

Ombudsman’s opinion under the Local Government Official Information and Meetings Act 1987

Legislation	Local Government Official Information and Meetings Act 1987, ss 7(2)(b)(ii), 7(1) (see appendix for full text)
Agency	Wellington City Council
Request for	List of buildings whose owners had not responded to Council’s requests for information about non-ductile columns
Ombudsman	Leo Donnelly
Case number(s)	456464
Date	18 June 2018

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Background

Earthquake safety review

1. Following the 2011 Christchurch Earthquake, the Ministry of Business, Innovation, and Employment (MBIE) carried out a review to identify buildings with certain features which

were suspected of having contributed to the collapse of the Canterbury Television (CTV) building and the loss of 115 lives.¹

2. MBIE's review identified reinforced concrete buildings, with three or more storeys, which were granted building permits or consents between 1982 and 1995. The use of *non-ductile concrete 'gravity' columns* was also considered a relevant factor.
3. While the resilience of these buildings was considered adequate at the time of their construction, MBIE identified the need for further engineering assessments, taking into account modern building standards, to confirm the adequacy of each buildings' overall structural performance or to identify any structural issues requiring remediation.

MBIE decision to withhold a list of buildings with similar features to the CTV building

4. In December 2013, former Chief Ombudsman Dame Beverley Wakem commenced an investigation and review, under the Official Information Act (OIA), of MBIE's decision to withhold a list of buildings with columns similar to the CTV building which were identified in its nationwide review.
5. In August 2014, Dame Beverley formed the opinion that the OIA provided good reason for MBIE to refuse that request.²
6. Dame Beverley accepted that, at the time of the request, section 9(2)(b)(ii) applied to the information at issue.³ In considering whether release of the list requested would unreasonably prejudice the commercial position of the building owners, Dame Beverley commented:

...I consider that it would be unreasonable in the circumstances to release unverified information into the public domain, when doing so has adverse commercial implications for the owners who are funding the voluntary reviews, and at the risk of thwarting the process in place to supply accurate and verified information to both the review, and to the public...

7. Dame Beverley accepted that there were public interest considerations favouring disclosure of the information, but was not persuaded that, at that time, they outweighed the need to withhold the information under section 9(2)(b)(ii). Dame Beverley instead considered that the public interest was met by the steps being taken by MBIE in its

¹ The Canterbury Earthquakes Royal Commission of Inquiry subsequently concluded, in its *Final Report – Volume 6 Canterbury Television Building (CTV)*, that a number of non-compliant design elements ultimately contributed to the sudden and catastrophic collapse of the CTV building. The report is available here: <http://canterbury.royalcommission.govt.nz/Final-Report-Volume-Six-Contents>

² Office of the Ombudsman 'Request for list of buildings requiring structural review' August 2014. Retrieved from http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/889/original/341821-request-for-list-of-buildings-requiring-structural-review.pdf?1413916825

³ Section 9(2)(b)(ii) of the OIA is the equivalent of section 7(2)(b)(ii) of the LGOIMA.

nationwide review, and her understanding that information about the review would progressively be made available to the public.

8. Dame Beverley also noted that the inclusion of buildings on the list did not necessarily mean that they were *'unsafe'*. Dame Beverley noted that the buildings were likely to be subject to further evaluation by the relevant local authorities, including Wellington City Council, to determine earthquake performance ratings.

A journalist's information request to Wellington City Council

9. In line with MBIE's nationwide review, Wellington City Council (the Council) wrote to each of the owners of the identified buildings within its territory and requested them to complete a review and provide information about their buildings' potential non-ductile columns.
10. On 19 May 2017, a journalist subsequently made a request to the Council, under the Local Government Official Information and Meetings Act (LGOIMA), for a list of the buildings whose owners had not responded to the Council's review.
11. On 16 June, the Council advised the journalist that there were five buildings whose owners had not, at the time of his LGOIMA request, responded satisfactorily to the Council. However, the Council withheld the locations of the buildings under section 7(2)(b)(ii) of LGOIMA, as it considered that providing the journalist with the list would unreasonably prejudice the commercial position of the building owners.
12. The journalist sought an Ombudsman's investigation and review of the Council's decision under the LGOIMA. He submitted that the release of the information at issue would not unreasonably prejudice the commercial position of the building owners, as he would ensure that the information would be published in a context which made it clear that being on the list did not necessarily mean that the buildings were unsafe.
13. The journalist further submitted that it was in the public interest for this information to be made available. He contended that the public has an interest in knowing *'which buildings are those where the building owner has not complied with the survey request'* so that they could make their own decisions in respect of those buildings on a more informed basis.
14. On 1 August, after the Council was notified of this complaint, the Council advised me that, subsequent to the journalist's request, it had received updates from the owners of the buildings at issue. The Council has subsequently advised that it is satisfied it had received responses from three of the four owners.
15. On 21 August, the Council provided the journalist with information about the actions taken by the relevant building owners since his information request, but continued to withhold the locations of the five buildings. The Council advised the journalist:
 - a. the owner of Building One confirmed they had received an engineering assessment and had undertaken remedial works. This information was provided to the Council.

- b. the owner of Buildings Two and Three confirmed an engineer was assessing both buildings and expected a report within the next two months;
- c. Building Four had recently been sold and the new owner was not aware of Council's request to its previous owner. The new owner subsequently provided Council with a summary of an engineer's report and undertook to provide a more detailed response in the next couple of months;
- d. the owner of Building Five had obtained an engineer's report but was not aware that it had not yet been passed onto the Council.

Analysis

- 16. Section 7(2)(b)(ii) of LGOIMA provides good reason for withholding information if, and only if, it is necessary:
 - a. to protect information where the making available of the information would be likely unreasonably to prejudice the commercial position of the person who supplied or is subject of the information; and
 - b. this interest is not outweighed by other considerations which render it desirable, in the public interest, to make the information available.
- 17. The Council advised that it had taken Dame Beverley Wakem's previous published investigation into account when making its decision on the journalist's request.
- 18. The LGOIMA requires me to investigate and review a decision at the time it was made, taking into account the terms of the request, the refusal, and any relevant context, as well as the countervailing public interest considerations which existed at that time. Dame Beverley's opinion was in respect of the circumstances that existed three years ago. I have, however, noted the principles considered in Dame Beverley's investigation and the rationale for her earlier opinion.

Application of 7(2)(b)(ii) to the information

- 19. The Council considered that the release of the information would unreasonably prejudice the commercial position of the owners, as release of the information would effectively enable the public to '*name and shame*' the owners, who are engaged in a voluntary process, in circumstances where the safety of their buildings are yet to be verified.
- 20. The Council submitted that, despite the journalist's assurances as to providing context in reporting, this will create the public perception that these select buildings are '*automatically unsafe*'.
- 21. In assessing the application of this section, I consulted with the owners of the buildings at issue. The building owners also considered that the release of the information would unreasonably prejudice their commercial position, due to the possible negative

perception that the release of the information would create, particularly due to the nature of the buildings and their use. The views expressed by the owners about the commercial prejudice aligned with those of the Council's.

22. In assessing whether 7(2)(b)(ii) applies to the information I must consider:
 - a. whether the information at issue relates to the commercial position of a person or organisation;
 - b. the precise nature of the predicted prejudice to this commercial position that would result from the release of this information, and how likely is this to occur;
 - c. whether the predicted prejudice would be '*unreasonable*'; and
 - d. whether this predicted prejudice is so likely to occur that it is '*necessary*' to withhold the information.
23. I accept that the release of this information would be likely to prejudice the commercial position of the owners by impacting on their ability to rent or sell the building or insure it for value.
24. The release of the information confirms that the buildings are part of the review due to potentially having non-ductile columns, which could lead to the public perception that the buildings are unsafe, when this is not necessarily the case.
25. Publication of the requested information in its proper context would not necessarily persuade all current tenants to cancel or choose not to renew their leases, dissuade potential tenants from taking up leases, or prompt insurance companies not to issue or maintain insurance cover. However, I accept that there is, nevertheless, a real risk that some people may react negatively to disclosure of the information thereby giving rise to the harm that section 7(2)(b)(ii) seeks to protect against.
26. The mere fact that these buildings are on this list does not necessarily mean that they are unsafe. The purpose of the list was to assess what, if any, further information was required as a starting point for further evaluation of how well each of the buildings would perform in an earthquake.
27. I accept that the owners' participation in the review was voluntary, and that subsequent information has revealed that many of the owners within the scope of the journalist's request had previously engaged engineers to assess the buildings. In several cases, there had simply been an omission to provide certain information to the Council.
28. However, the voluntary nature of the review is mitigated by a number of factors. Owners have had since 2012 to engage engineers to assess the potential risk. There was sufficient publicity about the issue to signal to building owners that they should take steps to ensure their buildings are safe. Additionally, the Council advised me that it is satisfied that it has received sufficient responses from most of the building owners.

29. The type of prejudice raised could also be seen as part and parcel of the commercial landscape. It is not uncommon for commercial investments to be adversely affected by an unexpected event. It is a general risk when investing in property, so in some respects this type of prejudice could reasonably be anticipated.
30. The fact certain buildings were involved in the review is also information recorded on their LIMs and therefore is, in a sense, information which is publicly available.
31. I note the journalist's argument that publication of this information, in its proper context, would not lead the public to consider that the buildings are unsafe. However, the journalist's request makes a comparison to the CTV building and the devastating events that occurred there. I therefore accept it is likely that some people at least will form a negative perception of safety for the buildings, notwithstanding the concurrent publication of contextual information. The number of buildings within the journalist's request is small, and the impact on these buildings may be magnified as a consequence.
32. In all the circumstances, I consider that although this information does not necessarily reflect the safety status of the buildings, disclosure would be likely to cause some people to believe that the buildings may be unsafe, and this would be magnified due to the narrow nature of the request. While finely balanced, I consider that the release of the locations of these buildings where owners had not complied with the Council's requests would likely cause an unreasonable prejudice to the commercial positions of the owners.
33. I therefore consider that section 7(2)(b)(ii) of LGOIMA applies to the locations of these particular buildings.

Is the need to withhold outweighed by the public interest in the information?

34. Having accepted that section 7(2)(b)(ii) applies, I must then consider whether the need to withhold the information is outweighed by the countervailing public interest favouring release (section 7(1) of LGOIMA).
35. One of the purposes of LGOIMA, set out in section 4(a)(ii) of the Act, is to promote accountability of local government members and officials *'and thereby to enhance respect for the law and to promote good local government'* through the progressive availability of official information.
36. There is a strong public interest in transparency and accountability which allows the public to determine what steps have been taken to ensure the safety of the buildings in question. At present, the current and future occupants of these buildings may not be aware of potential issues and are unable to make an informed decision about whether the owners of the buildings they are residing or working in or visiting are addressing any safety concerns. While a tenant may be able to request such information from the Council for their particular building, they are not necessarily alerted to any need to do so.

37. There is therefore a public interest in ensuring that building owners take public safety seriously, and are doing what they can to comply with reviews such as this to ensure appropriate steps are being taken, which can be achieved through greater transparency.
38. However, in the circumstances of this case, the purpose set out in section 4(a)(i) of the LGOIMA is also relevant. This purpose is to increase the availability to the public of official information held by local authorities *'to enable their more effective participation in the actions and decisions of local authorities and thereby to enhance respect for the law and to promote good local government in New Zealand'*.
39. Public concern about preparation by both central and local government to cope with the impact of earthquakes has risen strongly since the Christchurch earthquake in 2011. The public, particularly in areas of New Zealand such as Wellington which are more likely to suffer earthquake activity, have a strong interest in adequate transparency about steps being taken to ensure a safer environment should an earthquake strike. Disclosure of these steps and, equally as important, how such steps are being progressed, enables the public to participate more effectively in community debate about the effectiveness and timeliness of such steps.
40. It is undeniable that public attitudes and sentiments have shifted since Dame Beverley's investigation. The 2016 Kaikoura earthquake highlighted the vulnerability of many areas of Wellington City, and led to the partial or complete failure of a number of high profile buildings in the city. Earthquakes have been, and will continue to be, a fact of life for Wellington and the overriding public interest is in enabling people to weigh these risks as fully informed as possible.
41. Release of the locations of the buildings would enable the public, in particular the public of Wellington, to make better informed decisions regarding the safety of buildings in Wellington in the event of an earthquake. This may naturally involve seeking further information so that they can determine whether they are satisfied with the steps that have been taken.
42. In this case, at the time of the journalist's request, the Council had not been provided with the information it needed to continue with assessments concerning non-ductile columns in these buildings. Given that the review has now been underway for five years, the public interest in disclosure and transparency is strengthened as the public would have expected that this information would have been provided in a timely fashion given its public safety purpose.
43. Although I accept that a building's presence on the list does not mean that it is unsafe, its inclusion is nevertheless a signal that further assessment is or was needed. While the Council has a number of other processes and powers to enable it to identify earthquake risks in buildings and to notify the public about earthquake prone buildings, there remains a strong interest in increasing transparency to promote public safety, given the potential devastating consequences as illustrated by the CTV building collapse in Christchurch.

44. I have taken into account my understanding that some of the building owners had taken steps prior to the journalist's request but had not provided information about those steps to Council. While there is concern that these owners may be singled out in circumstances where a number of other buildings have similar features but are not identified, I can only consider the request as it was made by the journalist. I note that it is open to the Council to further consider whether the details of other buildings within the review with non-ductile columns should be released. This would certainly go towards promoting the public interest in transparency which I have identified.
45. I am not persuaded by the Council's arguments that the release of the information may prevent it from obtaining such information in future. If, in similar circumstances, there had been building owners who had not and did not intend to provide similar information to Council, release of the details of the buildings at issue would encourage compliance by making such non-compliance transparent to the public and enabling the public to express their concerns.
46. This reflects the strong public interest in knowing whether building owners are taking appropriate steps to ensure safety in buildings, and are not avoiding a review which is clearly in the public interest. Additionally, any subsequent reviews can be designed to ensure compliance, such as exploring appropriate methods of compulsion to ensure cooperation.
47. On balance, I consider that the countervailing public interest in disclosure of the information outweighs the interest in withholding it under section 7(2)(b)(ii). The prejudice to the commercial position of the owners can be mitigated by the Council providing the journalist with a relevant explanatory statement that provides additional context about the review and the steps since taken by the owners of the buildings. The Council may also wish to provide the full list of the buildings that were subject to the review, so as to allay concerns about the owners within the scope of this request being targeted.
48. The release of this additional information would address concerns that the owners had taken steps since the journalist's request to provide the Council with information.

Ombudsman's opinion

49. It is my final opinion that the Council did not have good reason to withhold the information requested under section 7(2)(b)(ii) of LGOIMA. Although I have accepted that section 7(2)(b)(ii) is applicable, it is my opinion that the interest in withholding is outweighed by the countervailing public interest in availability of the information requested.

Recommendation

50. I recommended that the information requested, namely a list of the buildings whose owners had not responded to the Council's review at the time of the journalist's request, be released to the journalist. It is open to the Council to consider providing the journalist with a relevant explanatory statement that provides additional context.
51. Following receipt of my final opinion, the Council provided the journalist with the information that was requested.

Appendix 1. Relevant statutory provisions

Local Government Official Information and Meetings Act 1987

7 Other reasons for withholding official information

- (1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.
- (2) Subject to sections 6, 8, and 17, this section applies if, and only if, the withholding of the information is necessary to—
 - ...
 - (b) protect information where the making available of the information—
 - ...
 - (ii) would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information;