

# Request for information concerning transport rate estimates in Wellington Regional Council's Draft 2011/2012 Annual Plan

<b>Legislation:</b>	Local Government Official Information and Meetings Act 1987, s 7(2)(b)(ii) (see appendix for full text)
<b>Agency:</b>	Greater Wellington Regional Council
<b>Ombudsman:</b>	Dame Beverley Wakem DNZM, CBE
<b>Reference number:</b>	309109
<b>Date:</b>	23 December 2014

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## Summary

The complainant requested the Greater Wellington Regional Council (GWRC) to provide him with *“a copy of all the background calculations used to create the estimates for the transport rate tables for the Draft 2011/2012 Annual Plan”*. The GWRC refused part of the request under section 7(2)(b)(ii) of the Local Government Official Information and Meetings Act 1987 (LGOIMA) on the basis that provision of some of those background calculations would be likely unreasonably to prejudice the commercial position of transport operators in the Wellington region.

The GWRC periodically seeks tenders from transport operators for the provision of public transport services in the Wellington region. The provision of such services is funded by fares paid by passengers, the transport rate levied by the GWRC on local authorities, and grants (subsidies) the New Zealand Transport Authority (NZTA) pays the GWRC. In its 2011/2012 Annual Plan estimates of expenditure, the GWRC indicated that the transport rate would be about \$46.4 million. The request related to background calculations for the transport rate.

In the last tender round for transport services, transport operators completed *“price proposal”* forms for each route tendered for. In these forms, transport operators provided details for each route of the *“gross contract price”*, *“total estimated revenue”* (called also *“anticipated revenue”*) and *“net contract price”*. The expression *“total estimated revenue”* is the revenue earned by transport operators from all sources, other than from the GWRC. Transport operators tendered a *“net contract price”* based on the difference between the *“gross contract price”* and their estimate of fare revenue (*“anticipated revenue”*) they would receive from passengers. The *“gross contract price”* is the total of the *“anticipated revenue”* and the *“net contract price”*. The *“net contract price”* largely determined the amount the GWRC originally paid to successful tenderers.

To assist it in keeping accurate information about the provision of public transport services, the GWRC created a transport rating model (TRM). The TRM includes information about the amounts originally paid by the GWRC to transport operators each year, the *“Contract PA – cost”* (annual cost of providing transport services for each route), adjustments to those amounts reflecting increases in NZTA subsidies, and operators' actual revenue for routes they service. The withheld information includes the described information. If the GWRC released the described information, the complainant would be able to calculate the transport operators' *“anticipated revenue”* and the *“gross contract price”* in the *“price proposal”* forms, together with the actual revenue earned by operators on a route-by-route basis. (During the course of my investigation, the GWRC stated it was prepared to release the following information in the TRM it had originally withheld: the *“net contract prices”*, contract prices amended to reflect changes to the originally contracted services and information relating to concessionary fares.)

Through public sources or as a result of a request to the GWRC, a member of the public is able to obtain a substantial amount of information about the cost of providing transport services and other information relating to those services. The information available includes the total amounts paid by the GWRC to transport operators for provision of transport services, the rates levied on local authorities, the names of present transport operators on a route-by-route basis

and now the “*net contract prices*”. The complainant is now able to calculate operators’ gross earnings per kilometre on a route-by-route basis, but not their profit margins.

In terms of section 7(2)(b)(ii) of the LGOIMA, I formed the opinion that the release of the withheld information would unreasonably prejudice the commercial position of transport operators. For example, the releasing of the “*anticipated revenue*” in the “*price proposal*” forms would be likely to reveal transport operators’ strategies in the last tender round and also in future tender rounds, if GWRC seeks tenders on the same, or substantially the same, basis as the last tender. The releasing of that information would thus affect transport operators’ ability to participate competitively in future tenders for transport services in the Wellington region. The disclosure to the GWRC of transport operators’ anticipated and actual revenue is a point of difference from day-to-day tenders, which do not usually require disclosure of such information.

Ratepayers are entitled to have as much information as is reasonably necessary to enable them to ascertain whether the amounts they pay through rates for public transport services have a reasonable basis, and, likewise, users of public transport services are entitled to know whether fares are reasonable taking into account, among other things, the cost of providing those services. But it is not in the public interest that transport operators reveal their tender strategy by disclosing their “*anticipated revenue*” and actual revenue on a route-by-route basis. Keeping that information confidential will assist in maintaining a competitive environment for the provision of transport services in the Wellington region, and allow GWRC to obtain the most favourable price for the service.

Accordingly, I formed the opinion that, in terms of section 7(1) of the LGOIMA, the withholding of the information at issue is not outweighed by other considerations which render it desirable, in the public interest, to make that information available.

For the reasons set out above, I formed the opinion that the GWRC had good reason to withhold the information at issue under section 7(2)(b)(ii) of the LGOIMA.

## Ombudsman’s role

1. As an Ombudsman, I am authorised to investigate and review, on complaint, any decision by which an agency subject to the LGOIMA refuses to make official information available when requested. GWRC is subject to the LGOIMA. My role in undertaking an investigation is to form an independent opinion as to whether the request was properly refused.

## Background

### The request

2. In an email of 24 March 2011 to the GWRC, the complainant requested the following information (the information at issue):

*“a copy of all the background calculations used to create the estimates for the transport rate table for the Draft 2011/2012 Annual Plan.”*

3. The “background calculations” referred to in the request are the calculations relating to how the GWRC calculates the rates it levies relating to the provision of public transport in the Wellington region.

### Refusal of request

4. In a letter of 27 April 2011 to the complainant, the GWRC withheld part of the information requested about the complainant. GWRC stated:

*“Parts of the documents have been withheld under section 7(2)(b)(ii) of the Local Government Official Information and Meetings Act 1987 (the Act) on the grounds that their release would be likely to unreasonably prejudice the commercial position of a person who supplied or is the subject of the information, and under section 7(2)(i) of the Act on the grounds that the release would prejudice or disadvantage the ability of a local authority holding the information to carry on negotiations.”*

5. During my investigation, the GWRC advised that it was no longer seeking to withhold the information at issue under section 7(2)(i) (prejudice to negotiations) of the LGOIMA. However, it advised it also wished to withhold that information under section 7(2)(c)(i) (prejudice to supply of confidential information). In the light of the opinion I have formed regarding the application of section 7(2)(b)(ii), it is not necessary for me to provide an opinion on the application of section 7(2)(c)(i).

### The complaint

6. On 17 November 2011, the complainant complained to me about the GWRC’s decision.
7. In correspondence with this Office, the complainant has provided a number of reasons why it is appropriate for the GWRC to release the withheld information. For example, in a letter of 4 November 2013, he stated (*verbatim*):

*“The GWRC Transport Rate has grown enormously over the past decade. In 2004/05, the Transport Rate was ‘only’ \$24M, (only half the amount of the amount of the General Rate). It is now about \$46M/year, twice the amount of the General Rate and over 50% of all GWRC rate income. These are huge amounts and yet the public is unable to obtain details of where GWRC’s ever*

*increasing PT expenditure is being spent or verify if the Transport Rates allocation is fair. The objective and purpose of the original information request in March 2011 was to:*

- *respond to the GWRC invitation to make an informed public submission on the ‘Significant Decision’ of adopting their proposed 2011/12 Annual Plan which included:*
    - *increases GWRC expenditure on Wellington public transport*
    - *consequential increases in GWRC Transport Rates*
    - *consequential increases in regional public transport fares that are also set by the GWRC and part of the Annual Plan consultation*
    - *understand PT expenditure. It is apparent that are (in both absolute and per commuter terms) very different between the regions constituent cities and different between the different modes (I count trolley bus as a different mode to diesel bus). Obtaining a summary understanding of proposed expenditure by city and mode appears to be an obvious approach*
    - *understand how the funding of PT expenditure is allocated to ratepayers through the transport rate calculation including whether the transport rate policy is being correctly applied to the actual transport rate calculations. As the transport rate policy specifically allocations rates income by different ratepayer categories, cities and modes, again obtaining a broad understanding by ratepayer category, city and mode appears to be an obvious approach.” (“PT” is an abbreviation for public transport.)*
8. The complainant requested the GWRC to provide him with information about, as he puts it, *“the proposed expenditure by city and mode”*. By *“mode”* he means buses, trolley buses and rail. He says he does not have that information for each local authority in GWRC’s region, but he suggests that information forms part of GWRC’s published policies for collecting/levying rates. He wants to ascertain if the levied rates reflect those policies. Based on explanations the GWRC have given, the information at issue does not have that degree of information. (The GWRC can give him the total amount of its expenditure for trolley buses as they operate only in the Wellington City Council area.) In other words, the background calculations for the rating tables do not have details of transport estimates for public transport on a *“city and mode”* basis.
9. The GWRC is responsible for the provision of public transport services in the Wellington region.
10. The request related to background calculations for the transport rate to assist with the provision of public road transport services. In response to other requests by the

complainant, the GWRC has provided certain information to him concerning the cost of the provision of rail services by TranzMetro.

11. While my investigation related to only GWRC's 2011/2012 Annual Plan, the complainant has the same concerns concerning the GWRC's subsequent Annual Plans.

## Investigation

12. In March 2012, this Office notified the GWRC it was investigating the complaint.
13. In a letter of 7 September 2012, the GWRC provided a report on the complaint and copies of the information then at issue.
14. During the course of this investigation, the GWRC agreed to release some of the information originally withheld subject to payment of the GWRC charges for collating that information. (Whether those charges are reasonable is outside the scope of this opinion.) That information includes "*the net contract prices*" in the "*price proposal forms*", the nature of which is explained later in this opinion.
15. In a letter of 26 November 2012, the GWRC provided further information concerning the information at issue in response to a request by this Office.
16. On 30 May 2013, members of this Office met with GWRC staff to discuss the complaint and the information at issue.
17. In a letter of 30 August 2013, the GWRC provided further information requested by this Office.
18. During the course of this investigation, this Office provided the complainant with opportunities to comment on the GWRC reports to this Office.
19. In June 2014, after considering the information remaining at issue, the GWRC's reasons for withholding that information, and the complainant's views, I formed a provisional opinion on the complaint and provided a copy of my provisional opinion to the GWRC for comment.
20. In July 2014, the GWRC provided advice to the effect that it accepted my provisional opinion.
21. In August 2014, I provided to the complainant for comment a copy of my provisional opinion.
22. In an emailed letter of 29 August 2014, the complainant provided comments on my provisional opinion.

## Analysis and findings

### Section 7(2)(b)(ii)

23. Subject to certain exceptions which are not relevant to this case, section 7(2)(b)(ii) of the LGOIMA provides good reason to withhold information –
- *“... if, and only if, the withholding of the information is necessary to ...*
    - b. protect information where the making of the information – ...*
      - ii. would be likely unreasonably to prejudice the commercial position of the person who supplied or is the subject of the information”;*  
*and*
  - this interest is not, in terms of section 7(1) of the LGOIMA,  
*“outweighed by other considerations which render it desirable, in the public interest, to make that information available.”*
24. Both of these elements must be satisfied before section 7(2)(b)(ii) provides a good reason for refusing a request.
25. The GWRC has provided me with copies of the information at issue in spreadsheet form and annotated those spreadsheets (‘the spreadsheets’) to show the information already released to the complainant, the information it is willing to release on payment of the GWRC’s reasonable charges for collating certain information, and the information it is not willing to release.

### Information available

26. As a result of the request or through public sources, the complainant (at no cost) has access to the following information:
- a. The gross sums paid by the GWRC in certain years for transport services (bus, ferry and rail) in the GWRC’s region.
  - b. The gross amounts which the GWRC has received from the NZTA in certain years to assist it with the provision of transport services (bus, ferry and rail) in its region.
  - c. The names of the present operators of each bus route and ferry and rail services in Wellington.
  - d. The period of the present contracts between the GWRC and bus operators.
  - e. The timetables for each bus operators’ routes.
  - f. The gross amounts paid by the GWRC in certain years for the provision of bus-rail connection services.

- g. The amounts paid in certain years by each local authority within the GWRC's region by way of rates and the rate struck.
  - h. The total amount paid to each bus operator in certain years for the provision of transport services (not per route).
  - i. Details of the total amounts which the GWRC receives for "Gold card" passengers and passengers who pay concessionary fares (for example, children and disabled persons).
27. Subject to the complainant paying its indicated costs for collating the information, the GWRC will provide the complainant with the following information:
- a. Tendered contract prices. (Transport operators tendered a price for each route, details of which are in the spreadsheets under the heading "*operator payment*".)
  - b. Variations to contract prices reflecting changes to services successful tenderers contracted to provide.
  - c. Certain information, not previously released, relating to concessionary fares.
28. The GWRC advised the complainant it would have to review its contract files for each of the 59 individual contracts referred to in the TRM and that it would take approximately 15 minutes to review each contract file.

## Information at issue

29. In summary, the information at issue – the information which the GWRC is not prepared to release – is:
- a. The amounts paid by the GWRC to transport operators for each of the services provided by transport operators, that is the "*Contract PA – Cost*". (The "*Contract PA – cost*" is the price paid by the GWRC to transport operators each year added to which are the described adjustments.)
  - b. Various adjustments to the original contract cost ("*Contract PA – Cost*"), such as those made for inflation in accordance with the NZTA inflation index.
  - c. Various other adjustments made to original contract costs arising from such matters as an increase in fares (increases occurred in 2008 and 2010).
  - d. The amount of "*anticipated revenue*" which transport operators expect to receive in total for all of the services and for each individual service which they provide. ("*Anticipated revenue*" forms part of transport operators' "*price proposals*" explained below.)
  - e. Transport operators' revenue on a contract-by-contract basis.
30. In a letter of 26 November 2012 to this Office, GWRC explained the nature of "*anticipated revenue*":

*“Anticipated revenue makes up a component of the tendered price, which is subject to an operator’s individual pricing strategy within a competitive tender process. A tenderer is likely going to tender a price they believe is competitive enough to win the tender.*

...

*Tendered net contract prices are part of a tender assessment, the lower the net contract price the more chance a tenderer may have of being awarded a contract.”*

## **GWRC’s comments**

31. In correspondence with this Office, the GWRC has stated that its concern is not to keep confidential the transport operators’ per kilometre operating costs. Rather, its key concern is to ensure that the operators’ commercial positions are not unreasonably prejudiced by the release of information enabling the complainant to calculate operators’ anticipated and actual revenues on a route-by-route basis and thus their likely tender strategy in a future tender round. Previous tender rounds took place each year from 2002 to 2007, with the timing of tenders dependent on the location and type of bus route. The timing of the next tender round is currently scheduled for July to September 2016 for ferry and rail services and for April to September 2017 for bus services.
32. As stated, the GWRC will release, on payment of its indicated charges, the successful tender prices on a contract-by-contract basis. The releasing of further information – part of the information at issue – in the “2008 Fare Adjustment” and “2010 Fare Adjustment” columns in the spreadsheets would enable the complainant to calculate the actual revenue received by transport operators on a route-by-route basis. Transport operators provide to the GWRC particulars of the annual revenue on the occasion of fare rises.
33. In its letter of 7 September 2012, the GWRC stated:

*“The actual revenue information would be of particular interest to other providers in the market as it would provide them with information which they could use to develop anticipated revenue information. Competitors would be likely to use this information in developing future tender strategies.*

...

*While not specifically relied on in the TRM released to [the complainant], much of the information contained within the TRM is sourced from confidential anticipated revenue information contained within the Proposals completed by transport operators. In addition to the anticipated revenue provided confidentially in the Proposal, operators provide Greater Wellington with actual revenue figures so that fare adjustments can be calculated.*

...

*The commercial relationships between Greater Wellington and transport operators are complex: Greater Wellington strongly relies on information provided to it, in confidence, by transport operators in order to plan and provide for public transport and ensure that Greater Wellington is receiving value for the ratepayers' money that it invests.*

*If Greater Wellington released information provided by operators on a confidential basis, there is a real risk that transport operators would revert to taking an adversarial approach to information sharing - the consequences being that Greater Wellington would be forced to make do with less and lower quality information which is much more expensive to obtain. This would damage the public interest in Greater Wellington's informed and efficient management of public transport in the Wellington region. It is submitted that a significant public interest lies in transport operators continuing to supply revenue information to Greater Wellington on a confidential basis."*

34. In its letter of 7 September 2012, GWRC explained the tender process as follows:

*"Currently, Greater Wellington has contracts with transport operators for the provision of public passenger transport services largely on an individual route basis ... Before entering into these contracts Greater Wellington invited tenders from transport operators and providers.*

*As part of its tender an operator must provide a price proposal (Proposal). This Proposal includes a contract price and information on revenue that the tenderer is expecting to receive from a particular route for the first year of the contract. Where the contract is in existence for more than one year inflation is calculated and paid to operators.*

*The contract price and anticipated revenue taken together provide the base for calculating inflation. Inflation is calculated for the operator for each year that the contract is in operation (excluding the first year of the contract's operation). The amount of inflation paid is calculated using a publicly available index which is produced by the New Zealand Transport Agency (NZTA).*

*Since being entered into, a large number of contracts have been renegotiated with operators. These renegotiated contracts provide for new contract prices and in limited instances new revenue information.*

*Contracts are renegotiated for the following reasons:*

*- where there have been changes to the originally contracted routes and services; or*

*- where there has been a move from the old NZTA index to the new NZTA index.*

*Any calculated change is based on variation rates provided by the operator in their Proposal.”*

35. The “net contract price” tendered largely determines the amount GWRC originally paid successful tenderers for each route they “won” in the tender round. This “net contract price” is subject to the various described adjustments which, speaking generally, are in large measure based on revenue received by transport operators or as negotiated with operators. All of these amounts are inputs in the GWRC’s TRM. The TRM contains the inputs and outputs to create the estimates for the transport rate in the transport rate tables for the GWRC’s draft 2011/2012 Annual Plan, and, for that matter, subsequent Annual Plans.

36. The GWRC states:

*“The GWRC has provided [the complainant] with information which has enabled him to calculate how much the GWRC has received in total from transport operators (the total of the tendered prices), the total sum which the Council has levied by way of rates for the purpose of subsidising transport operations in the GWRC’s area and the total amount received from the NZTA for that purpose.”*

37. On occasion, the amounts paid by the GWRC to transport operators are subject to “fare clawback”. “Fare clawback” can arise, for example, where the adjustments described above are applied to fare revenue and GWRC considers transport operators have received (or will receive) more than they are entitled to. (Calculations of “fare clawback” are made by the GWRC on the basis of revenue information provided confidentially to it by transport operators. Under its existing contracts with operators, GWRC has no right to demand that information.)

38. The GWRC advised that, with the information at issue such as fare clawbacks and adjustments in 2008 and 2010, the complainant would be able to calculate the actual revenue figures provided by operators on a contract-by-contract basis.

## **Transport Operators’ comments**

39. The GWRC provided comments which it had received from Mana Coach Services and New Zealand Bus Limited.

40. In a letter of 23 August 2012 to the GWRC, Wilson and Co, New Zealand Bus Limited’s lawyers, referred to earlier correspondence with this Office concerning another complaint by the complainant in which it commented:

*“The information ... is provided on an ongoing basis to GWRC under the contractual relationship that exists between the parties.*

...

*The Standard Conditions of Contract [between the GWRC and New Zealand Bus Limited (and, for that matter, with other operators)] ... in clause 5.3 ... require GWRC to*

*‘Not use the Confidential Information for any purpose other than a purpose permitted or envisaged by this contract.’”*

41. The information provided by New Zealand Bus Limited to GWRC, which forms part of the information at issue and which New Zealand Bus Limited considers is commercially sensitive, includes data relating to patronage, ticket sales and income (including adjustments to its income by fare increases and NZTA subsidies).
42. The provision in the standard contract referred to by New Zealand Bus Limited’s lawyers requiring transport operators to keep certain information confidential is subject to the LGOIMA and cannot define any interest protected by section 7 of LGOIMA.
43. Mana Services stated the release of that information –

*“would place [our] competitor(s) at great advantage, because they would have our underlying cost per service [kilometre] data, but we would not have their data.”*

## Discussion

44. In his opinion of 23 March 2011, a former Ombudsman, Dr David McGee, was of the opinion that GWRC had no good reason under the LGOIMA to withhold the documents entitled “*Essbase download*”, “*Concessions and Fare Savings*”, and “*Additional Bus Service Costs*” relating to transport costs in the Wellington region. These documents have information about the costs of providing transport services in the Wellington region. The GWRC consequently provided the complainant with that information enabling him to calculate operators’ gross earnings per kilometre on a route-by-route basis, but not their profit margins, at the time of their successful bids. Without the withheld information, for most routes, the complainant will not be able to calculate operators’ gross earnings in 2011/2012 to that level of detail, as, for example, the described adjustments increased operators’ gross earnings. However, as stated, the GWRC’s concern is that releasing the information at issue will reveal transport operators’ tender strategies, not operators’ gross earnings as such.
45. I reject any suggestion by the bus operators that the purpose of section 7(2)(b)(ii) is to protect existing operators from the prospect of competition when future public contracts are awarded. As Dr McGee stated in his opinion:

*“The presence of a reasonableness test in section 7(2)(b) ... entails that it is not just the interests of the present operators that must be considered. Section 7(2)(b) demands a consideration of the circumstances in which it is reasonable to overlook any suggested (even acknowledged) commercial prejudice to them. ... the erosion (if such it is) of commercial advantage resulting solely from incumbency, is not an unreasonable prejudice.”*

46. When transport operators tendered for each service, they completed a “*Proposal to Provide a Contracted Passenger Service*” (“*Form 03D: Price Proposal*”). In that form, tenderers provided revenue information, which includes the “*total estimated revenue*”. The “*total estimated revenue*” is the revenue which transport operators estimate they would receive from all sources, except from the GWRC. (The amount paid by GWRC to operators includes the NZTA subsidy.)
47. The GWRC did not provide tenderers, as part of a due diligence process, with details of past revenues earned for any routes tendered. The only information the GWRC provided to tenderers were publicly available timetables for the routes tendered.
48. In a letter of 30 August 2013 to this Office, GWRC gave the following example of how, in its view, “*anticipated revenue*” forms part of an operator’s tender strategy:

*“Tenderer anticipates that the cost of running a service is \$1.5 million per annum. Anticipated revenue will cover \$0.8 million per annum, requiring an annual contract payment of \$0.7 million.*

\$1,500,000	Gross contract price
\$800,000	Anticipated revenue
\$700,000	Net contract price

*However, as part of its strategy, a tenderer may decide to reduce its net contract price and thus take a gamble on the amount of anticipated revenue that a tenderer expects to receive.*

*Tenderer revises estimates and anticipates that revenue will cover \$1 million per annum, requiring a reduced annual contract payment of \$0.5 million.*

\$1,500,000	Gross contract price
\$1,000,000	Anticipated revenue
\$500,000	Net contract price

*This demonstrates that the anticipated revenue figure whilst indicating the expected farebox revenue from the tendered contract can also be a mechanism for establishing the net contract price which is what the tender is awarded on. In other words its relationship to the net contract price can have direct implications on the outcome of the tender bid. Thus, the anticipated revenue is a part of the operator’s strategy, when tendering for a bus contract.”*

49. The transport operators’ contracts are a special form of “*net contracts*” where operators take the risk on the amount they are able to earn by way of passenger fares which they retain.
50. The contract tender process for the provision of public transport in the Wellington region was thus quite different from many other tender processes, where tenderers simply tender a price. The transport operators’ “*anticipated revenue*”, which is part of the

information at issue, is, as the GWRC has stated, an integral part of the way the operators calculated their “net contract price” in that tender.

51. In its letter of 7 September 2012, the GWRC illustrated its concerns about the release of the information at issue as follows:

*“If [the complainant] had the old and new contract price, and index start dates he would be able to back calculate (using publicly available NZTA indices) the figures to determine the amount of anticipated revenue provided by the operator in their tender proposal.*

...

*The total actual revenue received by the transport operators has, historically, been released annually by Greater Wellington according to mode (bus, train, ferry, cable car). If we released the figures in the 2008 and 2010 fare adjustment columns [the complainant] would be able to assess the actual revenue figure provided to Greater Wellington by each operator for individual contract by determining the percent of the total revenue which is taken up by each individual fare adjustment figures.*

*Actual revenue is provided to Greater Wellington when there has been a fare rise.*

*The actual revenue information would be of particular interest to other providers in the market as it would provide them with information which they could use to develop anticipated revenue information. Competitors would be likely to use this information in developing future tender strategies.*

...

*The anticipated revenue information provided by the operator in their tender could be calculated by using the publicly available inflation index should information in the TRM relating to payments made by Greater Wellington be released. This information, while only referring to anticipated revenue for the first year of the contract, is still relevant as it provides insight into information held by the operator relating to patronage and their strategy.”*

52. In its letter of 30 August 2013, the GWRC provided examples to show how the complainant could ascertain operators’ anticipated revenue if he had the information at issue. In one example, with reference to a particular bus route, the GWRC showed how the complainant could calculate the transport operator’s “anticipated revenue” for that route knowing the contract price, “the net contract price” explained above, the NZTA index start dates for inflation adjustments in 2008 and 2010, and publicly available NZTA indices. Transport operators receive the benefit of these adjustments and these inflation adjustments are part of the information at issue. In another example, the GWRC showed that, if the complainant knew the total actual revenue advised by operators to GWRC for particular routes and the fare adjustment information for 2008 and 2010, he would be able to calculate operators’ revenue for each route.

53. In discussion with this Office, the GWRC provided an example of how a tenderer's strategy might be revealed if it released the information at issue. A transport operator may decide to tender for a route on the basis it is to be a "loss leader". Winning of such a route for a "net contract price" on that basis would not fully compensate a tenderer for the costs of providing that service, but it may enable the tenderer to more efficiently provide services for other nearby routes. These efficiencies may lead to cost savings for that transport operator arising from, for example, the use of a common depot for several routes, including the "loss leader" route.
54. While the GWRC has not yet determined exactly how and when it will re-tender operators' routes, I accept that releasing the withheld information will not only reveal existing operators' tender strategy in past tender rounds, but also likely tender strategies in future tenders.
55. I am of the opinion that section 7(2)(b)(ii) applies to the information at issue, as releasing that information is likely to unreasonably prejudice the transport operators' commercial position by revealing transport operators' tender strategy (as I have described) which would affect their ability to participate competitively in future tenders for transport services in the Wellington region.

## Public interest

56. Having accepted that section 7(2)(b)(ii) applies, I must consider whether, in terms of section 7(1) of the LGOIMA –  

*"the withholding of the information is outweighed by other considerations which render it desirable, in the public interest, to make that information available."*
57. The issue under section 7(1) is not simply whether there is a "public interest" in making the information at issue available, but rather whether any considerations favouring disclosure outweigh the interests that would be protected by withholding the information requested. The GWRC has already released a substantial amount of information to the complainant concerning the background calculations to the transport rating tables and is prepared to release further information on payment of its indicated charges. Further, as described above, certain information is publicly available such as the NZTA inflation indices.
58. As I have explained, transport operators disclosed to the GWRC in their price proposals their anticipated revenue. During their contracts, they also disclose their actual revenue for each route they service. The disclosure of their anticipated and actual revenue is a point of difference from day-to-day tenders, which do not usually require disclosure of such information.
59. The complainant referred to the fact that the setting of the transport rate (as part of the GWRC Annual Plan process) is a "significant decision" under the Local Government Act 2002 and, as a "significant decision", the GWRC is legally obliged to consult in terms of

the principles of consultation set out in section 82 of the 2002 Act. Section 82(1)(c) sets out one of those principles:

*“that persons who are invited or encouraged to present their views to the local authority should be **given clear information** by the local authority concerning the purpose of the consultation and the scope of the decisions to be taken following the consideration of views presented.”* (emphasis added)

60. Contrary to the complainant’s view, in my opinion, the information publicly available or as a result of a request to the GWRC enables submitters on the GWRC’s Annual Plans to make informed and appropriate submissions on matters relating to the cost of provision of transport services.
61. It is in the public interest that GWRC’s tenders for transport services are as competitive as possible; that is one of the principal purposes of those tenders. The releasing of the information at issue is likely to undermine the competitive character of that process.
62. Further, it is in the public interest that transport operators continue to provide information about the actual revenue they receive each year for each route to enable the GWRC to calculate, if appropriate, the necessary “fare clawbacks” and adjustments (if any).
63. Accordingly, I am of the opinion that, in terms of section 7(1), the withholding of the information at issue is not outweighed by other considerations which render it desirable, in the public interest, to make that information available.

## Chief Ombudsman’s opinion

64. For the reasons set out above, I formed the opinion that the GWRC had good reason to withhold the information at issue under section 7(2)(b)(ii) of the LGOIMA.

## Appendix: Relevant statutory provisions

### Local Government Official Information and Meetings Act 1987

#### 4 Purposes

The purposes of this Act are—

- (a) to provide for the availability to the public of official information held by local authorities, and to promote the open and public transaction of business at meetings of local authorities, in order—
  - (i) to enable more effective participation by the public in the actions and decisions of local authorities; and
  - (ii) to promote the accountability of local authority members and officials,—  
and thereby to enhance respect for the law and to promote good local government in New Zealand:
- (b) to provide for proper access by each person to official information relating to that person:
- (c) to protect official information and the deliberations of local authorities to the extent consistent with the public interest and the preservation of personal privacy.

#### 5 Principle of availability

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

#### 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; or
- ...
- (c) protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information—
  - (i) 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; or
  - (ii) would be likely otherwise to damage the public interest; or
- ...
- (i) enable any local authority holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations);
- ...