

Commercial position and negotiations – request for information concerning Council’s decision to allocate ratepayer funds to marketing support for Singapore Airlines

Legislation	Local Government Official Information and Meetings Act 1987, sections 7(2)(b)(ii), 7(2)(c)(i), 7(2)(i)
Agency	Wellington City Council
Ombudsman	Leo Donnelly
Case number(s)	428998
Date	June 2018

Summary

Wellington City Council (the Council) received a request for any written material used by the Council’s Chief Executive when he made his decision to provide designated ‘*Destination Wellington*’ funds to Wellington Airport International Airport Limited (the Airport). The Airport intended to use these funds to market Singapore Airlines’ Wellington-Canberra-Singapore route.

The Council relied on sections 7(2)(b)(ii) and 7(2)(c)(i) of the Local Government Official Information and Meetings Act 1987 (LGOIMA) to withhold the information at issue. It considered that this was necessary to avoid prejudice to the respective commercial positions of the Airport and Singapore Airlines and, in addition, to protect information that was subject to an obligation of confidence.

Balancing the interests identified by the Council favouring withholding the information against the countervailing public interest in its release, the Ombudsman ultimately recommended release of much of the information at issue, including a summary of certain details from the agreement formalising the funding arrangements.

Background

1. On 1 February 2016, the Council received a request from a journalist for:

Any written material used by WCC chief executive ... in coming to his decision to provide marketing support to the proposed Wellington-Canberra-Singapore air service from the Destination Wellington fund.

2. The Council provided five documents in response but these contained redactions on the basis that the withheld information would be likely to either unreasonably prejudice the commercial positions of the Airport and Singapore Airlines, and/or that the information was subject to an obligation of confidence (sections 7(2)(b)(ii) and 7(2)(c)(i) of LGOIMA refer).
3. The journalist sought an investigation and review of this decision by the Ombudsman, contending that the information that was released did not enable him to assess whether the expenditure was prudent, or whether it made a difference to Singapore Airlines' establishment of the route and, as such, the public interest favoured release of the withheld material.

Investigation

Information at issue

4. The Council provided the Ombudsman with copies of information relevant to the request and investigation. In addition to the redacted documents, the Council enclosed a written agreement between the Council, Wellington Regional Economic Development Agency and the Airport, which had been signed after the Council received the request (the agreement).
5. The Council contended that this agreement was outside the scope of the request, on the basis that it was not written material used by the Chief Executive in coming to his decision to commit marketing support. The Council said that this was simply the legal document which gave effect to the arrangements already made between the parties and that, in any event, it had come into existence after the Council had made and communicated its decision on the information request. Believing this took the agreement outside the scope of the request, the Council had simply not considered it as part of the decision-making process.
6. The Ombudsman, on careful review, did not accept that the Council had made and communicated a valid decision on the LGOIMA request prior to the agreement's signing in April 2016. Rather, he considered that the communication referred to by the Council as its 'decision' merely constituted advice to the requester that the information was being collated. In those circumstances, by the date of the actual decision – for the purposes of giving effect to the Council's obligations under LGOIMA the agreement had come in to existence and fell within scope of the original request.
7. The information at issue as considered by the Ombudsman for the purposes of this investigation and review therefore included the agreement, as well as the redactions from the documents initially released to the journalist.

Section 7(2)(b)(ii) – Prejudice to commercial position

8. Section 7(2)(b)(ii) of LGOIMA provides that information may be withheld where the making available of the information *‘would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information’*.
9. The Council considered that release of details of the Airport’s arrangement with Singapore Airlines would prejudice the Airport’s ability to negotiate with other airlines who might wish to provide services to Wellington. It submitted that providing competitor airports with an *‘understanding of how WIAL structures and quantifies its support arrangements and the details of Council’s assistance would place other airports at a distinct commercial advantage.’*
10. The Council also argued that release of the information would enable competitor airlines to gain a deeper understanding of Singapore Airlines’ profitability, thereby enhancing those other airlines’ ability to compete, to the detriment of Singapore Airlines.
11. After considering the Council’s report and meeting with an Airport representative, the Ombudsman accepted that details of the Airport’s arrangement with Singapore Airlines could be withheld. The Ombudsman noted in a letter to the requester that:

[A]irports, not just airlines, are essentially in competition with one another for passengers, because higher passenger numbers coming through an airport increases revenue. Airports attempt to attract new airlines and destinations and, therefore, new passengers through arrangements such as the one in this case. Wellington Airport’s concern is that if details of its arrangement were released, it would make its future negotiations of similar arrangements more difficult and prejudice its ability to increase passenger numbers and, therefore, revenue.
12. The Ombudsman considered that the Council and, by extension, the public generally, have a legitimate interest in assisting the Airport to promote Wellington as a destination without unduly hindering it through the creation of an expectation that funding from the Council will routinely be made available. As such, the Ombudsman accepted that section 7(2)(b)(ii) applied to details of the agreement, including details of the Council’s payments from the Destination Wellington fund, on the basis that knowledge of those details would be likely to encourage other parties to believe that the type or level of assistance provided in this instance would be also be available in other cases, thereby prejudicing unreasonably the Airport’s position in future negotiations.
13. However, even where section 7(2)(b)(ii) applies, this is subject to balancing the protected interest against the countervailing public interest in release. The Ombudsman turned next to this exercise, as discussed under the heading *‘Public interest’*.

7(2)(c)(i) – Obligation of confidence

14. Section 7(2)(c)(i) of LGOIMA applies to information where the making available of that information *‘would be likely to prejudice the supply of similar information, or information*

from the same source, and it is in the public interest that such information continue to be supplied.'

15. The Ombudsman did not accept that all information exchanged in the course of the negotiations was automatically subject to an obligation of confidence. LGOIMA does not provide blanket protection against release of information by virtue of its belonging to a particular class or category. Rather, the agency, and an Ombudsman on review, must be satisfied in each case that there is a reasonable and objective basis for the understanding that the particular information sought is subject to an obligation of confidence, and that its release would be prejudicial.
16. The Ombudsman found it difficult to accept that an obligation of confidence could exist in respect of the withheld information where the matter under discussion was whether, and to what extent, ratepayer funds should be provided for the benefit of third party commercial entities. To accept this argument would be tantamount to accepting that third parties can prevent the Council from disclosing to ratepayers how it uses rates.
17. Further, for section 7(2)(c)(i) to apply, the information at issue must be of a character such that its disclosure would create a demonstrable harm to the protected interest. Specifically, 7(2)(c)(i) requires that release would be likely to prejudice the supply of similar information, or information from the same source, and that it is in the public interest that such information continue to be supplied. The High Court has relevantly said:¹

There cannot be allowed to develop in this country a kind of commercial Alsatia beyond the reach of a statute. Confidentiality is not an absolute concept admitting of no exceptions.

...

It is an implied term of any contract between individuals that the promises of their contract will be subject to statutory obligations. At all times the applicant would or should have been aware of the provisions of the Act and in particular s7, which effectively excludes contracts on confidentiality preventing release of information.

18. In other words, LGOIMA does not protect confidentiality for confidentiality's sake. Nor can parties seek to avoid the impact of LGOIMA by contracting out of its application. In the circumstances, the Ombudsman did not accept that section 7(2)(c)(i) applied to the information.

Section 7(2)(i)

19. Turning to the agreement itself between the Council, the Airport and Wellington Regional Economic Development Agency (WREDA), following discussions with Council officials, the Ombudsman accepted that section 7(2)(i) of LGOIMA applied. This provision

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

allows for information to be withheld where necessary to enable an agency to carry out negotiations, ‘*without prejudice or disadvantage*’.

20. The Ombudsman was satisfied that there were, or would be, future negotiations where the Council – and therefore the public generally – would be at a disadvantage if other parties obtained the details of the agreement, on the basis that it would reveal information about the Council’s negotiating position which understandably needed to be kept confidential for the Council to be able to advance its interests in future negotiations.

Public interest

21. The Ombudsman considered that, given the information at issue related to a decision to spend public money, there was an inherent public interest in its release. He noted the High Court’s statements in *Wyatt* that:²

Governments of different political philosophies have endorsed the principle of freedom of information so as to express support for the concept that knowledge and information about the conduct of public affairs, and the application of public money, in a democratically governed country are essential to its right to be so described...

It is fundamental to the Act that the public are to be given worthwhile information about how the public’s money and affairs are being used and conducted, subject only to the statutory restraints and exceptions.

22. Having concluded that there were both interests to be protected by withholding the information at issue and a public interest in making it available, the Ombudsman’s task was to strike a balance between those competing interests.
23. In this case, the Ombudsman considered that 7(2)(b)(ii) applied to the details and structure of the Council’s potential payments, as part of the Airport’s arrangement with Singapore Airlines. Additionally, some of this information could also be withheld under section 7(2)(i) of LGOIMA. However, the Ombudsman considered that there was a strong public interest in releasing the total dollar figure that the Council could be required to pay over the time period that it has committed to in its April 2016 agreement.

Outcome

24. In light of the above, the Ombudsman recommended the release of:
 - a. All of the information originally redacted from information already released by the Council, with the exception of certain specific items, the release of which the Ombudsman accepted would be likely both to unreasonably prejudice the Airport’s commercial position and the Council’s future negotiations; and

² As above n1.

- b. A summary statement which outlined key details of the April 2016 agreement and some details of the background to the decision to commit Destination Wellington funds to this project.