

Auckland Council's processing of a request for official information

Complainant	Radio New Zealand
Agency	Auckland Council
Ombudsman	Peter Boshier
Case number(s)	474094
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Contents

Summary	2
Ombudsman's role	2
Background	3
Investigation	4
Analysis and findings	5
The processing of the request	5
The law and principles of good administrative practice	11
Application of the law and principles of good administrative practice	13
Observations on draft documents	19
Final opinion	21
Recommendation	22

Summary

I have investigated an Ombudsmen Act (OA) complaint by Radio New Zealand (RNZ) about the way in which Auckland Council processed its request for information under the Local Government Official Information and Meetings Act (LGOIMA).

I have formed the opinion that the Council's processing of RNZ's LGOIMA request was unreasonable and, in some respects, appears to have been contrary to law.

The Council has cooperated fully with my investigation, and responded positively and assiduously throughout. It has fully accepted my opinion and indicated its willingness to accept my recommendations. It has already started a review of its policies and procedures on the handling of LGOIMA requests.

I have recommended that the Council:

1. apologise to RNZ; and
2. complete the review of its policies and procedures on the handling of LGOIMA requests in light of the principles and findings in this opinion, and provide me with an update on the outcome.

I have also identified some actions that my office can take, including producing guidance on the commercial withholding grounds, and requests for draft documents.

Ombudsman's role

1. Under the OA, it is my function to investigate the administrative acts, decisions, omissions and recommendations of central and local government agencies, including Auckland Council.¹ My role is to consider the administrative conduct of the agency, and to form an independent opinion on whether that conduct was wrong, unreasonable or appears to have been contrary to law.²
2. Under the LGOIMA, it is my function to investigate specific decisions and omissions by local government agencies in relation to requests for official information. These include delays, refusals, charges, extensions, and the release of information subject to conditions. My role is to consider whether the request should have been refused, or whether the decision complained about was otherwise wrong or unreasonable in OA terms.
3. This investigation is conducted under the OA not the LGOIMA. The focus of this investigation is on the reasonableness of the Council's acts and omissions in the processing of RNZ's LGOIMA request. It is not on the merits of the Council's decision to refuse RNZ's request. However, I have taken this opportunity to make some general

¹ See s [13\(1\)](#) OA.

² See s [22\(1\) and \(2\)](#) OA.

observations on the application of section 7(2)(c)(ii) of the LGOIMA to draft documents (see [Observations on draft documents](#)).

Background

4. The key parties involved in this complaint other than Auckland Council and RNZ are Auckland Council Investments Limited (ACIL) and Ports of Auckland Limited (POAL). ACIL is a council-controlled organisation (CCO),³ and the investment arm of Auckland Council. Auckland Council owns ACIL, and ACIL in turn owns POAL.
5. In his letter of expectations for 2017-2018, the Mayor of Auckland Council asked ACIL to *'investigate, with the Ports and any other relevant parties ... how the adverse impacts of motor vehicles stored on the wharves can be reduced or eliminated'*.
6. To give effect to this, POAL, on behalf of ACIL, commissioned the New Zealand Institute of Economic Research (NZIER) to *'evaluate the costs and benefits of moving the vehicle import operations, which currently take place at [POAL's] port in downtown Auckland, to another location'*.
7. RNZ requested a copy of the NZIER report (referred to as 'the report' from here on), and complained to my office when it was withheld. This complaint was resolved when Auckland Council subsequently agreed to release the report.
8. RNZ made a follow-up request for all correspondence between the Mayor's office, ACIL, the Council and any other parties about the report. The Council released the requested correspondence in large part.
9. RNZ published a story about the information obtained in response to its follow-up request (*'Questions over tardy release of Auckland Council report'*⁴). The story quoted a particular exchange where one Council officer said it was only a matter of time before the report was required to be released, and therefore it might be better to plan for a *'managed release'*. The officer further noted that *'if [RNZ] objects, [its] only recourse is to appeal to the Ombudsman, and that process will take time, and may be overtaken by the planned release'*. The story quoted another executive as saying it might not be *'useful'* to have the report in the public domain during an election campaign, and that his *'instincts [were] to withhold it for the maximum period'*.
10. RNZ made another complaint to my office about the way in which Auckland Council handled its request for information. I was sufficiently concerned about the content of the relevant email exchange that I agreed to investigate RNZ's complaint about the processing of its request for information under the OA.

³ See [s 6](#) Local Government Act 2002.

⁴ Retrieved from <http://www.radionz.co.nz/news/national/352800/questions-over-tardy-release-of-auckland-council-report> on 20 June 2018.

11. It is important to note that not every request for official information will warrant the level of analysis brought to bear in this investigation. However, where information calls into question whether the LGOIMA (or OIA) is being 'gamed', and risks eroding public trust and confidence in the operation of the legislation, it is incumbent on me to enquire into the circumstances, and make observations and conclusions in order to improve practice in the future.

Investigation

12. On 21 March 2018, Ombudsman Leo Donnelly notified the Council of this investigation on my behalf. He sought a copy of all information held by the Council about the LGOIMA request, including (but not limited to) working documents, reports, letters, memos, emails and text messages, as well as a summary of undocumented meetings or telephone calls.
13. On 28 March 2018, the Council sent Mr Donnelly its response.
14. On 10 April 2018, Mr Donnelly queried whether the Council had supplied all the relevant information. In particular, there appeared to be no summaries of undocumented meetings or telephone calls. Mr Donnelly also sought a copy of Auckland Council's policies and procedures on the handling of LGOIMA requests.
15. On 13 April 2018, the Council provided a further response.
16. On 24 April 2018, Mr Donnelly informed the Council of his provisional opinion on RNZ's complaint.
17. On 8 May 2018, the Council provided comments on the provisional opinion. The Council requested a meeting with Mr Donnelly.
18. On 9 May 2018, the Council advised that it had identified additional internal correspondence in relation to the decision making on RNZ's request, and provided a copy of that correspondence.
19. On 22 May 2018, the Council identified a further relevant email that was not previously supplied, and forwarded a copy of it.
20. On 28 May 2018, Mr Donnelly met with senior Council officers, including some of the officers directly involved in processing the request.
21. On 18 June 2018, I resumed responsibility for this investigation, as Mr Donnelly was due to complete his term as Ombudsman.
22. Having reviewed all the relevant information, I formed a provisional opinion on this complaint, and provided the Council, and ACIL's Chief Executive, with an opportunity to provide comment.
23. After considering their comments, I formed the final opinion set out below.

Analysis and findings

The processing of the request

24. There were in fact three parallel and overlapping processes in train: the finalisation of the report, the processing of RNZ's request for the report, and RNZ's complaint to my office about Council's refusal of that request. The information available to me disclosed the following sequence of events.

25. On 28 July 2017, the RNZ reporter asked the Council's media team for a copy of the report:

I'd like to get copies of any reports that have been done by/for ACIL on the future of car imports across the wharves of POAL, which was requested through the Finance Committee in December 2016.

26. On 31 July 2017, a media advisor responded that 'ACIL don't have any reports on this' and RNZ might be best off asking POAL. This prompted RNZ to clarify that 'this was laid out in ACIL's letter of expectation contained in the December [Finance and Performance Committee] agenda'. RNZ queried, 'so they are saying that this work has not been done in any form?' The media advisor replied 'I understand that work is underway but not yet complete—the letter of expectation covers the whole year'. The RNZ reporter in turn responded:

Can I get a reply from ACIL about what they have or don't have, in relation to my request. 'Work underway' might mean there's a report of some form, which would fall within what I'd asked for. And if they have something they don't feel they can release, they need to explain the grounds under LGOIMA.

27. On 1 August 2017, the Council's media team provided the following statement from ACIL:

ACIL do not have any reports relating to the future of car imports on the wharves. As per the letter of expectation, ACIL is working with POAL on how the adverse impacts of motor vehicles stored on the wharves can be reduced or eliminated. This work is being led by POAL.

28. On 9 August 2017, in response to a request by ACIL's Chief Executive, POAL provided ACIL with a copy of the report (version 21). This was the first time ACIL had received a copy of the report.

29. On 30 August 2017, the RNZ reporter emailed the media team again stating:

I am convinced ... that ACIL does have a report that it commissioned, relating to future options for vehicle imports. I may not have nailed the subject matter word-for-word, but they'll know what I mean.

I'd like a copy please.

If they have one, that they are not prepared to release, they need to provide grounds so that I can appeal it to the Ombudsman, and name the report that falls within the scope of my request.

30. On 31 August 2017, the Media Relations Manager advised the RNZ reporter in a telephone discussion that the report was still in draft and likely to be withheld. On 4 September 2017, the RNZ reporter asked the Media Relations Manager ‘*can I get the declining of my request to ACIL, for that Car trade report, in writing please*’. On the same day, the Media Relations Manager referred RNZ’s request to the Council’s LGOIMA and legal teams. The legal team noted in reply that ‘*draft reports are usually withheld under section 7(2)(c)(ii), if they have been provided to the Council in draft in order to allow for fact checking etc, before a final is prepared*’, but said they would leave RNZ’s request to the LGOIMA team to handle.
31. On 6 September 2017, RNZ complained to my office about the Council’s initial refusal on the basis that ACIL did not hold the report, and the subsequent refusal conveyed by telephone on the basis that the report was in draft form. RNZ questioned the Council’s assertion that the report was a draft, and suggested that it was aimed at delaying the report’s release until a more politically acceptable time.
32. In the week beginning 4 September 2017, a member of the LGOIMA team attempted to contact ACIL’s Chief Executive ‘*to obtain a copy of the NZIER report, but no conversations took place*’. A member of the media team also recalls a conversation with ACIL’s Chief Executive in which he noted the LGOIMA team wanted to obtain a copy of the report to allow RNZ’s request to be processed.
33. On 7 September 2017, the exchange of emails that prompted this complaint took place. ACIL’s Chief Executive emailed staff in the Mayor’s office—the Principal Political Advisor and the Director of Finance and Policy—and copied in the Council’s Chief Executive and the Executive Officer within his Office, stating:

As most of you know, I have received a draft report from NZIER on the value of the imported vehicle trade to Auckland. I expect to receive a final copy today after asking for the draft to be peer reviewed and a greater focus put on the regional benefits rather than the national benefits.

I am being asked by the LGOIMA team for a copy of the draft. I have reservations about providing a draft when the final is so close, and I also have concerns that it might [not] be useful if this or the final document is in the public domain during an election campaign, given the announcements made earlier.

My instincts are to withhold it for the maximum period, and for the LGOIMA to be transferred to ACIL. It should also be with Mayor Goff and Cr Darby ahead of its release.

Please can I have some advice!

34. The Executive Officer replied:

All—the requester is [RNZ] and [its] request is reprinted below. It is only a matter of time before we are required to release it under this LGOIMA request or another. Assuming we will have to release it at some stage, it might be better to plan for a managed release. If so, we can refuse [RNZ's] request on the basis that it will be released shortly. We just need to have an idea of the likely release date (mid October, late October, early November?). If [RNZ] objects, [its] only recourse is to appeal to the Ombudsman, and that process will take time, and may be overtaken by the planned release.

35. ACIL's Chief Executive asked 'so should I give the draft report to the LGOIMA team?', to which the Executive Officer responded:

...—no, no need to hand over the draft to the LGOIMA team, and our legal team have grounds for refusing to release the draft. [The RNZ reporter] wants us to put that in writing and he may complain to the Ombudsman. At this stage, [the RNZ reporter] is the only journalist asking for this, and so comms will talk to you (and the Mayor[']s] Office) about the best way of releasing this work eventually.

36. ACIL's Chief Executive thanked the Executive Officer and said he would talk to the manager of the LGOIMA team. The Principal Political Advisor sought the names of the LGOIMA staff so she could liaise with them directly, and advised ACIL's Chief Executive to 'hold off and I will give you a buzz to confirm if anything changes'.

37. Also on 7 September 2017, ACIL's Chief Executive met with the NZIER to discuss the report. Immediately following that meeting, he again emailed the Mayor's Principal Political Advisor and Director of Finance and Policy, and the Chief Executive and Executive Officer. He stated 'while there are quite a few changes to the executive summary, the conclusions and broad numbers in the draft are close to the final'. However, he also noted that the conclusion (that shifting car imports to Northland or Tauranga will have a net cost to the national economy of around \$1bn), 'underestimates the impact on Auckland's economy'. He concluded that the report, 'which I had previously indicated would be available today ... will now not be ready until early next week'.

38. Another member of the LGOIMA team recalled a telephone discussion with the Principal Political Advisor on 7 or 8 September 2017. The Principal Political Advisor advised that the Mayor's office did not hold a copy of the report. The LGOIMA team staffer also recalled the content, but not the date, of a subsequent discussion with the Executive Officer about the risk of unauthorised disclosure of the report and potential withholding grounds under the LGOIMA.

39. On 11 September 2017, ACIL's Chief Executive received an updated version of the report from NZIER (version 34). He forwarded it to the Principal Political Advisor, Director of Finance and Policy, and Executive Officer, stating 'Final report from NZIER. Let me know

next steps in the process'. The Director of Finance and Policy queried whether POAL had a copy of the report.

40. On 12 September 2017, ACIL's Chief Executive asked POAL's Chief Executive whether he had a copy of the *'final report'*. POAL's Chief Executive said he did not, and on 18 September 2017, ACIL's Chief Executive forwarded him a copy. Sometime that week, ACIL's Chief Executive also had a telephone discussion with POAL's Chief Executive. He checked whether the report was likely to have any implications for POAL's commercial position, should it be made public. POAL's Chief Executive confirmed that POAL did not have concerns.
41. On 20 September 2017, the LGOIMA team emailed the Principal Political Advisor, and copied in the Executive Officer:

A few weeks ago we received a request for information relating to the ACIL report for Car Imports from ... RNZ.

I was waiting to receive back from the Mayor's Office the draft report which was given to the [Mayor's Office] by [ACIL's Chief Executive]. I was advised that the draft report will be passed to our team when the final report has been completed but I haven't heard back about either report, or the release date of the final.

Are you please able to update me on the progress of the report and/or let me know when the final report is scheduled to be published?

I have written up a draft refusal of the request but will need to check the document against the proposed withholding grounds before we can produce an adequate response.

42. On or around the same date, the Principal Political Advisor met with members of the LGOIMA team to discuss the decision to be made on RNZ's request. She explained that the Mayor's office was *'in the process of providing comments'*, and *'raised concerns that release of the report could prejudice POAL's commercial position'*. Potential withholding grounds were discussed, but no conclusions were reached *'as it was considered that the report might be finalised shortly (and therefore may be able to be made public)'*.
43. On 21 September 2017, ACIL's Chief Executive emailed NZIER to say that the Principal Political Advisor and Director of Finance and Policy wanted to meet with NZIER to discuss the report. He stated *'they have a concern that the national benefits of the cruise ship industry (or the foregoing of such benefits) has not been properly addressed in the report'*.
44. On 22 September 2017, NZIER emailed ACIL's Chief Executive another version of the report *'as requested'* (version 35).
45. During the week beginning 25 September 2017, members of the LGOIMA team discussed the request, because the team member responsible for the request was due to finish at

the end of that week. On 26 September 2017, that team member emailed the Principal Political Advisor to inform her that he was leaving Council, and asked her to keep the manager of the LGOIMA team informed of any progress in finalising the report.

46. On 29 September 2017, a meeting took place between the NZIER, ACIL's Chief Executive, the Principal Political Advisor and the Director of Finance and Policy. The following day, the NZIER emailed the Director of Finance and Policy responding to issues raised at the meeting and concluding *'we'll make the necessary amendments to the report'*. The NZIER also stated *'on the next exercise, we have considered the methodology we could use, which we'll tighten early next week'*.
47. On 3 October 2017, the Director of Finance and Policy forwarded the NZIER a version of the report with comments and tracked changes provided by the Council's Chief Economist. He stated *'you may want to take [this] into account as your team completes its work'*. Later that day, he emailed NZIER querying their reference to the *'next exercise'*, and suggesting that the points raised would be an integral component of the existing study.
48. On 3 October 2017, the Manager of the LGOIMA team and the Executive Officer exchanged emails. The Executive Officer stated:

...at this stage there is still a question about whether the report is finalised. However, the report will not be released ... as it contains sensitive commercial information. I have read the draft report and can confirm that it contains information that would disadvantage POAL if the information was made available to its competitors.

49. The Manager replied that he *'was comfortable with that'*, and instructed a member of his team to prepare a draft refusal letter.
50. On 5 October 2017, the Council refused RNZ's request. The refusal was signed by a member of the LGOIMA team on Council letterhead. It stated:

The report you are requesting contains information provided by the Ports of Auckland about its commercial operations. We believe releasing this report would unreasonably prejudice the commercial position of the Ports. We therefore refuse your request for information under s 7(2)(b)(ii) of the Act.

Additionally, the version of the report in ACIL's possession is yet to be finalised and is subject to fact checking and further feedback to the consultant. The report was provided to ACIL as a confidential draft for this purpose, and your request is accordingly also refused under 7(2)(c)(ii) of the Act. Ombudsmen have generally taken the approach that documents, which are the end product of a deliberative drafting process and are labelled 'draft', and then circulated to third parties for comment before being finalised, can be withheld under this section if there had been an understanding that such a process would be carried out on a confidential basis.

We have considered whether there are any overriding public interest grounds that will compel us to nevertheless provide the report. In this instance we do not believe that the public interest in release outweighs the reasons for the information to be withheld. Please also note that we intend to release the report at a future time, but cannot commit to a date at this time.

51. On 6 October 2017, my office started making informal enquiries with the Council about RNZ's complaint of 6 September 2017 (see [paragraph 31](#)). On 9 October 2017, the Council forwarded my office a copy of its decision dated 5 October 2017.
52. On 10 October 2017, RNZ advised the Council that it had complained to my office. The Executive Officer forwarded RNZ's email to ACIL's Chief Executive and the Principal Political Advisor. ACIL's Chief Executive asked the Principal Political Advisor to *'please let me know the next steps in finalising this report'*.
53. On 11 October 2017, the NZIER responded to the Director of Finance and Policy's email dated 3 October 2017 (see [paragraph 47](#)). It said that including the elements mentioned at the meeting would *'represent a substantial revision to the scope of the study commissioned by ACIL'*. It also said *'we have gone through the [Chief Economist's] comments ... and are putting our response through QA at the moment'*.
54. On 30 October 2017, my office formally notified the Council that the Ombudsman would be investigating RNZ's complaint, and sought a copy of the report.
55. On 6 November 2017, the Executive Officer emailed the Principal Political Advisor and ACIL's Chief Executive advising:

...we are still refusing to release the ACIL report, but we need a copy to supply to the Ombudsman. Is there [an] earlier copy, or [are] we correct in saying that although this is [stamped] final, ACIL still had additional questions.
56. On 7 November 2017, ACIL's Chief Executive responded *'[g]iven that the report is now final, which was the grounds for withholding originally, why are we still withholding it?'*
57. On 13 November 2017, the Principal Political Advisor replied that *'more work is still being done on the report and therefore it isn't complete from our perspective'*.
58. On the same day, ACIL's Chief Executive responded:

From an ACIL perspective, the report is complete—and NZIER are not planning to revisit it after discussions with the Council. Can you please call to discuss what further work is being contemplated.
59. Later that day the Council's legal advisor provided my office with a copy of the report (version 34).
60. On 17 November 2017, the Council's legal advisor confirmed to my office that the report was final.

61. On 28 November 2017, my office asked the Council to reconsider whether it was still necessary to withhold the report now that it was final.
62. On 29 November 2017, the Council's legal advisor agreed to do so.
63. On 13 December 2017, the Council's legal advisor met with ACIL's Chief Executive, the Principal Political Advisor and the Executive Officer to consider whether any part of the report still needed to be withheld. They concluded that, as the report was finalised, and POAL raised no objection to release, there was no longer good reason to withhold.
64. On 20 December 2017, the Media Relations Manager asked whether POAL had been made aware of the impending release of the report. ACIL's Chief Executive replied *'I will let POAL know the report will be released. I have previously checked and they have no issue with the report being released without any redactions'*.
65. That same day, the report (version 35) was released to RNZ.

The law and principles of good administrative practice

66. I set out below the relevant law and principles of good administrative practice applicable in this case.
67. Under the LGOIMA, any person may request a local authority to make available to that person any specified official information (section 10(1)).
68. A local authority must make and communicate its decision on a request for official information as soon as reasonably practicable and no later than 20 working days after it was received (section 13(1)).
69. The decision must be made by the chief executive or any *'officer or employee'* authorised by the chief executive (section 13(5)). Elected members (mayors or Councillors) are not *'officers or employees'*, and are therefore not permitted to make decisions on LGOIMA requests.
70. If the local authority does not hold the information but believes it is held by another central or local government agency, or if the local authority believes the information is more closely connected with another agency's functions, the local authority must transfer the request to the other agency (section 12). This is a mandatory requirement, not an option.
71. There is no requirement to consult others before making a decision on a LGOIMA request. However, it is expressly permitted under the legislation (section 13(6)), and it is good administrative practice where the release of official information could affect their interests.
72. Consultation is particularly important when a local authority is seeking to withhold official information in order to protect a third party's interests, as opposed to its own (for

example, under sections 7(2)(a) (privacy), 7(2)(b)(ii) (unreasonable commercial prejudice) or 7(2)(c) (confidentiality)).

73. As I noted in a similar case last year (regarding [KiwiRail's processing of an official information request](#)):

...consultation on an OIA request is just like any consultation process. According to clearly established legal principles, consultation is the statement of a proposal not yet fully decided on. It involves listening to what others have to say, considering their responses, and then deciding what will be done. Consultation is not 'negotiation', which implies that the parties must eventually reach agreement. Consultation can occur without those being consulted agreeing with the outcome.

74. The third party cannot simply veto release. The local authority must consider any objections raised by the third party, and decide whether they give rise to a lawful reason for withholding under the LGOIMA. Alternatively, if the third party raises no objection to release, this should be highly persuasive that there is no good reason to withhold the information in order to protect their interests.
75. When deciding on a request for official information, local authorities must be guided by the 'principle of availability', which is enshrined in section 5 of LGOIMA. That is, they must release the requested information unless there is a good reason to withhold it.
76. 'Good reasons' for withholding official information are found in sections 6 and 7 of the LGOIMA. They are based on avoiding harm to certain specified interests, like personal privacy. The fundamental question that agencies must ask themselves when deciding whether to release or withhold official information is: 'what is the harm?'
77. The reasons for withholding in section 7 are subject to a public interest test. This means that, having established that there would be a harm to one of the interests protected in section 7, agencies must consider whether the need to withhold is outweighed by the public interest in release. If it is, the information must be released.
78. It essential to review the information before deciding that it can properly be withheld. Collins J in *Kelsey v The Minister of Trade* identified the importance of a close analysis of the information, noting:⁵

...the fundamental point [is] that the Act required the Minister to assess each piece of information requested by Professor Kelsey that was held by the Minister and/or MFAT against the criteria in the Act for withholding official information before that request could be refused.

79. If the decision is made to withhold official information, the local authority must provide the reasons for refusal (in terms of sections 6, 7 or 17 of the LGOIMA), and advise the

⁵ *Kelsey v The Minister of Trade* [2015] NZHC 2487 at [108].

requester of their right to seek an investigation and review of that decision by the Ombudsman (section 18).

80. If there is no good reason to withhold, the information must be released without '*undue delay*' (section 27(5)).
81. Good administrative practice requires that the process for responding to LGOIMA requests be carefully managed to ensure that local authorities are able to comply with their statutory obligations, including in relation to timeliness. It should be overseen and coordinated by a person or team with the ability to escalate matters if the local authority is at risk of non-compliance with the law.
82. The lines of accountability and decision making should be clear. Staff should know who is making the decision on a request, and what their role in the process is. Decision makers should understand the law and principles of good administrative practice discussed above. It is ideal if others involved in the decision making process do too. To minimise the risk of poor decision making based on inadequate knowledge, local authorities should apply quality assurance and peer review processes before decisions are communicated.

Application of the law and principles of good administrative practice

83. I discuss below the following aspects of the Council's processing of RNZ's LGOIMA request:
 - a. Handling of requests by the media team
 - b. Which agency was responsible for the request
 - c. Coordination and oversight
 - d. Delay
 - e. Consultation
 - f. Reviewing the information
 - g. Irrelevant considerations

Initial handling of requests by the media team

84. The media team handled RNZ's request of 28 July 2017. It also handled its request of 30 August 2018, at least initially. Both requests were refused; the first in writing, on the basis that the report was not held, and the second verbally, on the basis that it was in draft form and would not be released until it was finalised. The media team did not tell RNZ the reasons for refusal in terms of section 17, or advise it of the right to seek an investigation and review by the Ombudsman. This is despite the RNZ reporter reminding them of the obligation to provide the grounds for refusal under LGOIMA. This omission was contrary to section 18 of the LGOIMA.

85. While I understand the reasons for having media information requests dealt with by a specialist and dedicated team, it is important not to overlook the fact that such requests are governed by the LGOIMA (provided they are for information held, and not for information that would need to be created). This should make little practical difference when the Council is able to fully meet the requester's needs in their preferred timeframe but, if not, it is essential the LGOIMA be complied with in all respects.
86. In my opinion, Council should ensure that all media information requests are handled in accordance with the LGOIMA. This should include providing specific guidelines and training for the media team on their obligations under the LGOIMA. It should also include consideration of appropriate consultation or referral processes to LGOIMA specialists when media information requests become complex, and the media team is unable to meet them fully, in the requester's preferred format, and within their preferred timeframe.

Which agency was responsible for the request

87. As discussed in [paragraph 4](#), Auckland Council and ACIL are closely related. In addition, ACIL is a small organisation and relies on assistance from the Council's LGOIMA team to comply with its obligations under the Act. However, it is important to remember that ACIL and the Council are separate entities under the LGOIMA, and each are subject to its obligations in their own right.
88. RNZ directed its request to the Council, for a report that was held and commissioned by ACIL. Apart from the ACIL Chief Executive's comment that *'[his] instincts are for the LGOIMA to be transferred to ACIL'*, no consideration appears to have been given to whether the Council's obligation to transfer the request to ACIL under section 12 was triggered. This should have been considered because Council did not hold a copy of the report until 12 September 2017, and because the report was arguably more closely connected with ACIL's functions, given that it commissioned the report in fulfilment of one of its *'key focus areas'* for the 2017/2018 year. Transfer would not have prevented Auckland Council from having input into the decision on the request.
89. The Council's letter to this office dated 8 May 2018 stated that *'[RNZ's] 30 August 2018 request was for information held by [ACIL] and therefore a decision on the request ultimately sat with ACIL'*, and that Council's LGOIMA team *'was co-ordinating the request'*. However, there is nothing to suggest the request was transferred to ACIL (there was no notice of a transfer to ACIL or RNZ, as required by section 12), and the decision on RNZ's request was made by the LGOIMA team on Council letterhead. While ACIL's Chief Executive was involved in some of the discussions about the request, he does not appear to have been the final decision maker on it.
90. The Council's *Protocols for Managing LGOIMA Requests Involving CCOs* suggest that requests relating *'predominantly'* to the Council, and those relating in equal measure to a Council and CCO, will be handled by the Council; whereas requests relating exclusively to a CCO will be handled by the CCO, with the assistance of the LGOIMA and legal teams.

From the LGOIMA team's perspective, therefore, it probably makes little practical difference who the decision maker is, because they will help with the processing regardless. However, the blurring of decision making and accountability lines in this way risks non-compliance with the LGOIMA.

91. In my opinion, Council should better align its protocols and practice with the language and requirements of section 12, so that in future requests for information that is not held by the Council but is held by a CCO, and requests for information that is more closely connected with a CCO's functions, are formally transferred to that CCO.
92. The Council has advised that it is already reviewing the LGOIMA protocols with its CCOs.

Coordination and oversight

93. A number of staff were involved in the processing of this LGOIMA request—principally, members of the LGOIMA team, the Executive Officer in the Chief Executive's office, the Principal Political Advisor in the Mayor's office, and the Chief Executive of ACIL. However, their respective roles do not appear to have been clear, nor was it clear who was responsible for making a decision on the request in accordance with the statutory timeframes.
94. The Council's LGOIMA guide suggests that the LGOIMA team acts as a 'hub' within the organisation for the coordination and processing of LGOIMA requests, and the provision of expert advice. The team's role includes:
 - *provid[ing] specialist advice on the legislation*
 - *manag[ing] the end to end process, from receiving a request to responding to it*
 - *coordinat[ing] complex or sensitive requests.*
95. The Council appears to operate a 'mixed model' of LGOIMA processing. This means the coordination of requests is performed, for the most part, by the LGOIMA team, but most of the processing is performed by other staff in the organisation. The Council's LGOIMA guide says that requests are allocated to the appropriate person in the relevant department, who is responsible for investigating and preparing a response, which must be returned to the LGOIMA team within 10 working days.
96. The process for dealing with this request appears to have been different. The request was handled by a member of the LGOIMA team, but the work involved in processing it does not appear to have been allocated, clearly, to any particular person. The people involved do not seem to have had a clear sense of what their role was in the process, and who was responsible for making a decision on the request.
97. The maximum 20 working day count for responding to the 30 August 2017 request ended on 27 September 2017. However, nothing appears to have been done on the request from 7/8 September 2017, when the LGOIMA team discussed the request with the

Principal Political Advisor, until 20 September 2017, when the LGOIMA team emailed her enquiring about progress.

98. All that occurred on 26 September 2017—the day before the Council was due to be in breach of its statutory obligations under LGOIMA—was an email from the LGOIMA team to the Principal Political Advisor, advising her that the relevant team member was leaving, and asking her to update the manager of the team on any progress in finalising the report. The decision on RNZ's request was not drafted until 3 October 2017, and dispatched until 5 October 2017.
99. There does not appear to have been adequate oversight or coordination of this request to ensure that the Council was able to meet its statutory obligations. The Council has acknowledged that *'uncertainty about who was providing formal direction to the LGOIMA team'*, and *'the absence of clear ownership of the final authorisation'* were problems in this case. It has agreed that *'better clarity of decision making responsibility in relation to LGOIMA requests would be desirable, and that it would assist in the timely processing of information requests'*.
100. In my opinion, Council should review its policy and practice to ensure there is clear oversight and coordination of the LGOIMA process. All parties should be aware of their role in the process, including who the decision maker is, and the timeframes within which they must comply. One way that other agencies operating a *'mixed'* model of OIA/LGOIMA processing do this is through a standard email containing key dates and helpful information when allocating a request to an individual or business unit. Council should also ensure that the LGOIMA team actively tracks and monitors LGOIMA requests, and has the power to escalate matters when there is a risk of non-compliance with statutory timeframes.
101. The Council has advised that it is working on a protocol for requests made under the LGOIMA. The purpose of the document is to set out the roles and responsibilities of key staff involved in the LGOIMA process and clarify decision making requirements for LGOIMA responses.

Delay

102. This point is directly related to the one above, but I record it for the sake of completeness. The lack of coordination and oversight meant there were delays in processing the request. The Council's decision on RNZ's 30 August 2017 request was made 26 working days after it was received, which was outside the maximum 20 working days specified in section 13(1) of the LGOIMA.
103. There is also a question of whether the decision was made *'as soon as reasonably practicable'*. It seems clear that there was a reasonable consensus much earlier that withholding of the report in its current form was necessary (whether that was a justifiable decision under the LGOIMA is a separate matter). The Council has agreed that:

...the absence of clear ownership of the final authorisation meant that despite a shared view that the report was in draft and undergoing revision, a final response was not sent to [RNZ] until 5 October 2017.

104. My sense is that Council officers delayed making a decision on the request in the hope that the report would be finalised and able to be released. That was a well-intentioned but risky strategy, and it meant the Council breached the law.
105. I do note, however, that once the Council made and communicated its decision to refuse RNZ's request on 5 October 2017, it had no further legal obligations under the LGOIMA. Council had the *opportunity* to release the report proactively once it was finalised. While some Council officers were aware that opportunity was available (see the Executive Officer's reference to '*managed*' release), it was not acted upon. That may be unfortunate, but it was not unreasonable.
106. Council did agree to consider releasing the report when it was asked to do so by my office on 28 November 2017, as part of the investigation of RNZ's complaint about the refusal of its request. It then released the report, in a reasonably timely fashion, on 20 December 2017.

Consultation

107. Another issue that flows on from the lack of oversight and coordination is that the process of consulting interested parties was mishandled.
108. In my opinion, the Council should have consulted POAL, particularly before refusing the request on the basis that this was necessary to avoid unreasonable prejudice to its commercial position.
109. ACIL's Chief Executive consulted POAL, which advised that there were no concerns from its perspective with release of the report in its current form. ACIL's Chief Executive considers that he would have advised someone within the Council of this, however he is not able to recall with whom he spoke and on what date. There is no written record that he had advised anyone involved in the processing of the request at the Council, and no recollection of such a conversation has been provided by Council officials. On balance, I am unable to form a firm conclusion on whether this did occur, but if it did, it appears not to have factored in the Council's decision making process.
110. Had the Council's decision making process, including consultation with interested parties, been better coordinated, and had POAL's view on the matter been known to the decision maker, there would, in my view, have been no credible basis to rely on section 7(2)(b)(ii) of the LGOIMA to withhold the report.
111. Another party with a legitimate interest in the matter was the Mayor. It was pursuant to his letter of expectations that ACIL commissioned the report.

112. As explained earlier, elected members cannot legally make decisions on LGOIMA requests. However, they are entitled to be consulted, where their interests are likely to be affected.
113. The Mayor did not make the decision on RNZ's request. The Council has advised that he took no part whatsoever in the consideration of that request. However, the Mayor's Principal Political Advisor was involved. Mayoral office staff, such as the Principal Political Advisor, are Auckland Council staff. However, they are employed by the Council *'to support the mayor to fulfil the unique role of an Auckland mayor set out in section 9 of the Local Government (Auckland Council) Act 2009'*.
114. It seems to me that the appropriate role for the Mayor's Principal Political Advisor would have been to represent the Mayor's interests in the matter. The correct approach to consultation would have been to invite the Mayor's views, through his Principal Political Advisor, and to consider them before deciding whether they gave rise to a legitimate reason for withholding. The Mayor (or the Principal Political Advisor on his behalf) could not veto release.
115. There is nothing to suggest that the Mayor or his Principal Political Advisor acted improperly in this case. However, as noted above, there was an undesirable lack of clarity concerning their role in the process.
116. In my opinion, the Council should take steps to clarify the roles of elected members in the LGOIMA process through the development of a protocol. The Council has agreed that *'a tidier protocol in relation to elected members and elected member staff would be desirable'*, and is working to prepare this protocol. It is also amending its Officer Delegations Register to remove any LGOIMA decision making delegation to the Mayoral office.

Reviewing the information

117. In my opinion, there was no clear structure or process in place to ensure that those involved in advising and making the decision on RNZ's request had the opportunity to review the information at issue before deciding it needed to be withheld.
118. I understand the Executive Officer reviewed the report, as he showed Mr Donnelly his copy of it, with tabs identifying information that he considered commercially sensitive.
119. However, the LGOIMA team was unable to review the report, despite requesting a copy for that purpose on 4 and 20 December 2017. The Executive Officer and Principal Political Advisor advised ACIL's Chief Executive that it was not necessary to provide the LGOIMA team with a copy.
120. The Council has accepted this, and said that *'going forward we will be ensuring that the LGOIMA team are provided with the relevant information so that they can best perform their role as expert adviser'*.

Irrelevant considerations

121. It is of course essential to address the comments that prompted RNZ's complaint and my investigation (see paragraphs [33-35](#)).
122. First, the idea that it might not be helpful to have the report in the public domain during an election campaign. This is a completely irrelevant consideration under the OIA. Information must be released in response to a request unless there is good reason to withhold it under sections 6 or 7. Utility or political expedience do not factor in this equation.
123. Secondly, the preference to withhold the report for the '*maximum period*'. It cannot be over-emphasised that a local authority's obligations under LGOIMA are to decide on a request '*as soon as reasonably practicable*' (section 13(1)), and to release the information without '*undue delay*'. The idea that information may be withheld for up to 20 working days is wrong in law.
124. Thirdly, the notion that one can '*plan for a managed release*' in preference to release under the LGOIMA. '*Managed release*' can refer to the proactive release of information requested under the LGOIMA to the world at large. In this sense, it is a positive thing, and furthers one of the purposes of the LGOIMA, which is to '*to increase progressively the availability to the public of official information held by local authorities*'. However, it is not an alternative to an agency meeting its obligations under LGOIMA in respect of a request that has been received. It cannot legitimately delay an agency's decision on a request for official information, or the release of information in response to that request.
125. In my opinion, these considerations were irrelevant. They may not have factored into the final decision, but they cast the Council and its commitment to openness and transparency in a very poor light.

Observations on draft documents

126. As noted above (see [Ombudsman's role](#)), it is not my role in this investigation to say whether or not the Council should have refused RNZ's request. However, I note that the Council's primary concern, and the reason for withholding under section 7(2)(c)(ii) of the LGOIMA, was the draft status of the report. I would therefore like to take this opportunity to make some observations on the application of that withholding ground to draft documents.
127. First, I understand the preference to release final documents rather than drafts. However, preference does not come into it when a request is received under the LGOIMA. As discussed above (see [The law and principles of good administrative practice](#)), this triggers an obligation to release the requested information unless there is '*good reason*' to withhold it.
128. As I said in the [KiwiRail](#) case referred to above, there is no blanket basis for withholding draft documents under the LGOIMA until they are completed and finalised:

There are withholding grounds that can apply to protect draft documents, including, most commonly, sections [7(2)(c) and 7(2)(f)(i) of the LGOIMA]. However, their application depends on a close analysis of the information at issue, and the harm that would flow from its release. Not all drafts are the same.

129. Section 7(2)(c)(ii) of the LGOIMA applies if withholding is necessary to ‘protect information which is subject to an obligation of confidence ... where the making available of the information ... would be likely otherwise to damage the public interest’.
130. Two elements must be satisfied. First, the information must be subject to an obligation of confidence. This may be express or implied, but there must be a mutual understanding and reliance as between the parties that the information will be held in confidence. Secondly, there must be reason to believe that release of the draft, or part of it, poses a serious or real and substantial risk of damage to the public interest.
131. The Council’s refusal letter stated that the report was ‘yet to be finalised and [was] subject to fact checking and further feedback to the consultant’ and that it was provided to ACIL ‘as a confidential draft for this purpose’. It also quoted from a previous Ombudsman’s opinion:

Ombudsmen have generally taken the approach that documents, which are the end product of a deliberative drafting process and are labelled ‘draft’, and then circulated to third parties for comment before being finalised, can be withheld under this section if there had been an understanding that such a process would be carried out on a confidential basis.

132. I can see why the Council took support from the quoted excerpt. However, the application of section 7(2)(c)(ii) of the LGOIMA to draft documents is more nuanced than that excerpt would suggest.
133. Section 7(2)(c)(ii) usually applies where a draft has been prepared as part of a review, investigation or enquiry into matters affecting an individual (or group), and it is shared with the implicated individual(s) to enable them to comment on the provisional findings and conclusions before the draft is amended and/or finalised.
134. The obligation of confidence arises out of the duty of fairness and natural justice, which are important legal tenets. Release of draft findings and conclusions would defeat the purpose of allowing the implicated individuals to comment, and call into question the fairness and integrity of both the process and the outcome of the review, investigation or enquiry. This would damage the public interest.
135. The Ombudsman’s opinion from which the excerpt was drawn provides a good example of this (although that case actually turned on section 7(2)(c)(i), rather than section 7(2)(c)(ii)). It concerned the withholding of a draft report by Ernst and Young into the conduct of former Mayor Len Brown. The draft was provided to the former Mayor to enable him to comment on the proposed findings and conclusions.
136. Following the above-quoted excerpt, the Ombudsman went on to say:

I consider it in the public interest that such a process be undertaken in that it would likely assist in achieving a more accurate final report by providing an opportunity for mistakes or misunderstandings to be corrected. Not only does it seem to be a sound administrative practice in that sense, but it also recognises the importance of people having the opportunity of commenting on potential adverse comment in the interests of fair process and natural justice.

By not recognising confidentiality in this process, I am inclined to the view that it would be likely that the supply of similar information in the future would be prejudiced should participants in the process be aware that confidentiality assurances may not necessarily be upheld. In the operations of local authorities it seems inevitable that, from time to time, issues will emerge where the commissioning of these types of independent reports will be necessary. I consider that there is a public interest in encouraging full participation in this process to ensure the most accurate report possible.

137. This is the kind of context in which section 7(2)(c)(ii) is likely to apply to a draft document. The fact that an agency or its staff do not agree with a report that has been commissioned will not, on its own, generally give rise to a reason for refusal under section 7(2)(c)(ii) or any other ground. In such circumstances, it is open to the agency to release the report with a contextual statement explaining its concerns.
138. I note that misunderstandings around the withholding of draft documents are very common. I consider that part of the solution lies in my office promulgating additional targeted guidance. With that in mind, it is my intention to publish guidance on the application of the OIA and LGOIMA to requests for draft documents, and on the application of the commercial withholding grounds, in the near future.

Final opinion

139. In my opinion:
- a. the Council's media team did not comply with section 18 of the LGOIMA when refusing RNZ's request;
 - b. the Council did not consider whether it was obliged to transfer RNZ's request to ACIL under section 12 of the LGOIMA;
 - c. there was a lack of coordination and oversight of the processing of RNZ's request; staff were not aware of their role in the process, or who the decision maker was;
 - d. the lack of coordination and oversight led to delays in processing RNZ's request, in breach of section 13(1) of the LGOIMA;
 - e. the process of consulting interested parties, including POAL and the Mayor's office, was mishandled;

- f. there was no clear structure or process in place to ensure that those involved in advising and making the decision on RNZ's request had the opportunity to review the information at issue before deciding it needed to be withheld; and
 - g. Council officers raised some irrelevant considerations, which reflected poorly on the Council's commitment to openness and transparency.
140. I have therefore formed the opinion that the Council's processing of RNZ's request was unreasonable, and in some instances, appears to have been contrary to law.

Recommendation

141. I recommend that the Council:
- a. apologise to RNZ; and
 - b. complete the review of its policies and procedures on the handling of LGOIMA requests in light of the principles and findings in this opinion, and provide me with an update on the outcome.
142. I have also identified some actions that my office can take, including producing guidance on the commercial withholding grounds, and requests for draft documents.