

Decision to impose conditions on the release of National Stadium reports to councillors

Legislation	Local Government Official Information and Meetings Act 1987, ss 7(2)(b)(ii), 7(2)(c)(i), 27(1)(c)
Agency	Auckland Council
Ombudsman	Peter Boshier
Case number(s)	479476, 479483
Date	November 2018

Summary

The Auckland Council received two reports as part of a pre-feasibility study on the potential for a new National Stadium and Precinct in downtown Auckland.

The Council released redacted versions of the reports, in response to Local Government Official Information and Meetings Act 1987 (LGOIMA) requests. The Council relied on sections 7(2)(c)(i) and 7(2)(b)(ii) of LGOIMA to withhold portions of the reports.

In June 2018, the Council wrote to councillors to advise that unredacted copies of the reports would be released to them subject to the imposition of certain conditions on the use, communication and publication of the information. Councillors Cathy Casey and John Watson complained to the Chief Ombudsman about the decision to impose these conditions.

The Chief Ombudsman considered the application of the withholding grounds, the countervailing public interest in the release of the information and the reasonableness of the specific conditions, which were imposed on the councillors' use, communication and publication of the information. The Chief Ombudsman ultimately formed the opinion under LGOIMA that the Council's decision to impose conditions was not unreasonable.

Background

1. The information at issue consisted of two reports prepared by PwC New Zealand (PwC) as part of a pre-feasibility study on the potential for a new national stadium and precinct in downtown Auckland (the reports).¹
2. On 15 May 2018, councillors were briefed on the contents of these reports.
3. On 18 May 2018, as a result of an investigation by former Ombudsman Leo Donnelly following a separate LGOIMA request, the Council released redacted versions of the reports to requesters and councillors. Councillors were advised that unredacted copies could be viewed in the Mayor's office.
4. On 1 June 2018, following informal discussions with Mr Donnelly, the Council's Governance Director wrote to councillors to advise that unredacted copies of the reports would be released to them on the condition that the reports could not be copied, must be kept in a secure location, and were to be returned to him.
5. On 5 June 2018, two councillors (the requesters) made a complaint to the Chief Ombudsman about the decision to impose these conditions. The requesters also questioned why the Mayor was entitled to have unrestricted access to the stadium reports, but they were only provided with the unredacted reports subject to conditions.

Investigation

6. 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 portions of the reports.
7. Under section 27(1)(c) of LGOIMA, it is a function of an Ombudsman to investigate and review any decision by which a local authority '*imposes conditions on the use, communication, or publication of information made available*'. Under LGOIMA, conditions may only be applied if there is first a basis for withholding the information at issue.

The information at issue and reasons for withholding

Owners of potential stadium sites

8. The Chief Ombudsman noted that the reports contained detailed analysis of the sites being considered as the location for a future stadium and precinct.

¹ There were two reports:

- National Stadium and Precinct Pre-feasibility study (June 2017); and
- National Stadium and Precinct Pre-feasibility study: Funding and delivery (October 2017).

9. This information was withheld under section 7(2)(b)(ii) of LGOIMA. This section applies where the withholding of the information is necessary to protect information, where its release would be likely unreasonably to prejudice the commercial position of the person who supplied, or who is the subject of, information.
10. The Council submitted that release of these details would be likely to prejudice the interests of the site owners. The Council was at an early stage in this process, and no decisions had been made as to locations, nor any agreement reached with site owners. There was a concern that premature release of the location of potential sites, and their suitability, could lead to doubt about the commercial future of these locations.
11. The Chief Ombudsman was satisfied that section 7(2)(b)(ii) of LGOIMA applied to this information.

Potential stadium stakeholders

12. Parts of the reports revealed key input from potential stakeholders for the Stadium, and comments on possible decisions that would be made.
13. This information was withheld under sections 7(2)(c)(i) and 7(2)(b)(ii) of LGOIMA.
14. Section 7(2)(c)(i) applies where the withholding of the information is necessary to protect information which is subject to an obligation of confidence, where the making available of the 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 should continue to be supplied.
15. This information was provided to the Council in order to inform the review and was subject to non-disclosure agreements to enable the unencumbered exchange of information. The Chief Ombudsman was satisfied that the information was provided subject to an obligation of confidence.
16. With regard to the predicted prejudice, the Chief Ombudsman referred to the earlier opinion of former Ombudsman Leo Donnelly on one of the reports,² in which he stated:

The stakeholders have an interest in being involved in the Council's development process to work towards outcomes in their own interest. However, I do accept that there is a likelihood that the release of information which reveals specific stakeholders and their comments would create a real risk that the Council would not be able to receive particularly sensitive information in the future. This may hinder the effectiveness of the Council's processes. Stakeholders would be likely to become selective and less candid about the information they provide. It is in the public interest that the Council is able to receive information from potential stakeholders in order to ensure that there is a successful study of the feasibility of a National Stadium.

² The National Stadium and Precinct Pre-feasibility study (June 2017).

The identity of the stakeholders would also reveal the level of involvement, and possible decisions that may be made by these potential stakeholders. This is evident in the comments that are detailed in the Report. The release of information identifying the stakeholders could impact on the current commercial contracts that the stakeholders have. At such an early stage in the process, this could lead to negative commercial consequences for the stakeholders, which may not be warranted given the uncertainty about how the project will develop, and whether the stakeholders will be involved.

17. The Chief Ombudsman considered that the above points were equally applicable to both reports and he saw no reason to depart from Mr Donnelly's opinion that sections 7(2)(b)(ii) and 7(2)(c)(i) applied to this information.

Public Interest

18. The Chief Ombudsman considered whether there were any considerations favouring disclosure in the public interest that outweighed the need to withhold the information.
19. The Chief Ombudsman referred first to the public interest considerations identified by Mr Donnelly in his opinion on one of the reports, in which he stated:³

I consider that there is a strong public interest in the availability of certain information within the report to promote transparency. While there may not yet be any decisions made on the matters raised in the report, there is a high public interest in transparency of the expert advice the Council has received to inform its future decisions on a possible National Stadium. This is a project which, if progressed, will likely involve the use of significant public funds, either through the Council or central government. There is a public interest in the Council being transparent at each step of the process. This would also promote greater accountability of the Council when decisions are made.

I also consider that there is a strong interest in the release of information within the report to enable more effective participation by the public in the decision making by Council concerning a possible national stadium (section 4(a)(i) of LGOIMA). There is a public interest in availability of information that enables the public to understand and debate issues, and participate in decision making processes which affect them. Timely access to information is important to enable the public to participate more effectively in the actions and decisions of local authorities. Delaying access to relevant information until after decisions are made thwarts effective participation by the public and runs counter to one of the purposes of LGOIMA.

Planned opportunities for public consultation at a later stage in the project, is not necessarily an adequate alternative to release of information as early as possible to enable more effective participation by the public. The 'pre-

³ The National Stadium and Precinct Pre-feasibility study (June 2017).

feasibility' phase would seem to be an entirely appropriate time for the public to have an opportunity to consider the issue, and the advice that the Council has received. If matters develop and change following the report, the Council can also provide further information to better inform the public at that time.

In these circumstances, however, I consider that the public interest in the information does not outweigh the need to withhold in relation to the land owners and the potential stakeholders. The release of the parts of the report which does not reveal this information will go towards meeting the public interest I have identified.

20. The Chief Ombudsman shared Mr Donnelly's views on the public interest in this information. However, in considering these complaints, the Chief Ombudsman was also required to consider whether the requesters' position as councillors meant there was a heightened public interest in them having access to this information.
21. The Chief Ombudsman accepted that a councillor does not have an absolute right to inspect all information the Council holds. However, successive Ombudsmen have recognised a strong public interest in allowing elected members access to information they require in order to perform their duties, a consideration that would not apply to other members of the public. The Chief Ombudsman took note of the common law position as stated in *R v Clerk to Lancashire Police Committee*:⁴

... a councillor has a right to inspect all documents in possession of the Council so far as this is reasonably necessary to enable the councillor to perform his duties as a member of the council.
22. Each case needs to be judged on its own facts having regard to the particular information at issue. In this case, there was a strong argument that councillors should be kept informed on the various factors that may influence an important proposal such as this one, even at a very early stage of its development. This would seem to be necessary for them to effectively perform their duties.
23. Ultimately, however, it was the Chief Ombudsman's view that this public interest had been met by the conditional supply of this information. This approach allowed councillors to be kept informed, while also recognising the particular sensitivities of the information. He did not see that unconditional release of this information would be required for Councillors to perform their duties.

Need to know principle and LGOIMA

24. The Council noted that its decision to supply the reports to Councillors and impose conditions on that supply was made under the common law need-to-know principle rather than under LGOIMA. The Chief Ombudsman reviewed the Council's internal correspondence in relation to this decision and accepted that this was the case.

⁴ *R v Clerk to Lancashire Police Committee* (1980) 2 All ER 353.

25. However, where Councillors, or anyone else, make a request for official information held by an agency that is subject to LGOIMA, such a request is also subject to that Act (section 10 of LGOIMA refers).
26. Whether or not the Council considered its response to be under LGOIMA, it had imposed conditions on the release of information, which it had made available in response to a request. Section 27(1)(c) of LGOIMA makes it the Chief Ombudsman's function to investigate a complaint about the imposition of such conditions.
27. With regard to the Council's application of the common law regarding councillors' entitlement to Council information, this is an internal matter for the Council. The requesters had made it clear that in this instance they were seeking this information in their capacity as councillors.

Reasonableness of the particular conditions

28. Having determined that the Council's decision to release with conditions was justified, the Chief Ombudsman went on to consider whether the particular conditions applied by the Council in this case were reasonable in the circumstances.
29. In this case, the Council was concerned with losing control of the information through copying and disseminating. While the Council recognised that the role of councillor favoured the disclosure of further information than what was available to the public, it did not consider the position as an elected member in itself altered the likely harm that would arise from public disclosure of the information. It was therefore necessary to balance these considerations. Asking that the information not be copied and requesting it back seemed a very straightforward way to do this, and the Chief Ombudsman noted that this is not an unusual practice for controlling the dissemination of information. A time limit on the Councillors access was not imposed, nor was there a limit on the number of times councillors could request and view the information at their desks.
30. In the Chief Ombudsman's opinion, these conditions were not unreasonable in the circumstances.

Distinction drawn between councillors and the Mayor

31. The requesters also complained that the Mayor had been provided with unconditional access to the reports almost a year before councillors were notified that they existed, and that the Council had drawn a distinction between the entitlement to information of the elected councillors and the Mayor. It was argued that this was not reasonable.
32. In addressing this point, the Chief Ombudsman noted that there is no requirement for proactive disclosure under LGOIMA that would have required the Council to inform the councillors of these reports or supplied them with copies prior to a request.
33. The Chief Ombudsman also observed that LGOIMA decisions are made on their own facts. Although the availability or dissemination of information at the time of a request

may be relevant to the application of withholding grounds to that information, release or supply to one party does not necessarily entitle another party to the same information. In these circumstances, disclosure to the Mayor did not change the application of any of the relevant grounds, and the Chief Ombudsman therefore would not generally consider this a relevant matter under LGOIMA.

34. The Chief Ombudsman did consider whether inconsistent application of conditions between the Mayor and councillors could provide a basis for finding those conditions to be unreasonable. The Chief Ombudsman raised this point with the Council, who provided the following clarifications:

- a. the Mayor was briefed on the progress of the prefeasibility reports in his quarterly briefings with Council controlled organisations in 2017, but was not provided with a copy of the report until he was given a redacted version on 30 April 2018, and an unredacted version on 7 May 2018; and
- b. the Council explained that it did, specifically, consider the different roles of the Mayor and councillors in its decisions to provide the Mayor with information relevant to these reports. In particular, it noted that the *'Auckland Mayor has a specific individual statutory role, with related powers'*. It referred to section 9 of the Local Government (Auckland Council) Act 2009, which outlines the statutory role of the Mayor of Auckland. The Council noted that:

The Mayoral Office/Mayor considered that providing leadership on the consideration of a potential new National Stadium in Auckland was consistent with the role of the Auckland Mayor as set out in section 9. Should a National Stadium eventually be progressed, options will need to be considered, and planning undertaken well in advance to allow it to be included in the 10 year long term plan, and the annual plan. The practice at Auckland Council is that the Auckland Mayor begins these budget decision-making processes with a "Mayoral proposal" (which usually forms the basis for the most significant spend in the annual plan and long term plan) before decision-making proceeds by the Governing Body as a whole.

In addition to his unique statutory role, the Mayor is elected at large and therefore represents all Aucklanders. The public and media expectation is that he will be in a position to respond to requests for information and comment across a very broad spectrum of activity. This requires that he have access to information and be briefed on a wide variety of issues, proposals and policies.

35. The Chief Ombudsman was of the view that the lack of conditions applied to the Mayor's access to the report did not change the fact that the access granted to the councillors appeared to have been sufficient to meet the responsibilities of their role, taking into account the likely prejudice that would be caused by release *'at large'*.

36. The broader question of whether it was open to the Council to draw the distinction it did between the role of the Mayor and that of councillors is not a LGOIMA matter. That is an internal operational issue for the Council and was therefore beyond the scope of this investigation.

Outcome

37. The Chief Ombudsman formed the final opinion under LGOIMA that the Council's decision to impose conditions on the use, communication and publication of the reports was not unreasonable.