

Request for Skypath business case and procurement plan

Legislation	Local Government Official Information and Meetings Act 1987, ss 7(2)(b)(ii), 7(2)(i)
Agency	Auckland Council
Ombudsman	Leo Donnelly
Case number(s)	438343
Date	January 2018

Releasing business case and procurement plan would unreasonably prejudice the commercial position of the private partner in a public private partnership—withholding strengths and weaknesses of negotiating position necessary to enable Council to carry on negotiations without prejudice or disadvantage—ss 7(2)(b)(ii), 7(2)(c)(i), 7(2)(i) apply

A requester sought deleted sections of an Auckland Council Committee meeting agenda. The deleted sections contained the business case and public private partnership (PPP) procurement plan for the SkyPath project.¹

The Council refused the request under sections 7(2)(b)(ii) (unreasonable commercial prejudice) and 7(2)(i) (negotiations) of the LGOIMA, and the requester complained to the Ombudsman. The Ombudsman concluded that there was good reason, under both these provisions, to withhold the information.

In relation to section 7(2)(b)(ii), the Ombudsman noted that the affected third party was the private partner to the PPP agreement, the Public Infrastructure Partners (PIP) Fund. As an investment entity that aims to produce a profitable return for its investors, the PIP Fund clearly had a commercial position. The question was whether release of the information at issue ‘would be likely unreasonably to prejudice’ that commercial position.

¹ A project to construct a semi-enclosed pathway underneath the city-side of the Auckland Harbour Bridge.

The information included project costing figures, revenue estimates and proposed underwriting arrangements still to be negotiated between the Council and the PIP Fund. The Ombudsman was satisfied that releasing this information would be likely unreasonably to prejudice the ability of the PIP Fund to negotiate future PPP agreements, in particular those involving underwriting agreements.

Disclosure of the commercial terms under which the PIP Fund appeared likely to enter into a PPP with the Council in the case of the SkyPath, risked setting a benchmark for future projects, thus impacting upon its ability to negotiate more favourable terms in the future. Disclosure of construction cost projections would also impact on the ability of the PIP Fund, which was to fund the cost of constructing SkyPath, to obtain competitive tenders from contractors by revealing already anticipated costs and thus creating a 'price floor'.

The Ombudsman was also of the view that section 7(2)(i) provided good reason to withhold information about the negotiations.

The terms under negotiation with the PIP Fund included the Council's underwrite obligation, including the point at which it would be triggered, the breakeven point at which it would be removed, and the 'upside share' (or rate of return at which the Council would receive a share of the revenue generated).

The redacted passages included discussion of the strengths and weaknesses of the Council's negotiating position. The Ombudsman accepted that release of this information would prejudice the ability of the Council to carry out negotiations in respect of the underwrite agreement. There was a significant public interest in protecting the negotiating position of the Council to ensure that the financial implications of the Council's underwrite obligation and the overall cost of the project were minimised.

The Ombudsman did identify a public interest in disclosure of information to promote the Council's accountability in its dealings with public funds. However, in his opinion, that interest had been met in this case by disclosure of the majority of the business case and procurement plan. The released information included a detailed history of the project, patronage forecasts, design specifications and detailed analysis of procurement options. It also detailed the policy approach underlying the Council's preference for a hybrid PPP, as well as the criteria applicable to approval and negotiation of any final PPP agreement.

The Ombudsman noted that section 7(2)(i) would only apply for the duration of negotiations, and it was open to the requester to make a fresh request once the negotiations were concluded.

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