

OMBUDSMAN'S OPINION

Building consent information – application of the Local Government Official Information and Meetings Act and the Ombudsmen Act to the provision of such information

Summary

1. This investigation has been into the extent to which personal details may be withheld from building consent information held by local authorities.
2. The Building Act 2004 requires that local authorities must keep and make available building consent applications and other documentation associated with building consents. This information includes personal details such as names and addresses.
3. Building consent information is available to any person who requests it, regardless of their reason for doing so.
4. A local authority cannot withhold personal details from building consent information which it holds. It can only withhold plans or specifications marked confidential on security grounds.
5. The Local Government Official Information and Meetings Act 1987 (the LGOIMA) permits anyone to require a territorial authority to issue a Land Information Memorandum (LIM) relating to a property.
6. The LIM must include all building consent information held by the authority in relation to that property.
7. Where personal details form part of building consent information and are consequently available under the Building Act and on a LIM, it cannot be necessary to withhold such details in response to an official information request so as to protect the privacy of the person to whom they refer.
8. This is so whether the official information request is for one property or an unspecified number of properties. The principle is the same in either case.
9. Making personal details available in building consent information in response to a request under the LGOIMA is not contrary to the Privacy Act or the Building Act.
10. In respect of a request for information relating to an individual property, a local authority would be justified in requiring a requester to exercise the requester's rights under the Building Act. In respect of a request relating to a large or unspecified number of properties, requiring a requester to proceed under the Building Act is not reasonable and the request should be responded to as a request for official information under the LGOIMA.

11. A local authority making building consent information available in anticipation of an official information request or as part of a standing arrangement is not acting unreasonably in terms of the Ombudsmen Act. But in such circumstances the local authority would not be protected from any other legal liability that may arise, such as, for example, under the Privacy Act.

The complaints

12. On 24 March 2009 I received a complaint from a resident who objected to the Auckland City Council releasing building consent information to Whats On Report Ltd (Whats On) (A13772/9952). On 28 July 2009, Mr Tony Graham, Managing Director of Whats On, complained to this Office that, for the past three months, Waitakere City Council had excluded "names and addresses of owners and names of contacts e.g. architects, builders etc" from its monthly report of building consent information (A13783/10100). The Auckland Council has now succeeded to these complaints.
13. Complaint 9952 was made under the Ombudsmen Act, while complaint 10100 was ostensibly about information being withheld pursuant to the LGOIMA. They essentially approached the same issue from opposite angles. I have thus broadened out my consideration of them to address the issues that have arisen in considering these complaints both in terms of legality (the LGOIMA) and reasonableness (the Ombudsmen Act) of a local authority's actions in releasing building consent information.
14. Whats On has subsequently informed me of its decision to adopt the Do Not Call register option available from the Direct Marketing Association. It plans to remove names from any building consent record identified by the register and replace it with the building owner. These are responsible steps designed to meet some of the privacy objections to supply of the information. However, they have not affected my consideration of the matter, which is directed at the actions of the local authorities in supplying the information in the first place.

Background

15. For many years, Whats On has based a commercial business on building consent information which it obtains from local authorities around New Zealand. As I understand it, this information was originally requested by Whats On under the LGOIMA. At some point local authorities began to provide the information on their own part rather than requiring a formal request. Whats On compiles reports using this information, and provides it to companies who use it for direct marketing purposes.
16. Following the enactment of the Privacy Act 1993, there was apparently a disruption in the supply of data from some local authorities, arising from concern about possible breaches of building consent applicants' privacy. The Ombudsman was consequently asked to investigate and review the authorities' decisions.

17. In 1995 (C3441), 1996 (A5478) and 1998 (W39781), the Ombudsmen considered whether good grounds existed under the LGOIMA to withhold such information. These considerations culminated in a comprehensive view being expressed by the Chief Ombudsman in 1998 (W39781).
18. The Chief Ombudsman formed the view that the statutory right to inspect and copy building consent information under the Building Act 1991, coupled with such building consent information being subject to section 44A of the LGOIMA (which precludes information concerning building consents from being withheld from LIMs), meant that a local authority had a statutory duty, if it received a request for a copy of a building consent, to make that consent available. Where such a request was received, the Chief Ombudsman did not see it as open to a local authority to delete anything contained in a building consent on the basis of the Public Register Privacy Principles, when those very principles state that other inconsistent enactments will prevail.
19. The Chief Ombudsman's view relied principally on the application of section 44A(6) of the LGOIMA.
20. It was accepted that building consent information must be included in a LIM (section 44A(2)(d) and (e)). Section 44A(6) then goes on to provide:

Notwithstanding anything to the contrary in this Act, there shall be no grounds for the territorial authority to withhold information specified in terms of subsection (2) of this section or to refuse to provide a land information memorandum where this has been requested.

21. The grounds on which information may be withheld (including privacy) being set out in earlier sections of the LGOIMA (sections 6 and 7) were therefore negated, he considered, by section 44A(6)'s provision that "notwithstanding anything to the contrary" in the LGOIMA there were no grounds to withhold information required to be included in a LIM. I will return to this point later (paras 41-46).
22. In light of this, the Chief Ombudsman considered that section 7(2)(a) of the LGOIMA could not apply to permit information contained in building consent information to be withheld.
23. Furthermore, he considered that even if he had been of the view that section 7(2)(a) of the LGOIMA (dealing with protection for privacy reasons) did provide a possible withholding ground, the question would then have been whether such withholding was "necessary", quite apart from any other public interest considerations that might favour release. Given the statutory right to inspect and copy the information in issue, it would have been difficult, he said, to form the view that withholding it could be considered "necessary" to protect privacy.
24. In succeeding years a practice has developed whereby local authorities assemble the information and provide it, for a fee, in a monthly report to Whats On (among others). This is not to say that the information is provided on an unsolicited basis, since Whats On clearly wishes to receive it. Instead, it would appear that Whats On has, in effect, placed a "standing

order” with local authorities for the information, rather than making a specific request for it each month. This is an issue to which I shall return at a later point in this opinion (paras 107 - 108). However, it would clearly be open to Whats On to submit monthly requests for building consent information and such requests would fall to be considered under the LGOIMA. I have taken this into account in considering the current complaints.

The Auckland City Council’s response

25. The Auckland City Council told me that this was a somewhat unusual situation since the Council had reason to believe that its current approach of making building consent information available on a consolidated basis was wrong. But it was not so certain of this as to feel comfortable in ceasing to provide the information. This was because of the possible commercial impact that ceasing to supply could have on Whats On and because the present practice appeared to be in line with previous Ombudsmen decisions.
26. The Council’s concern was that the practice of selling consolidated lists of building consent information on a monthly basis outside the LGOIMA regime may be a breach of the Privacy Act. In respect of requests for the same information under the LGOIMA the Council believed that there were grounds to refuse to provide the information in the way it had been requested and to require applicants to rely on the public register provisions of the Building Act to obtain access to building consent information.
27. The grounds under the LGOIMA instanced for refusing an official information request for the information were section 17(d) (information already publicly available) and section 17(c)(i) (supply contrary to other legislative provisions). I discuss these grounds later in this opinion (paras 89 - 98).
28. Although the Council did not in its report to me identify section 7(2)(a) (protection of privacy) as a ground to withhold, its main concern with release did appear to revolve around this issue. In its submission the Council said: -

“The council only holds this building consent information because people are required by law to provide it in order to undertake building work on their own properties. In light of the compulsory way that the council obtains the information it is appropriate that it be under a high duty to protect the privacy of individuals to the greatest extent possible under the law. In this regard the council should therefore seek to rely on sections 17(c)(i) and 17(d) of LGOIMA as providing automatic grounds to refuse to supply consolidated lists of building consent information and make anyone wishing to access such information do so under the more limited method prescribed in the Building Act’s public register provisions.

It is also noted that this is not the sort of information that goes to the heart of decision-making about public administration and is being sought for purely commercial reasons rather than political or research reasons. It is not therefore the sort of information that LGOIMA was primarily enacted to make available. Any uncertainty in the interpretation of the provisions should therefore be interpreted in the way that best fits with

the spirit of the Privacy Act so as to provide the fullest possible protection to individuals.”

The Waitakere City Council’s response

29. In its report to me, the Waitakere City Council said that it did not in the course of 2009 receive a request for official information from Whats On. Rather, it said, Mr Graham is, “a person who is on a list of persons who receive monthly information regarding building consents on a subscription basis”. The information provided, “relates to building consents lodged, what the applications are for, and all other information which the Council keeps in accordance with s 216 of the Building Act”.
30. The Council said that the information is compiled in a register, from which the name, phone number and address of any private persons who are applicants, and any other information marked confidential by the applicant in accordance with section 217(2)(b) and (3) of the Building Act, are excluded. It explained that the decision to delete personal information about applicants was made as a result of requests from applicants who were private individuals.
31. The Council then went on to comment on LGOIMA requests for personal information contained in building consents. I shall quote the comments in full.

“However, it was noted that where there was a specific request for the name and contact details of consent applicants who are private individuals, the Council would contact such persons informing them of the information request. It is the Council’s view that the names and addresses of such private individuals would be disclosed to the requester of the information, unless there was a reason that precluded that information from being released under the [LGOIMA] or s217(2)(b) and (3) of the Building Act. By contacting the consent applicant, the Council is able to record the view of the person whose information is being requested and make a determination as to how to proceed. Although an onerous process, these steps allow the Council to meet its obligations under LGOIMA and the Building Act.

Consent applicants who are private persons, have raised the issue of their private information being misused on a number of occasions. Their view is that the information is not being supplied to the Council to be passed on to third parties for commercial purposes, but is being provided to comply with regulatory requirements. This creates a difficulty for local authorities given the obligation under LGOIMA. The Council has informed applicants that submitting their details on the face of an application, means that the information will be available under LGOIMA, unless it is marked confidential under s217(2)(b) and (3) of the Building Act. These applicants are legitimately entitled to their privacy [given] the potential for their personal details being misused for commercial gain, when the disclosure was not made on the basis that it would be used in such a manner.

In all other instances, the information as to the name of the applicant and their contact details, although removed from the register, is on the face of the building consent, as well as other information and can be

viewed upon request. The person requesting the information is provided [with] the consent file (in most cases electronically) and they can record the information or seek to have them printed or copied at a small cost.

There is no direction in the Building Act as to how this information is to be provided. Giving a summary of the information in the form of a register and then making the file available for viewing so that the person requesting the information can look at it and then take what they want is a practice that s217 of the Building Act envisages. The process of maintaining a register and providing that to the requester certainly assists the requester to readily access the information they want. However, any additional information that the requester would like can be obtained by reviewing the relevant file. This is a process open to Mr Graham and Whats On Report Ltd should they wish to utilise it."

The legislation

32. The requirement to keep records of building consent information and make it available was introduced by the Building Act 1991. The 1995-1998 investigations and review of the release of building consent information to Whats On under the LGOIMA were conducted while that Act was in force. The 1991 Act has now been replaced by the Building Act 2004. However, it seems to me that the provisions in the 2004 Act which deal with the requirement to keep building consent records and the right of access to those records (sections 216 and 217), do not differ in any significant respect from the comparable provisions in the 1991 Act (section 27).
33. The 2004 Act sets out more extensively the kinds of information that must be retained by a local authority (section 216, compared to section 27(1) and (2)). But as regards the right to access that information the only substantive change is that applicants or building owners can no longer mark plans or specifications confidential so as to safeguard copyright in them. This represents a movement in the direction of even greater availability.
34. Parliament's re-enactment of section 217 without substantive change since the previous investigations is significant. Also, there has been no relevant change to section 44A of the LGOIMA.

Building consent information

35. The provision of the Building Act identifying the information that must be kept reasonably available under that Act is section 216(2). The relevant information includes all plans and specifications submitted to a local authority in relation to a building consent application and other specified information "issued or received" by the authority in respect of a building. Included in the latter are building consents (section 216(2)(b)(ii)) and any other records that relate to such consents (section 216(2)(b)(viii)).
36. As the Waitakere City Council points out in its report to me, personal details submitted in an application or included on the face of a building consent will therefore become part of the information available. For the purposes of the views that I express in this opinion I accept that this is the case. Personal details that comprise building consent information within the meaning of

section 216(2) will be available for inspection under the Building Act. I discuss below the implications of that in respect of requests under the LGOIMA (paras 69 - 84).

37. But there may be other personal details held by a local authority about an applicant that do not comprise building consent information. In that case it will not be available under the Building Act, though it will be official information subject to the LGOIMA. The ordinary withholding grounds of the LGOIMA, particularly section 7(2)(a), will therefore clearly be relevant if it is requested. In this opinion I do not intend to make any comment on the ability of a local authority to withhold such information. I am concerned here solely with the potential for infringements of privacy resulting from, and other withholding grounds relating to, requests for personal details that are also building consent information.

Privacy Commissioner's view

38. I have consulted the Privacy Commissioner regarding this matter. The Commissioner's view is that there is a strong privacy interest in the personal details contained in building consent applications which needs to be protected. The Commissioner considers that the security and privacy of individuals is at risk when their details are released in bulk, and that the subsequent publication of personal details for purposes unconnected with the administration of the building laws further erodes individual privacy. Consequently, in the Commissioner's view, section 7(2)(a) of the LGOIMA applies to the information in issue.
39. The Commissioner concluded:

"I consider there is a privacy interest in the information which needs protecting. The security and privacy of individuals is at risk when their details are released in bulk. The subsequent publication of personal details to a wide audience for purposes unconcerned with the administration of the building laws further erodes individual privacy.

I also consider that there are no public interest considerations favouring release which outweigh that privacy interest. In fact, I believe there is a public interest in promoting good relationships between local authorities and citizens which may favour the information being withheld. Applicants for building consents do not provide their contact details to a council with the understanding that this information will be released to a private company and then on-sold for commercial gain.

This activity is a key privacy issue in the context of the widening public frustration with the use of information for purposes beyond its original collection – in this case direct marketing, when the original purpose is to provide transparency and community involvement in building issues. The collective impact of such practices is a significant issue challenging the concepts of privacy in the world of changing technology. If the practice of collecting personal information for building and consent purposes continues to be diverted to entities for commercial gain, the Privacy Act would at least expect a statement of this intention and perhaps a disclosure of likely recipients. For added good privacy practice I would expect that consent applicants would have the right to

opt out of any further purpose, or better still were able to choose to opt in."

40. The Privacy Commissioner also referred me to the views of her predecessor expressed in a letter of 2 June 1998 to the Chief Ombudsman when this issue was being considered at that time. The former Commissioner strongly urged the Chief Ombudsman to take a different view of the bulk release of building consent information. I have read these views with profit and will refer to them elsewhere in this opinion.

Land Information Memorandums

41. As indicated above (paras 18 - 21), one of the reasons that led the Ombudsmen to the view that was taken between 1995 and 1998 was a provision in the LGOIMA dealing with LIMs, section 44A(6).
42. Section 44A(6) has been quoted above (para 20). The Chief Ombudsman was of the view that this provision applied to any request made under Part II of the LGOIMA (a request for official information held by a local authority). Consequently, if the information requested must be included in a LIM (as building consent information must be) there could be no grounds for the authority to withhold that information when responding to a Part II request.
43. With due respect to this view, I am unable to accept that section 44A(6) has this wide application. The subsection is a savings provision to section 44A, the section which confers the right to apply for a LIM. As with any savings provision, its application must be approached cautiously. It should not be lightly assumed that its intention is to effect significant legislative change. Indeed, quite the contrary.
44. In my view, this savings provision's application is confined to applications for a LIM (made under Part VI of the LGOIMA). It does not extend or apply to requests for information made under Part II. It affirms two things. It makes it clear (as might otherwise have been ambiguous) that when a LIM is requested a local authority cannot rely on the withholding grounds set out in Part II of the Act either: (1) to withhold information from that *LIM* or (2) to refuse to provide a *LIM* altogether. But I reject the suggestion that section 44A(6) governs how the authority must respond to a request that does not seek a LIM. A request for official information not involving a LIM is determined by the withholding provisions set out in Part II, not by a savings provision in Part VI. In the circumstances that I am considering in this opinion, any request would not be for a LIM and so in my view section 44A(6) does not govern it.
45. There is a further question as to whether a request for a LIM is a request for official information at all. In a recent case in the Court of Appeal, *Vining Realty Group Limited v DS and JW Moorehouse* [2010] NZCA 104, a submission was made that a request for a LIM is a request under Part II of the LGOIMA and that section 44A(6) does apply to it. The Court did not find it necessary to rule on this submission in holding that the protection from liability in respect of information provided pursuant to a Part II request afforded by section 41 of the LGOIMA did not extend to information

provided in a LIM. This case is under appeal to the Supreme Court. However, in that case the request was for a LIM. Whatever result is reached on this question it does not affect the view I have expressed above where a LIM is not involved.

46. Although I do not consider that section 44A(6) applies to determine the issue in this case, the fact that the same information that is in issue here cannot be excluded from a LIM is an important factor in considering whether there are good grounds for withholding it under Part II. At the very least, the fact that the information must be made available in one context counts against an argument in favour of suppression of that information in another context.

Right to access building information under the Building Act

47. Section 216(1) of the Building Act requires territorial authorities to keep “reasonably available” certain information relating to building consents so as to enable members of the public to be informed of their obligations under the Act and to participate effectively under it. The type of information to which this obligation applies is accepted as including the information at issue in this case (as discussed in para 36). Section 217(1) confers a right on a person to access the information referred to in section 216.
48. An initial issue is whether this right of access conferred on “a person” is limited by the reasons set out in section 216(1) as to the purposes of the local authority maintaining the information in the first place. In other words, is the right to access conferred only on a person who wishes to be informed of their obligations under the Building Act or who wishes otherwise to participate effectively under that Act? Must the local authority establish the reason why a person wishes to access building consent information before granting access?
49. The Privacy Commissioner argued that access was so limited. In 1998 the then Privacy Commissioner also placed strong emphasis on the purpose of collecting the information in the first place. He said:

“It does not seem reasonable that information made available for purposes so clearly aimed at effectively implementing the Building Act should be open to exploitation for commercial purposes at such a privacy cost.”

He drew attention to a submission from Local Government New Zealand on a review of the Privacy Act that he had conducted making the same point.

50. I accept that it is a strong privacy principle (expressed in privacy principle 10) that personal information collected for one purpose should not be used for another purpose. The question in this case is whether the Building Act provisions can be confined by that principle.
51. I consider that they can not and that the right to access cannot be restricted to the purposes set out in section 216(1).

52. First, the Building Act right is conferred on “a person” without any qualification relating to the objectives of that person. Thus the right in its own terms can apply to any person who requests access to the information. However, this is relatively unimportant in determining this question. It is accepted that the context may require this wide permissible reading to be qualified.
53. Secondly, this is not the way in which the right to access has operated in the past (for almost 20 years). Local authorities making building consent information available have not questioned why individual requesters wish to obtain the information or required them to establish that they want it for a purpose that is consistent with the objectives set out in section 216(1). The latter requirement, in particular, could impose a considerable burden on local authorities, especially given that there is little or no opportunity to conduct inquiries. Access must be given “on request” (section 217(1)(b)). The belated discovery of a requirement to establish one’s “bona fides” at the very least suggests caution before accepting that the law requires this.
54. Thirdly, section 217(2) lists the qualifications to that right. The right is subject to the LGOIMA (section 217(2)(a)). This very matter is at the heart of this case and I will return to it. The right is also subject (by not extending to) a plan or specification marked confidential by the building owner or applicant (section 217(2)(b),(3)). I will also return to the relevance of this later. Finally, it is subject to “prescribed limits” (section 217(2)(c)). It is not clear exactly what these are (I assume administrative matters such as office hours) but no issue with regard to them has been raised here. In sum, the qualifications to the right to access that are set out in section 217(2) do not limit access to the purposes described in section 216(1) nor do they refer to those purposes in any way.
55. A fourth reason for considering that the right to access is not restricted by the section 216(1) purpose statement is the existence of the ability to request a LIM under section 44A of the LGOIMA. It is beyond question that no one requesting a LIM has to establish good grounds for their request akin to the purposes set out in section 216(1). The building consent information held by a territorial authority must be included on a LIM if one is requested. It would seem strange if a person could obtain building consent information on a LIM that that person was not qualified to access under the Building Act. There would seem little point in distinguishing between requesters under the two provisions.
56. This is not to say that the two rights have the same legal consequences. A LIM is a formal statement from a territorial authority of the full range of the information it holds about a property. A duty of care on the authority in providing a LIM may be readily implied and an error in that statement might attract legal liability. Making building consent information available pursuant to the Building Act involves no representation from the local authority. No doubt it has a duty to take care in providing it, but not the same duty as when providing a LIM. But even acknowledging these differences it is hard to see why the local authority could deny access to information in the one case that it would be obliged to make available in the other.

57. Finally, building consent information is liable to be requested under Part II of the LGOIMA. I will discuss this next (paras 59 - 66). It is incontestable that anyone exercising the right to request information under the LGOIMA (or under the Official Information Act) does not have to establish a particular interest in making the request (though the lack of a particular interest may be relevant in establishing the validity of claims to withhold the information). As with requests for LIMs, it would be inconsistent and somewhat futile if access could be denied under the Building Act but not under the LGOIMA.
58. Consequently, my conclusion is that the right to access building consent information conferred by section 217(1) is a right possessed by any person who wishes to exercise it and that that person's objective in making the request is not a qualifying consideration.

Application of the LGOIMA

59. It has not been suggested to me that the right to request building consent information under Part II of the LGOIMA has been expressly excluded by the Building Act. Indeed section 217(2)(a) of the latter says that the right of access under the Building Act is subject to the provisions of the LGOIMA. The Auckland City Council argued that access under the LGOIMA is "contrary to" the Building Act and the Privacy Act but did not argue that access is prohibited by those Acts. Rather it considered that the fact that those Acts contain provisions that relate to how such information may (or may not) be released, means that the LGOIMA should not be applied in a way that is inconsistent with those provisions. I will examine this argument later (paras 89 - 91).
60. The Building Act, in section 217, constructs a means by which building consent information can be accessed. The means that are prescribed envisage a person presenting at the authority's offices during ordinary office hours and being given immediate or near immediate physical (or electronic) access to the information. In addition, the authority must allow, indeed facilitate, the photocopying of the information on its premises. The Waitakere City Council has described how it provided the consent file electronically in most cases thus allowing the requester to record or print out what information is required. In short, it does not seem inappropriate to call this process "fast-track" access.
61. This right to access information on a fast-track basis is distinct from the right to make a request under the LGOIMA. Under the latter Act, a person could make a request in person at the local authority's offices, but does not have to. More importantly, in responding to a request under the LGOIMA, the authority has much greater discretion as to the time within which it must reply to the request and the form in which it replies. The LGOIMA has a provision for requests to be handled with urgency, but access generally is given on a measured rather than a fast-track basis. In short, the means of access to the same information under the two Acts are by no means identical.

62. The LGOIMA (and the Official Information Act) can be excluded from application by express provision, or in circumstances where if it was not excluded legislation to a contrary effect would be frustrated, or because this is the only reasonable interpretation of the legislation. But given the constitutional significance of the LGOIMA, an implication that it was to be excluded from operation would only be drawn in a clear case. There is nothing in the enactment of section 217 of the Building Act expressly excluding the LGOIMA (indeed quite the contrary) nor has it been suggested to me that there is anything that would justify such an implication being made in this case.
63. It thus seems to me that the right to utilise the LGOIMA rather than the Building Act as a means of seeking building consent information remains unimpaired. But section 217(2)(a) says that the right to access building consent information conferred by section 217(1) (the Building Act right) is itself subject to the provisions of the LGOIMA. What does this mean for the section 217(1) right?
64. At one point in my consideration of this matter I was attracted to the view that section 217(2)(a)'s reference to the LGOIMA was inserted out of an abundance of caution. That is, it was there simply to make it clear that the right to seek such information separately under the LGOIMA had not been excluded (even though it had not been excluded in any case). However, I am now persuaded that this is too narrow a view.
65. Subsection (2) of section 217 clearly sets out (in paragraphs (b) and (c)) qualifications on the open nature of the right expressed in subsection (1). It is reasonable to read the references to the LGOIMA in paragraph (a) of that subsection in the same light, that is, as potentially importing a limitation on the right to access building consent information, rather than as a mere savings provision. Obviously, any limitation imported by section 217(2)(a) from the LGOIMA cannot be inconsistent with the right to access conferred by section 217. The "fast-track" basis of access conferred by section 217 must prevail over the more measured access provisions of the LGOIMA. But the obvious limitations on the right to access that are imported by section 217(2)(a) are those grounds on which information may be withheld which are set out in sections 6 and 7 of the LGOIMA. In my view, therefore, where a local authority would have grounds to withhold information in respect to a request under the LGOIMA, it can assert those grounds in answer to a request for building consent information made in reliance on section 217. In particular, section 7(2)(a) of the LGOIMA permitting information to be withheld on privacy grounds is a relevant consideration.
66. Although I accept that the reference to the LGOIMA made by section 217(2)(a) potentially imports a limitation on the Building Act right to access building consent information, I think that it would be a mistake to read it only as a limitation. After all, the LGOIMA was enacted to make information available, not to restrict access to it. The reference in section 217(2)(a) is to the LGOIMA as a whole, not just to its withholding provisions. The Law Commission in its review of the law of privacy (Public Registers, para 3.72) takes the reference to the LGOIMA in section 217(2)(a) as, among other

things, signalling that there is wider access available in the form of LIMs. Consequently, I do not take the invocation of the LGOIMA in section 217 as merely evidencing an intention to restrict the right to access building consent information.

Plans marked confidential

67. The Waitakere City Council suggested to me that in supplying information under the LGOIMA applicants' personal details may be marked confidential in accordance with section 217(2)(b) and (3) of the Building Act. I cannot agree with this view.
68. Section 217(2)(b) states that the right to access building consent information conferred by section 217(1) does not extend to "a plan or specification that is marked confidential" by either the person who submitted it, the owner of the building to which it relates, or any subsequent owner; and section 217(3) clarifies that the justification for marking a plan or specification as confidential is confined to "any requirement of the owner of the building relating to the security of the building". Section 217(2)(b) relates only to plans and specifications. It does not relate to marking personal details confidential or provide authority to withhold personal information. (Though as plans and specifications properly marked confidential must be withheld under the Building Act, they should be refused if requested under the LGOIMA on the ground that their release would be contrary to a specified enactment – section 17(c)(i) applies in this case.)

Grounds for withholding under section 7(2)(a)

69. As described in the Waitakere City Council's report, the building consent information that a local authority must maintain under section 216 (and which is therefore subject to the Building Act right to access) almost inevitably contains some personal details, such as the name of the applicant. If building consent information does comprise, in part, personal details, then this latter is also subject to inspection under section 217. (I have given my reasons in para 68 for the view that the ability to keep plans and specifications confidential in certain circumstances does not apply to it.)
70. It is also clear that such personal details comprising part of building consent information must be included on any LIM that is requested in respect of the property to which it relates. Section 44A(6) (as discussed in paras 41 - 46) makes it impossible to invoke protection of the privacy of a natural person as a ground for excluding such information from a LIM.
71. But section 7(2)(a) of the LGOIMA itself must also be considered. Section 7(2)(a) (section 9(2)(a) of the Official Information Act) relates to the protection of the privacy of natural persons. Such privacy is often likely to be violated by the release of personal details about them though a violation of privacy does not have to take this form. However, I think the converse applies. Because a request relates to information that may contain personal details that does not automatically mean that its release would violate the privacy of the person to whom it relates. In this case, releasing building consent information that includes names and addresses may be

accepted as involving the release of personal details. But whether section 7(2)(a) is thereby engaged is another matter.

72. Section 7(2) of the LGOIMA consists of 11 paragraphs (and a number of subparagraphs and internal divisions) defining the circumstances that may give rise to a good reason to withhold information. The Official Information Act includes these and additional circumstances. But the application of these paragraphs are all predicated on the need – the necessity – to withhold the information in order to “protect”, “avoid”, “maintain”, “enable” or “prevent” the described circumstances from occurring or arising. The opening words of section 7(2) are emphatic:

“ . . . this section applies if, and only if, the withholding of the information is necessary to – “

(then follow the described circumstances).

73. The withholding must then be “necessary” in order to protect the identified interest. But if the identified interest has been or is subject to being infringed in any event it is difficult to see how withholding information can be necessary to protect it. Colloquially, “the horse has already bolted”.
74. In this case if the same information that is in question is available in a LIM (which it is accepted that it is), how then can it be necessary to withhold it to protect privacy when it is requested under the Building Act or Part II of the LGOIMA?
75. The Privacy Commissioner makes the point that the context in which information is released is important in assessing any infringement of privacy. The former Privacy Commissioner put it like this in 1998:

“Privacy is not secrecy. Once a secret is told, the secrecy is gone. But a privacy interest remains. Privacy involves the right to make the decision on who will be made aware of the information.”

76. Thus the fact that information may have been given to an individual or to a limited group of persons does not mean that there is no privacy interest in restricting that information to a wider group.
77. I accept these propositions. But it seems to me that they depend upon circumstances in which the subject of the information has a right to restrict or control access to the information in question. Under the Building Act (apart from plans or specifications on security grounds) this is not the case. The applicant is not given a right to restrict or control access to building consent information. Parliament, in section 217(1) of the Building Act and in section 44A of the LGOIMA, has provided that such information must be made available. It has not provided a right to “contract-out” of access on the part of the applicant. Providing access is a necessary incidence of applying for a building consent. (Whether it should be or should not be is a matter for Parliament to determine.) To acknowledge a general ability to withhold building consent information would negate the statutory access that has been provided under the Building Act. In addition section 44A(2) *requires* building consent information to be included on a LIM, and does not

offer the provider of that information any opportunity to have this suppressed.

78. The main reason relied on in this case for withholding information follows from the fact that the exercise of the Building Act right and a request for a LIM are made in respect of a particular identified property. By contrast, in this case what is in issue is all building consent information held by the local authority concerned or received by it within a certain period, without the requester specifying or identifying particular properties. This factor is said to differentiate this request from requests made in respect of particular properties.
79. In terms of the LGOIMA I am unable to accept that this is a valid distinction. The ground on which information may be withheld – the necessity to protect the privacy of natural persons – is the same in respect of a request that relates to a single property as well as to a number of properties. The LGOIMA requires that a requester must specify the request with due particularity (section 10(2)). It is not contended that a consolidated or bulk request fails to comply with this requirement. Such a request is perfectly comprehensible (which has been the accepted test for “due particularity”). It is, of course, open to a requester to further particularise a request by specifying a property. Quite apart from the Building Act right and the LIM right, a requester could request building consent information from a local authority for a specific property simply using Part II of the LGOIMA.
80. So, effectively, the sole reason suggested for withholding personal details in response to a request for information of this type under the LGOIMA is the fact that individual properties are not specified. In my view, provided the request itself is specified with due particularity, this is not a valid reason for responding in a different way to an information request of this nature. If the information is available if sought for a specified property, it cannot be necessary to withhold it to protect privacy where the property to which it relates is not itself identified in the request.
81. To take an extreme example. I take it that it is accepted that a request lodged periodically for building consent information for every property in the district, individually identifying all of those properties, would be fulfilled. But, it is said, a request for such information for every property that does not individually identify them should not be. A requester who was prepared to go to the trouble of constructing a list of all properties in the district would get the information. One who was not would not get it. If this were the case it would be using inconvenience to the requester as a means of denying access to information. I cannot accept that this is a basis for withholding information, provided that the request is a valid request in terms of section 10.
82. Administrative inconvenience for the *local authority* is a ground for refusing to supply information. If information cannot be made available without substantial collation or research, it may be refused (section 17(f)). It has not been suggested that this is the case here. The information is ascertainable and indeed has been supplied for many years. In the absence of such a reason to refuse I do not consider that a process

designed to exhaust a requester can be resorted to in order to deny information which it is basically (that is, on an individual basis) accepted must be made available.

83. Consequently, in my view the provisions of section 217 are quite inconsistent with reliance on section 7(2)(a) of the LGOIMA as a ground to withhold information. If section 7(2)(a) were to be applied there would not be a right to access information under section 217. The act of applying for a building consent is itself a surrender of one's privacy to that extent. It cannot be necessary to rely on section 7(2)(a) to protect something that is already lost.
84. Consequently, I do not consider that it is necessary to withhold information either individually or in bulk to protect the privacy of natural persons. This cannot be done consistently with the Building Act and the obligation on local authorities to provide LIMs.

The privacy interest

85. I accept that there are genuine concerns on the part of applicants for building consents at the potential availability of information about themselves. The Privacy Commissioner in her report emphasises these. The Privacy Commissioner in 1998 singled out bulk supply of this information as being of particular concern. Bulk supply, he said, enhances availability and thus while inevitably there is some loss of privacy by being on the register this loss is greater when made available in bulk. I agree with this observation insofar as the privacy loss where bulk information is concerned is wider in extent in that more people are affected. But as regards each *individual*, the privacy loss is the same regardless of whether information is obtained in bulk or individually.
86. However, the remarks of the Chief Ombudsman in 1998 are still pertinent. He said:

"Whilst I fully understand the concerns of those property owners who may not wish to receive unsolicited marketing material, and consider the disclosure of their names and addresses to requesters such as Whats On a breach of their privacy, nevertheless that is not the issue. What the Council must in the first instance consider is whether such a request may be refused under LGOIMA.

...

I should, perhaps, emphasise that I have arrived at my view simply on what I see to be the current statutory obligations and not because I consider that individuals can have no legitimate concern about the disclosure of personal information about them in circumstances such as exist here. However, the appropriate means of addressing such concerns is by way of proposing legislative amendments to meet them. If such legislation were proposed or introduced, all relevant public interest considerations for and against any change to the present laws could then be addressed in the appropriate forum, which is Parliament. It is not for an Ombudsman to pre-empt the outcome of such a process,

but to apply the present legislation as it is seen to be, rather than as might be seen by some to be desirable.”

87. Parliament did not deem it necessary, when re-enacting the Building Act in 2004, to alter the provisions which deal with the requirement to keep building consent information and provide access to that information. Indeed, insofar as it made any change (as remarked in para 33 above) it enhanced the right to access information by removing infringements of copyright as a ground to withhold it. When Parliament re-enacted the right to access building information such information had been provided in bulk for some 10 years. A provision restricting such supply could have been included in the legislation. It was not. (By contrast, an amendment to the Local Government (Rating) Act 2002, made as from 7 July 2004, provides specifically that where “a series of requests” is made “about particular rating units” listed on a local authority’s rating information database, the requests must be “related” and “for purposes other than for the bulk collection of the names or postal addresses (or both) of people included in the database” [s.28A(6) LGRA 2002].)

Other possible grounds for refusing to supply the information

88. The Auckland City Council suggested two other possible reasons for refusing to supply the information sought by Whats On. These were section 17(c)(i) and section 17(d) of the LGOIMA.

Section 17(c)(i)

89. The Council suggested that making the information available under the LGOIMA would be contrary to the provisions of the Building Act and the Privacy Act (section 17(c)(i)).
90. In regard to the Privacy Act, that Act itself supplies the answer. Section 7(1) provides that nothing in privacy principle 11 (which relates to disclosure of personal information) derogates from a provision in another Act authorising or requiring personal information to be disclosed. Section 60(3) provides that nothing in any information privacy principle or any public register principle that is inconsistent with the provisions of another enactment, applies. These provisions have been referred to by the Ombudsmen in the past as establishing that requests under the official information legislation must be determined under those Acts and not under the Privacy Act.
91. Nor do I accept that making the information available would be contrary to the Building Act. My reasons for not accepting this argument in respect of the Building Act follow from the discussion above (paras 59 - 66) about the relationship between that Act and the LGOIMA. In essence, the two Acts operate in parallel providing different means of accessing building consent information. One does not exclude the other. There is nothing in the Building Act that excludes the right to seek information under the LGOIMA. Parliament could have made the Building Act the exclusive means of

obtaining building consent information but it did not do so. Section 17(c)(i) cannot apply to such a request.

Section 17(d)

92. The second reason that was advanced accepts the parallel nature of the two means of access and develops it by claiming that, as the information can be obtained by exercising one's Building Act right, it is thereby already "publicly available" and supply under the LGOIMA may consequently be refused (section 17(d) – the information requested is or soon will be publicly available). In considering the validity of this argument one must, I think, compare the nature of any LGOIMA request with what is available under the Building Act.
93. If a request was made under the LGOIMA for building consent information held in respect of an identified property, there is, on the face of it, a strong argument for the view that this information is available by exercising one's rights under the Building Act. In some respects the latter may be more favourable than the LGOIMA (more immediate access). In other respects it may be less convenient (requiring personal attendance at the local authority's office).
94. If information is available under the Building Act then seeking to withhold it, if requested under the LGOIMA, would be ineffectual and could not be "necessary" in order to protect the interests expressed in section 7(2). I see the force of the argument that section 17(d) would apply to such a request. A local authority might, for convenience, choose to provide the information in response to a LGOIMA request but it is likely that it could rely on section 17(d) and insist on the requester proceeding under the Building Act.
95. But the situation is different with a consolidated or bulk request. To be "publicly available" the information requested must be reasonably accessible. If, for example, the alternative means suggested would be prohibitively expensive or so difficult to access as to be virtually impossible to obtain, it could not be said that the information was publicly available so as to justify refusing to supply it under section 17(d). The duty of reasonable assistance also puts some limits on the ability of an agency to utilise this ground.
96. With consolidated requests of the nature in issue here, I do not consider that insisting on the requester presenting at the local authority's offices and making a large number of Building Act requests is an adequate substitute.
97. Though the Building Act right is not restricted in the number of inquiries that may be made about individual properties (a person could presumably ask to see the building files for two or three properties at a time), there is a strong implication that in practice it is relatively limited. It appears to be the expectation that there will be individual requests. If it was not so confined it is difficult to see how an authority could comply with its obligation to give immediate or near-immediate access to the requester. At the very least, insisting that a requester desiring a large number of files use the Building

Act route imposes a level of inconvenience that raises a question of whether the information is truly publicly available.

98. But regardless of whether particularised multiple requests can be adequately satisfied under the Building Act, I do not consider that a consolidated request of this nature can be. This is for essentially the same reason as was discussed in paras 81 - 82. It is, in effect, impossible or too inconvenient for a requester to make this type of request on a particularised basis. Relying on the requester's inability to frame a sufficient number of requests as a means of resisting the provision of information, does not seem to me to be within the spirit of the LGOIMA. If section 17(d) could be used for that purpose it would be being used to resist the provision of information, not to direct a requester to an adequately available alternative source. In this case the Building Act is not a real alternative for the information desired by Whats On (and any attempt to utilise it would be likely to bring an authority's administrative facilities to a standstill). I therefore do not consider that the information sought here is publicly available. Consequently, a bulk request cannot be refused under section 17(d).

General principle

99. Although I have approached this matter on the basis of the particular circumstances of this case, I do consider that there is a general principle to be derived from consideration of it.
100. There is a question that has arisen in past complaints to the Ombudsmen of whether there is a distinction in the application of the withholding grounds of section 9 of the Official Information Act and section 7 of the LGOIMA depending upon whether particularised individual information or generalised aggregate information is being sought. In my view there is not.
101. This issue generally arises in respect of sections 9(2)(a) / 7(2)(a) where the privacy of natural persons is in issue. As will be apparent from my reasoning above, I am unable to accept that it is necessary to withhold information sought on an unparticularised, general basis, where the same information is available (whether under the LGOIMA or another statute) on a particular, individual basis. It seems to me to be inconsistent, granted the latter right, to claim that it is "necessary" to withhold the information in the circumstance of the former. An approach that relies for its effectiveness on making it difficult or inconvenient for the requester to frame his or her request in a way that will elicit the desired information seems to me to be at odds with the intent of the official information legislation generally.
102. I do accept that there may legitimately be different outcomes where the individual information and the generalised information are held by different agencies subject to different conditions. For example, in 2008 I dealt with two complaints against the Department of Building and Housing concerning its refusal to release lists of properties that had had claims lodged with the Weathertight Homes Resolution Service (W58586 and W58267). I accepted that section 9(2)(ba)(ii) (information held subject to an obligation of confidence) applied, notwithstanding that the information was available on

an individual basis from territorial authorities. The fact that this was so did not negate the obligation of confidence owed by the *Department* and there were still good public interest reasons why its obligation of confidence should be maintained.

103. But where there is no difference in the conditions under which information is held, especially where it is held by the same agency, I cannot see a reason for distinguishing between individual and general requests. If the information is available in the one case, it cannot be necessary to withhold it in the other.

Consideration under the Ombudsmen Act

104. The foregoing analysis has been undertaken in terms of local authorities' obligations under the LGOIMA and the relationship of those obligations with the provisions of the Building Act. The conclusion was that there are no good grounds under the LGOIMA to withhold personal details that comprise part of building consent information. In any request under the LGOIMA for building consent information this is the end of the matter. Complying in good faith with a request for official information cannot involve any question of unreasonable behaviour in terms of the Ombudsmen Act.

105. But, as indicated at the outset of this opinion, the two complaints made to this Office are not about refusals to supply information requested under the LGOIMA. They are, respectively, about a local authority's practice of voluntarily or proactively making such information available and a local authority's decision to cease voluntarily making such information available. These complaints therefore engage the Ombudsmen Act (though they have grown out of the LGOIMA) and therefore involve a consideration of whether the practice and decision are objectionable in that Act's terms.

106. Section 22(1) and (2) of the Ombudsmen Act set out a number of circumstances that may justify an Ombudsman making a formal recommendation under that Act. The circumstances are not expressed as constricting the scope of an Ombudsman's consideration of a complaint under the Act but they may be taken as providing it with a focus. I have given my reasons in this opinion for my view that providing such information is not contrary to the LGOIMA. In Ombudsmen Act terms the principal question that would seem to arise is whether a local authority proactively releasing information it would be obliged to release under the LGOIMA could be said to be acting in a way that is administratively unreasonable under the Ombudsmen Act. (I will come back to the implications of proactive release in terms of other legislation after considering this question.)

107. I have set out above how the pro-active release of this information developed out of regular LGOIMA requests for it and the Ombudsmen's endorsement of the legality of providing the information under that Act. Proactive release seems to me to have been an understandable development. Rather than Whats On making a formal request each month, its desire for the information has been anticipated and it is made available to it without the need to ask. In fact, Whats On's desire for the information

is not merely anticipated, it is well-understood and has been the subject of ongoing dealings with local authorities for many years.

108. Regardless of how close the relationship is with Whats On, it does not seem to me at all unreasonable for local authorities to have adjusted their release practices in this way. Rather than requiring a formal request to be made, they assemble and release the information as a matter of course. To have done otherwise and required a request each month could rightly be criticised as unduly bureaucratic. The fact that the course they have adopted changes the legal conditions of release (which I refer to later) does not make it unreasonable. Indeed I consider the adjustment in practice perfectly reasonable. I therefore do not consider that the practice of proactive release is unreasonable or otherwise objectionable under the Ombudsmen Act.
109. But there is a further factor in considering the reasonableness of release of the information. That is that some local authorities at least charge a fee for release of the information to Whats On (and others). Does the element of a pecuniary relationship convert a reasonable practice into an unreasonable one?
110. In my view it does not. If the information had been released in response to a request under the LGOIMA, the local authority would have been entitled to make a charge for supplying it (section 14(1A)). In the absence of regulations prescribing charging rates (and none exist) the charge fixed must be reasonable (section 14(3)) and can be reviewed by the Ombudsmen (section 27(1)(b)). The legislature clearly did not regard it as illegitimate to charge for replying to an official information request. I cannot think that charging for supplying the same information to a willing recipient outside the LGOIMA could be viewed as illegitimate either. If the recipient considered that it was unreasonable to charge at all or that the charge fixed was unreasonably high, it could complain to the Ombudsmen about such a charge under the Ombudsmen Act in the same way as any other administrative decision of a local authority can be challenged.
111. In this way a question as to the appropriateness of the charge actually levied could arise (it has not in this case), but that is a different matter from the supply of the information. Whatever view one took of the reasonableness of a charge, that could not convert the decision to release building consent information in the first place into an unreasonable one. Consequently, the fact a local authority may charge for supply of this information does not, in my view, render its decision to supply it unreasonable.

Protection for release of building information

112. An authority's disclosure of information in response to a LGOIMA request will be protected from criminal or civil liability by section 41 of that Act.
113. But this protection, and the views expressed above on release under the LGOIMA, apply only in respect of the disclosure by a local authority of

building consent information in response to a LGOIMA request. The LGOIMA only applies to information that is “held” by an organisation subject to the Act. It does not apply to information that is not yet in existence. Therefore the LGOIMA will not apply to requests for information to be provided at some future time when that information comes into being. This issue has arisen for consideration by Ombudsmen in the past, and the view that has been taken is that, while it is open to an agency to choose to treat a standing order for information which is collected on a routine basis as a request under the Official Information Act or the LGOIMA and to make decisions about release at regular intervals, there is not in fact a valid request under those Acts. Thus section 41 would not apply to release pursuant to such a practice. Nor will section 41 apply to any other voluntary or proactive release of the information.

114. In respect of any such release outside the scope of the LGOIMA, the Privacy Act will apply and the release will need to conform to the privacy principles set out in that Act. These are matters for the Privacy Commissioner and, if need be, the Human Rights Review Tribunal to consider, not an Ombudsman.

Conclusions

115. I conclude that:

1. The LGOIMA does not authorise a local authority to withhold personal details that comprise part of building consent information which is subject to the Building Act.
2. A local authority releasing personal details that comprise part of building consent information that is subject to the Building Act, either in response to a request under the LGOIMA or on its own initiative in lieu of such a request, is not acting unreasonably or otherwise objectionably in terms of the Ombudsmen Act.
3. A local authority releasing personal details that comprise part of building consent information that is subject to the Building Act in response to a request under the LGOIMA is protected from criminal or civil liability by section 41 of the latter Act.
4. Whether a local authority releasing personal details that comprise part of building consent information that is subject to the Building Act on its own initiative in lieu of a request under the LGOIMA is acting contrary to the Privacy Act is a matter for the Privacy Commissioner and the Human Rights Review Tribunal to determine.

My view

116. In terms of the Ombudsmen Act it is my view as follows:

1. The complaint against the Auckland City Council (9952) is not sustained.

2. The complaint against the Waitakere City Council (10100) is sustained to the extent that it was unreasonable for the Council to exclude from monthly reports that it issued information that it was obliged to release under the LGOIMA and the Building Act (as discussed in this opinion).

117. I do not propose to make any recommendation in respect to the actions of the former Waitakere City Council. I have informed the Chief Executive of the Department of Building and Housing that I consider that there are difficult questions concerning the relationship between the right to access building information under the Building Act and the right to that information under the LGOIMA. I expressed the view that the Department may wish to examine these matters in the context of its current review of the Building Act. I also intend to draw this opinion to the attention of the Law Commission in the context of its ongoing reviews of the law of privacy and official information.

118. Given the length of time that these bulk supply arrangements have been in place it is somewhat surprising that their implications remain contentious. I do consider that local authorities should do what they can to promote a wider understanding of the potential dissemination of building consent information both in respect of individual availability under the Building Act and the bulk supply discussed in this opinion. This could be done by including such information in the privacy statement attached to building consent application forms. I understand that some local authorities either have done or are considering doing this. I will draw this matter to the particular attention of Local Government New Zealand.

David McGee
Ombudsman

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