSD policy on defining ordinarily resident*
4. *How many applications for Superannuation including portability have been declined on the basis of not being "ordinarily resident"*
5. *How many of those declined applications have been overturned on*
 - *appeal handled by MSD Review of Decision Team*
 - *any other legal authority including the NZ Judicial system*

On 8 October 2021, the Ministry contacted you to refine question three, four and five of your request. In response, you refined your request to the following:

- *Minutes or reports relating to policy since the rewrite of the Superannuation Act 2001. Specifically, Ordinarily Resident*
- *Minutes or reports relating to the rewrite of the Social Security 2018 Specifically, Ordinarily resident*

On 8 October 2021, the Ministry also provided you with the publicly available legislation and information from the Ministry's website in response to parts one and two of your request. These links are copied again for your reference:

www.workandincome.govt.nz/pensions/travelling-or-moving/moving-to-nz/residency-requirements-for-new-zealand-benefits-and-pensions.html#null

www.legislation.govt.nz/act/public/2018/0032/latest/DLM6783138.html

As already mentioned to you in a letter from Hon Carmel Sepuloni, the Minister for Social Development and Employment, on 17 November 2021, the Ministry takes a

flexible approach to defining “ordinarily resident” in order to better consider a wide range of people’s differing circumstances.

A person is generally considered ordinarily resident in the country where they usually live. For the Ministry to consider someone ordinarily resident in New Zealand, they would need to be legally residing in New Zealand, with their day-to-day life centred here, a home they usually reside in, and the intention to remain in New Zealand on a long-term basis.

When determining whether a person is ordinarily resident during a period of absence from New Zealand, the Ministry considers factors such as the nature and length of the absence from New Zealand, and the person’s intent towards New Zealand during their absence.

Where a person has a temporary absence from New Zealand, for example going on a two-week holiday overseas and then returning to New Zealand on a permanent basis once the holiday is completed, the absence is clearly of a temporary nature as it lasted for a limited time. In such instances, the person would be considered as being ordinarily resident in New Zealand during their absence.

During longer periods of absence, the nature of the absence along with the length of absence and the person’s intention toward New Zealand during the absence all need to be considered. For example, if a person was intending to travel on holiday to a number of overseas countries over the course of one year and then return permanently to New Zealand, the absence could be considered temporary.

Whether a person continues to be ordinarily resident in New Zealand becomes less clear where the absence is for a longer period. If someone is absent from New Zealand for 10 years, for example, this suggests that the person may have a settled purpose in another country and their day-to-day life is occurring there.

Additionally, there are a number of court decisions and Social Security Appeal Authority cases which relate to the interpretation of “ordinarily resident” as defined in the legislation (i.e. case law) which the Ministry may rely on to inform its understanding of “ordinarily resident”. A key decision in this regard is the Court of Appeal’s decision in *Chief Executive of the Ministry of Social Development v Greenfield* [2014] NZCA 611). You can find further information about this case at the following link: www.courtsofnz.govt.nz/cases/dawn-lorraine-greenfield-v-chief-executive-of-the-ministry-of-social-development-1.

In regards to part three of your request which is asking for minutes or reports relating to policy since the rewrite of the Superannuation Act 2001 and the Social Security Act 2018, specifically relating to ‘ordinarily resident’, I can inform you of the following: There was initial work undertaken during the time of the Social Security Appeal Authority case (referenced above). It is important to note, however, that this policy work was not considering changing the definitions or the intent behind either of these terms – it looked into clarifying and confirming MSD’s existing practice and to further distinguish differences between the word ‘resident’ and ‘ordinarily resident’ in legislation. A decision was made however that the Ministry would rely on the outcome of this case to guide its practice, before undertaking further policy work. With the Supreme Court subsequently ruling in the Ministry’s favour, no further action was taken as it confirmed the Ministry’s existing practice and the case is used to guide our operational decision making as precedence.

In response to your request, please find the following documents enclosed, which relate to the initial work undertaken by the Ministry during the time of this Social Security Appeal Authority case:

- *Report – Social Security Act rewrite: Clarifying “resident” and “ordinarily resident” – dated 21 July 2015*
- *Email – FW: PASS minutes re SSA rewrite & definitions - dated 5 August 2015*

You will note that the names and contact details of some individuals are withheld under section 9(2)(a) of the Act in order to protect the privacy of natural persons. The need to protect the privacy of these individuals outweighs any public interest in this information.

Part four and five of your request, for information relating to New Zealand Superannuation (NZS) and portability applications that have been declined on the basis of not being "ordinarily resident", and the subsequent Review of Decisions as a result of this, is refused under section 18(f) of the Act as it would require substantial manual collation. This is because this information is not part of the Ministry's regular reporting, and the information requested would be held in notes on individual case files. In order to provide you with this information, Ministry staff would have to manually review thousands of files. The greater public interest is in the effective and efficient administration of the public service.

I have considered whether the Ministry would be able to respond to your request given extra time, or the ability to charge for the information requested. I have concluded that, in either case, the Ministry's ability to undertake its work would still be prejudiced.

The Ministry is only able to report on the number of NZS declines there have been due to not meeting residential qualifications. Not being 'ordinarily resident' is one of the criteria of not meeting residential qualifications.

The principles and purposes of the Official Information Act 1982 under which you made your request are:

- to create greater openness and transparency about the plans, work and activities of the Government
- to increase the ability of the public to participate in the making and administration of our laws and policies
- to lead to greater accountability in the conduct of public affairs.

This Ministry fully supports those principles and purposes. The Ministry therefore intends to make the information contained in this letter and any attached documents available to the wider public. The Ministry will do this by publishing this letter on the Ministry of Social Development's website. Your personal details will be deleted and the Ministry will not publish any information that would identify you as the person who requested the information.

If you wish to discuss this response with us, please feel free to contact OIA_Requests@msd.govt.nz.

If you are not satisfied with this response regarding the definition of ordinarily resident, you have the right to seek an investigation and review by the Ombudsman. Information about how to make a complaint is available at www.ombudsman.parliament.nz or 0800 802 602.

Yours sincerely

A handwritten signature in black ink that reads "Harry J Fenton". The signature is written in a cursive style with a large, stylized 'H' and 'F'.

Harry Fenton
Policy Manager
Seniors Policy