

Request for transport rates, cost and revenues per route

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| Legislation | Local Government Official Information and Meetings Act 1987, s 7(2)(b)(ii) |
| Agency | Greater Wellington Regional Council |
| Ombudsman | David McGee, Dame Beverley Wakem |
| Case number(s) | 179073, 309109 |
| Date | July 2012, December 2014 |

Cost per route to the Council not protected by s 7(2)(b)(ii)—any prejudice would not be unreasonable—s 7(2)(b)(ii) applies to revenue per route—this would reveal operators’ tender strategies, thereby prejudicing their ability to participate competitively in future tenders

Cases 179073 and 309109 concerned requests to Greater Wellington Regional Council for its transport rating model, which were refused partly in reliance on section 7(2)(b)(ii) of the LGOIMA (unreasonable commercial prejudice). The issue was whether disclosure of the cost and revenue per route would be likely unreasonably to prejudice the transport operators’ commercial positions.

Case 179073—cost per route to the council

The information at issue in case 179073 concerned the cost per route to the Council. The Council argued that disclosure of this information would reveal the operators’ pricing strategies, and prejudice their commercial position by enabling competitors to undercut them in future tenders for the same or similar services.

However, the Ombudsman did not consider that disclosure of the total cost per route would reveal the operators’ pricing or market strategy to any significant degree. He noted that operators would build a range of variables into their tender bids, including the various cost components and their projected profit margins. The information at issue did not provide a detailed breakdown of the full range and costs of the variables that operators used in

calculating their tender bids. It was therefore unclear how disclosure would be likely to prejudice the operators' commercial positions.

The Ombudsman accepted that, where the total contract price of a successful tender has been kept confidential, the incumbent supplier has the advantage over its competitors at the next tender round of knowing the details of the previous accepted tender. If this information was made available to competitors, that advantage would be lost. This may prejudice the incumbent's commercial position, but such prejudice is not 'unreasonable', as it would simply allow competitors to redress an advantage created by confidentiality, and to enter a tender round on a more level playing field.

By incorporating the reference to 'unreasonable' in section 7(2)(b)(ii), Parliament recognised that there may well be commercial prejudice arising from release, but that information must still be released if that prejudice is not unreasonable. In the Ombudsman's view, it was not unreasonable, indeed it should be anticipated, that information generated in the course of carrying out a public sector activity will be publicly available. On the other hand, information that discloses the particular marketing or pricing policies followed by the operator on the basis of its own commercial judgements will not be available merely because these are in the hands of a public sector agencies with which it had a contract.

The Ombudsman stated:

I do not see it as being a purpose of section 7(2)(b) of the LGOIMA to protect existing operators from the prospect of competition when future public contracts are awarded ... 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. In my view the erosion (if such it is) of commercial advantage resulting solely from incumbency, is not an unreasonable prejudice.

The Council agreed to release the information.

Case 309109—revenue per route

In case 309109, the Council agreed to disclose the cost per route, but withheld the estimated revenue for each route. The Chief Ombudsman formed the opinion that release of the information would unreasonably prejudice the commercial position of transport operators. Releasing the estimated revenue would be likely to reveal transport operators' strategies in the last tender round and also in future tender rounds, if the Council sought tenders on the same, or substantially the same, basis as the last tender. This would affect transport operators' ability to participate competitively in future tenders for transport services in the region.

The Chief Ombudsman observed that 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 was not in the public interest that transport operators reveal their tender strategy by disclosing their revenue on a route-by-route basis. Keeping that information confidential would assist in maintaining a competitive environment for the provision of transport services in the region, and allow the council to obtain the most favourable price for the service.

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