|  |
| --- |
| Request for consultant’s report on potentially contaminated sites |
|  |
| Legislation Local Government Official Information and Meetings Act 1987, s 7(2)(b)(ii)  Agency Regional Council  Ombudsman Sir Brian Elwood  Case number(s) C6407  Date August 2002 |

*Requester sought consultant’s report on potentially contaminated sites—Council concerned that information would prejudice site owners’ commercial position when selling land and/or business on that land—s 7(2)(b)(ii)—information already available by way of LIM or PIM request—release would not increase extent of prejudice that already existed—information released on recommendation*

A reporter from a local newspaper had written an article some years previously on contaminated sites within a Regional Council. The reporter wanted to follow-up on any progress the council had made clearing up the sites. She wrote to the Council requesting a copy of a 1994 consultant’s report on contamination of certain timber treatment sites. The Council advised that it would release the information only on a site-specific basis and that landowner permission would be required. However, the location of the sites was part of the information withheld and the requester was therefore not able to make site-specific requests in order to obtain the information from local territorial authorities. The requester asked the Regional Council to provide her with reasons for not releasing the information but did not receive a reply.

When responding to the Chief Ombudsman, the Council clarified that it was relying upon section 7(2)(b)(ii) of LGOIMA to withhold the report. The focus of the Chief Ombudsman’s enquiries in this case were therefore twofold, namely to establish whether release of the information at issue would be likely to prejudice the commercial position of the owners and, if so, to then establish whether such a prejudice was unreasonable.

The Chief Ombudsman considered the contents of the report. He noted it was seven years old and related to nine separate timber treatment sites. It provided the Council with information based on preliminary sampling and site assessments. Each site report contained recommendations for further investigation where it was deemed appropriate. In justifying the application of section 7(2)(b)(ii), the Council gave an example of one particular company which was trying to sell part of an affected site. The Council submitted that disclosing the information relevant to that particular site would be likely to prejudice the company’s commercial position.

In order to establish whether such a prejudice was unreasonable, the Chief Ombudsman asked the Council to consult the relevant site owners for their views on the possible release of the information. Of the nine consulted, six owners did not reply, one site owner replied in favour of release, another site owner favoured withholding the information until his particular land was sold, whilst another considered that the information should be withheld on the basis that if there was a public health risk, it was being managed already.

The Chief Ombudsman also considered information that was already in the public domain. He noted that the Council was providing contaminated site information from its database to District Councils when those councils received requests for LIMs and PIMs (Land Information Memoranda and Project Information Memoranda). Where the sale of land is being negotiated, a prudent potential purchaser may be expected to seek a LIM or a PIM or both. This would disclose the fact or possibility of contamination and thus affect the outcome of those negotiations and lead to an owner’s commercial interests being affected. The Chief Ombudsman noted that the site owners who had been consulted were also aware that the information was already available in LIMs and PIMs.

The Council argued that, while the information only concerned the land and not any capital or assets on that land, there may still be potential for other aspects of a business run on that site to be adversely affected by the release of the information. However, the Chief Ombudsman observed that a prudent potential purchaser of a business (who was not also buying the land from which the business operated) would also be likely to request from the Council information relevant to operating the business on that land. Such a request would be likely to include a request for a PIM or LIM as such information would ensure that the purchaser was fully acquainted with all matters affecting the land.

Finally, the Chief Ombudsman noted that even if a LIM or a PIM was not requested, section 44(6) of LGOIMA states that no information required to be included in a LIM may be withheld by a territorial authority. So once a territorial authority holds the information it cannot then refuse a request for it.

While the Chief Ombudsman agreed with the Council that release of the information contained in the report would be likely to prejudice the commercial position of the relevant site owners, he did not accept either that withholding the information was necessary to avoid such a prejudice or that making the information available would unreasonably prejudice the owners’ commercial position.

It was the Chief Ombudsman’s view that any prejudice to the owners’ position already existed through the availability of the information to a prospective purchaser of either the land or a business conducted from the land by way of a request for a LIM or PIM. The Chief Ombudsman did not consider that prejudice to be increased by making the same information available to the requester in this case. He was therefore not satisfied that section 7(2)(b)(ii) applied and recommended that the information be released.

The Council duly released the information to the requester.

**Comment**

During the course of the investigation, the complainant advised the Chief Ombudsman that, in light of the Council’s advice that she could obtain site specific information from the relevant territorial local authority, she would be happy to limit her request to simply the location of the sites referred to in the report. The Regional Council declined to comply with this limited request. The Chief Ombudsman noted that this created a situation whereby if the requester knew the location of the site, the information would be released to her, but the fact that she did not know the location had the effect of the Council withholding information which would otherwise be released. The Chief Ombudsman said such a distinction on the availability of information is not justified in terms of LGOIMA.

*This case note is published under the authority of the* [*Ombudsmen Rules 1989*](http://legislation.govt.nz/regulation/public/1989/0064/latest/DLM129834.html?src=qs)*. It sets out an Ombudsman’s view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.*