

Request for a Regional Councillor's email and telephone communications

Legislation	Local Government Official Information and Meetings Act (LGOIMA) 1987, ss 13(5), 7(2)(c)(ii)
Agency	Hawke's Bay Regional Council
Ombudsman	Leo Donnelly
Case number(s)	439322
Date	October 2017

Summary

A requester sought access to a Hawke's Bay Regional Councillor's email and telephone communications with specified third parties between 8 and 25 August 2016. When the request was refused, the requester made a complaint to the Ombudsman under the Local Government Official Information and Meetings Act 1987 (LGOIMA).

Most of the communications in question were conducted and stored on the Councillor's private email account. In the course of the Ombudsman's investigation, parties suggested that information stored in a personal email account was not official information and therefore was not subject to the LGOIMA. The Ombudsman did not accept this argument.

The question of LGOIMA's application turned on whether the Councillor had sent or received the communications while acting in his official capacity as a Councillor. The LGOIMA could not be circumvented by conducting or storing those communications on private email accounts or personal devices.

After carefully reviewing the nature and content of the communications and the context in which they were sent and received, the Ombudsman concluded that the LGOIMA applied to some of the requested communications.

However, the Ombudsman also formed the opinion that, in this case, section 7(2)(c)(ii) of the LGOIMA justified the withholding of some information to protect the confidentiality of journalists' sources.

Background

1. Under section 13(5) of the LGOIMA, it is the responsibility of the Chief Executive of a local authority, or their delegate, to make a decision on an information request.
2. In this case, however, the Chief Executive and the officials who ordinarily processed information requests on behalf of the Council did not have access to the information requested, as it was located in the Councillor's private email account.
3. The Council also did not hold a written record of one telephone conversation between the Councillor and one of the specified third parties.
4. Upon commencing an investigation and review under the LGOIMA, the Ombudsman typically requires the Chief Executive of the local authority to provide him or her with all of the requested information. However, in this case Council officials were unable to do so for the reasons above. The Ombudsman therefore exercised his power under section 19(1) of the Ombudsman Act 1975 to require the Councillor personally to provide him with the requested information.

Investigation

5. The Councillor complied with the requirement to provide the requested information by:
 - providing copies of the relevant emails;
 - providing a record of his inbox and outbox (sender/recipient, subject line, date) so that the Ombudsman could cross reference this data with those emails, and ensure all the relevant information had been provided;
 - answering questions as required; and
 - meeting with the Ombudsman and his staff.

The information at issue

6. On careful review of the information provided by the Councillor, the Ombudsman determined that it included:
 - communications with the parties named in the request that were not sent or received in his capacity as a Councillor, and therefore were not official information which must be considered for release under the LGOIMA;
 - some official information, contained in communications with the parties, in respect of which there was no '*good reason*' to withhold; and
 - some official information in respect of which there was '*good reason*' to withhold.

Information that was not official information

7. Some of the communications were not sent and received in the Councillor's official capacity. Instead, these were communicated in the Councillor's capacity as a political candidate standing for election, and as an editor of a magazine.
8. Consequently they were not official information, and the Ombudsman did not consider their prospective release under the LGOIMA.

Official information that could not be withheld

9. Some of the communications were with a Non-Government Organisation (NGO) official named in the request. The Ombudsman accepted that the emails were official information because they were sent and received in the Councillor's capacity as a Councillor.
10. The NGO official was consulted in the course of the Ombudsman's investigation, and expressed no concerns about the release of her communication with the Councillor. In the circumstances, the Ombudsman identified no ground for withholding the emails under the LGOIMA. The Councillor agreed that this communication could be released to the requester.

Information that could be withheld

11. Some of the communications were between the Councillor and a journalist. The Ombudsman accepted that the emails were official information because they were sent and received in the Councillor's capacity as a Councillor.
12. However, for the reasons set out in detail below, the Ombudsman accepted that it was necessary to withhold this information, on the basis that the communications were subject to an obligation of confidence and that their release would be likely otherwise to damage the public interest (section 7(2)(c)(ii) of LGOIMA refers).
13. The Ombudsman had regard to the public interest considerations favouring disclosure of this information but was not, in the circumstances of the case, persuaded that they outweighed the need to withhold the communications to protect the specified interest.

Was there an obligation of confidence?

14. After carefully reviewing the correspondence and having gained an understanding of the relevant telephone conversation, the Ombudsman accepted that the Councillor and the journalist were respectively acting in their official and professional capacities.
15. Having met with both parties, he accepted that they had regarded their communications as confidential from the outset, and each expressed concern about the prospect of their release under the LGOIMA. In these circumstances, the Ombudsman accepted that the communications in question were subject to an obligation of confidence.

16. The Ombudsman, however, did not accept that a blanket of confidentiality exists over all communications a journalist has with elected officials. Each case must be considered on its own merits. In this case, the Ombudsman accepted that release of this particular information would be likely to prejudice that journalist's ability to receive information from official sources and report on issues which are in the public interest to report.

Would release be likely otherwise to damage the public interest?

17. The Ombudsman accepted that there is a strong public interest in enabling the free flow of information to the media to enable it to carry out its reporting and commenting function. The Ombudsman noted that Parliament and the courts have afforded a high degree of protection to journalists' confidential sources. Section 68 of the Evidence Act 2006 creates a presumption that journalists' sources need not be disclosed, and states:

68 Protection of journalists' sources

(1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered.

18. The Ombudsman also noted comments by the High Court in *Hager v Attorney General*,¹ which said:

...pursuant to s 68, it is no longer for the media to establish the public interest in preserving the confidentiality of their sources. Rather, it is for the applicant for a media warrant to persuade the court that other relevant public interests in disclosure outweigh the presumptive public interest in the preservation of that confidentiality.

19. The High Court quoted the Law Commission's comments on section 68 of the Evidence Act:

The protection of journalists' confidential sources of information is justified by the need to promote the free flow of information, a vital component of any democracy.

20. The Ombudsman therefore accepted that section 7(2)(c)(ii) of the Act applied. He found that disclosure of the information at issue would be likely to damage the public interest in maintaining the free flow of information to journalists, recognised by Parliament and the courts as a vital component of democracy in New Zealand, by interfering with the protection afforded to the confidentiality of journalists' sources.

¹ *Hager v Attorney General* [2016] 2 NZLR 523

Countervailing public interest in release

21. The Ombudsman noted that he would not interfere lightly with the free flow of information to the media, and it would therefore require a strong public interest to outweigh the protection afforded to it under section 7(2)(c)(ii) of LGOIMA. In this case, the Ombudsman did not identify public interest considerations favouring release of the information at issue that outweighed the protected interest. While the Ombudsman accepted there might be a sufficiently strong public interest in disclosing information which, for instance, revealed impropriety by elected officials, that was not the case here.

Outcome

22. The Councillor released the communications with the NGO official, but was entitled to withhold the communications with the journalist. Additionally, the communications exchanged in his capacity as a candidate and an editor were not official information, and did not need to be considered for release to the requester under LGOIMA.
23. The key points arising out of this investigation are:
 - a. The use of private email accounts or personal devices does not override the application of LGOIMA. The question of whether information is official information turns on both the content of the information and the capacity in which it is generated, communicated, received or otherwise held.
 - b. The LGOIMA may provide protection to communications between journalists and communications with elected officials, but this is not a blanket protection. Such communications may be justifiably withheld if their disclosure would be likely to damage the public interest by compromising the confidentiality of journalists' sources. This would affect the free flow of information to journalists, recognised by Parliament and the courts as a vital component of democracy in New Zealand.