

Request for MOTAT organisational review

Legislation	Local Government Official Information and Meetings Act, ss 7(2)(a), 7(2)(c), 7(2)(f)(i) and 7(2)(j)
Agency	Museum of Transport and Technology
Ombudsman	Dame Beverley Wakem
Case number(s)	346787
Date	October 2015

Summary

The Board of the Museum of Transport and Technology (MOTAT) refused a request under the Local Government Official Information and Meetings Act (LGOIMA) for a copy of the MOTAT Strategic Review Report (the report). In refusing the request, MOTAT relied on sections 7(2)(a), 7(2)(c), 7(2)(f)(i) and 7(2)(j) of the LGOIMA.

The Chief Ombudsman formed the provisional opinion that, whilst some of the information at issue could be withheld, no good reason existed to justify withholding parts of the report, in particular the executive summary and recommendations. Her provisional opinion illustrates the Ombudsman's approach to the application of sections 7(2)(a), 7(2)(c), 7(2)(f)(i) and 7(2)(j) of the LGOIMA.

Having considered the Chief Ombudsman's provisional opinion, MOTAT made available a redacted version of the executive summary and recommendations. This resolved the complaint and the Chief Ombudsman discontinued her investigation.

Background

1. After a troubled period for MOTAT, two high-level inquiries were carried out into the museum, including one by Dame Cheryl Sotheran and Tim Walker. MOTAT refused a request for access to the resulting report, relying on sections 7(2)(a), 7(2)(c), 7(2)(f), and 7(2)(j) of the LGOIMA.

2. The requester sought an investigation and review of this decision, stating in his letter of complaint:

There is significant public interest in the findings of the report, in particular current employees and former employees, such as myself, had submitted information, whether used or not used, during gathering and compiling of the report.

Investigation

3. The Chief Ombudsman notified MOTAT of the complaint and invited reconsideration of the decision, given the extent of information that had come into in the public domain as a result of an article in the New Zealand Herald.
4. MOTAT maintained the decision to withhold that information, stating:

The Report was commissioned by the Board entirely on a confidential basis. All participants participated in the review on the basis that the information they provided was to be kept confidential. It is therefore important for that obligation to be maintained...

MOTAT does not consider that the passage to time has altered MOTAT's obligation of confidence and privacy to those who participated in the review. Nor do we consider the fact that the NZ Herald may or may not have a copy of the Report to outweigh our obligation or reasons for withholding the Report.

5. MOTAT did not otherwise advance any material to support the proposition that there was good reason to withhold the report.
6. During the course of the investigation, the requester refined the scope of his complaint to the executive summary and recommendations of the report.
7. The Chief Ombudsman formed the provisional opinion that sections 7(2)(a), 7(2)(c), 7(2)(f), and 7(2)(j) of the LGOIMA did not provide good reason to withhold the executive summary and recommendations of the report.

Provisional opinion

Section 7(2)(c) – obligation of confidence

8. Section 7(2)(c) of the LGOIMA applies where withholding is necessary to:
 - (c) *protect information which is subject to an obligation of confidence ... where the making available of the information—*
 - (i) *would be likely to prejudice the supply of similar information, or information from the same source, and it is*

in the public interest that such information should continue to be supplied; or

(ii) *would be likely otherwise to damage the public interest*

9. The Chief Ombudsman emphasised that this provision does not protect information subject to an obligation of confidence per se. Rather it applies where information is subject to an obligation of confidence **and** release would be likely to prejudice the ongoing supply of information that is in the public interest or otherwise damage the public interest.
10. The Chief Ombudsman accepted that an express obligation of confidence was contained in the terms of reference for the report, and noted that the report also stated that interviewees signed a confidentiality agreement. These factors together made it clear that MOTAT itself intended to maintain confidentiality in respect of the report.
11. However, the Chief Ombudsman considered it questionable whether, as an entity subject to the official information legislation, it was legally able or entitled to do that, stating:

Obligations of confidence must be mutually understood and relied upon, not unilaterally imposed. Agencies subject to the official information legislation, such as MOTAT, can never guarantee confidentiality, as a request for information will inevitably fall to be considered under that legislation, and the principle that information must be made available unless there is good reason for withholding it.

References to confidentiality (in contracts, agreements or terms of reference) will be relevant, but never conclusive as to the proper application of section 7(2)(c). Otherwise an agency would, in effect, be able to contract out of the official information legislation. This point was thoroughly canvassed in Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council.¹

12. Although the Chief Ombudsman accepted that an obligation of confidence was owed to the participants in the review, MOTAT did not explain how disclosure of the report *'would be likely'* to prejudice the ongoing supply of information that was in the public interest, or otherwise damage the public interest.
13. The Chief Ombudsman drew a distinction between the raw or source material provided by the participants (eg, interview records or transcripts), and what the reviewer does that material (final reports and findings).
14. It may be argued that release of raw or source material supplied by individuals in confidence would prejudice the future supply of similar information or information from the same source. Without an assurance of confidentiality individuals, particularly in an employment context, would often be reluctant to provide information or be less likely to

¹ *Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180 (HC) at 191.

be as candid or open in the information that they do provide, were their comments to be subsequently publicly released.

15. However, that is not necessarily the case with release of final reports or findings (except to the extent that those reports or findings contain the raw or source material supplied by participants, or enable those participants and their individual contributions to be identified).
16. The report in this case was an overview, based on a synthesis of information derived from a range of sources. Having carefully reviewed the executive summary and recommendations, the Chief Ombudsman believed it would be extremely difficult, if not impossible, to attribute specific information, comments or views to particular participants.
17. With respect to the reviewers themselves, the Chief Ombudsman did not accept that an obligation of confidence could be owed. While the reviewers might have expected the Board to maintain confidentiality of the Report, the Board was unlikely to have been 'obliged' to keep it confidential. Further, the Chief Ombudsman did not consider that disclosure of the executive summary and recommendations of the report would prevent the reviewers, or any other similar professional reviewer or consultant, from preparing a similar report in the future, if one was commissioned. Professional persons are expected to be frank and robust in their work, and state their findings and conclusions to the best of their ability. That is what they are paid to do.
18. Accordingly, even if the report were subject to an obligation of confidence, the Chief Ombudsman was not persuaded that release of the executive summary and recommendations of the report would prejudice the ongoing supply of similar information or information from the same source, nor was she persuaded that release would otherwise damage the public interest.
19. She did not consider that it was necessary to withhold the executive summary and recommendations of the report under section 7(2)(c) of the LGOIMA.

Section 7(2)(f)(i) – free and frank opinions

20. Section 7(2)(f)(i) applies where withholding is necessary to *'maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to members or officers or employees of any local authority ... in the course of their duty'*.
21. The Chief Ombudsman noted that this section does not protect free and frank opinions per se. It is about maintaining the effective conduct of public affairs through the free and frank expression of opinions. Accordingly, for this provision to apply, there must be some reason to believe release would prejudice the future generation and expression of free and frank opinions that are necessary for the effective conduct of public affairs.
22. The Chief Ombudsman accepted that the executive summary and recommendations of the report contained the free and frank opinions of the reviewers. However, she did not

accept that disclosure of those opinions would inhibit the reviewers, or any other similar professional reviewer or consultant, from expressing their opinions in future, where those have been commissioned. As noted above, the Chief Ombudsman considered that professional persons are expected to be frank and robust in their work, and state their findings and conclusions to the best of their ability; that is what they are paid to do.

23. The Chief Ombudsman observed that, although the report may have been based on free and frank opinions supplied to the reviewers by participants in the review, it did not itself reveal those opinions, nor attribute them to any particular participants. The Chief Ombudsman was therefore not persuaded that participants in similar reviews in the future would be inhibited from sharing their opinions with reviewers.
24. The Chief Ombudsman did not consider that it was necessary to withhold the executive summary and recommendations of the report under section 7(2)(f)(i) of the LGOIMA.

Section 7(2)(a) – privacy

25. Section 7(2)(a) of the LGOIMA applies where withholding is necessary to *‘protect the privacy of natural persons’*.

Consultation with the Privacy Commissioner

26. As required by section 29A of LGOIMA, the Chief Ombudsman consulted with the Privacy Commissioner about the privacy interests involved.
27. The Privacy Commissioner considered that, for the most part, the information did not affect the privacy of natural people, observing that, although there were *‘... many general references to “staff” and to “volunteers”, ... those references [did] not seem to be specific enough to be capable of identifying any particular individuals’*.
28. With respect to some comments contained in the report about the former Chief Executive and references to *‘the Board’* and to *‘management’*, the Privacy Commissioner noted that releasing the report might have some continuing effect on the privacy interests of the relevant individuals. However, he considered those privacy interests somewhat lessened because the report generally assigned collective responsibility to those groups, rather than pinpointing individuals.
29. The Privacy Commissioner concluded that a summary would protect the remaining privacy interests of the individuals involved but commented that *‘privacy alone may not provide a strong justification for reducing the report to a summary’*.
30. The Chief Ombudsman agreed that the vast majority of the information contained in the report did not affect the privacy of natural persons and, as such, formed the provisional opinion that it was not necessary to withhold this information in order to protect the privacy of natural persons.
31. With regard to certain comments about the former Director/Chief Executive contained in the executive summary and recommendations of the report, the Chief Ombudsman

accepted these to be personal information about the Director/Chief Executive. However, the Chief Ombudsman noted that they were comments about him in his professional, as opposed to personal or private capacity.

32. Whilst the Chief Ombudsman considered that this reduced the privacy interest, it was clear a privacy interest did indeed exist and, as such, section 9(2)(a) applied to this information.
33. With respect to the privacy of those individuals identified in the report only as the (former) 'Board' and 'management' of MOTAT, in light of the comments of the Privacy that '*the report generally assigns collective responsibility*', the Chief Ombudsman was not persuaded that it was necessary to withhold the executive summary and recommendations.

Section 7(2)(j) – improper gain or advantage

34. Section 7(2)(j) of the LGOIMA applies where withholding is necessary to '*... prevent the disclosure or use of official information for improper gain or improper advantage.*'
35. The Chief Ombudsman explained that the word '*improper*' has been held by the courts to import an element of illegality or moral turpitude.² An agency wishing to rely on section 7(2)(j) needs to demonstrate that any advantage to be gained by the requester through the release of information is '*improper*' in this sense.
36. It was not clear to the Chief Ombudsman—nor did MOTAT seek to explain—how the disclosure or use of the executive summary and recommendations of the report would result in an improper gain or advantage.
37. The Chief Ombudsman did not consider that it was necessary to withhold the executive summary and recommendations of the report under section 7(2)(j) of the LGOIMA.

Public interest

38. The remaining issue for the Chief Ombudsman to consider, therefore, was whether the public interest in release of the information she considered section 7(2)(a) applied to outweighed the privacy interest in that information.
39. The Chief Ombudsman observed that the former Director/Chief Executive (and the former Board and management) were, at the time of the request, responsible for the direction taken by the organisation. They were senior decision-makers and, the Chief Ombudsman considered, a level of public accountability for their decisions was to be expected.
40. The Chief Ombudsman noted that MOTAT was funded by rates, to the sum of '*... \$11.5 million in operational funding annually*'. The Chief Ombudsman considered there to be a

² *Waitemata County v Expans Holdings Ltd* [1975] 1 NZLR 34, 46.

general public interest in the accountability of ratepayer funded organisations in demonstrating how they expend those funds. The Chief Ombudsman also observed that the strategic review itself was likely to have been ratepayer funded.

41. In addition, the Chief Ombudsman noted that the inquiry and resulting report had arisen further to multiple complaints to the Office of the Auditor-General, the Employment Relations Authority, the Human Rights Commission, and the Serious Fraud Office, and was the subject of numerous negative media articles sourced from within the organisation. In circumstances where the report set out an opinion as to whether MOTAT was being run successfully, as well as making recommendations for change, the Chief Ombudsman considered there to be a significant accountability interest in the contents of the report.
42. In this case, the fact that the requester was a former MOTAT employee was an additional public interest factor. The Chief Ombudsman considered that his position (and that of others in his position) resulted in a legitimate interest in knowing the outcome and conclusions of the review, which were reflected in the executive summary and recommendations of the report.
43. The Chief Ombudsman formed the opinion that, in the circumstances of this case, the public interest in disclosure of the executive summary and recommendations of the report was strong, sufficient to outweigh the interest protected by section 7(2)(a) of LGOIMA.

Outcome

44. Having considered the provisional opinion of the Chief Ombudsman, MOTAT decided to make a redacted version of the executive summary and recommendations available to the requester. This resolved the complaint and the Chief Ombudsman discontinued her investigation. However, the Chief Ombudsman's provisional opinion is illustrative of the Ombudsman's general approach to sections 7(2)(a), 7(2)(c), 7(2)(f)(i) and 7(2)(j) of the LGOIMA.