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| Request for settlement amount reached following unsuccessful prosecution |
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| Legislation Local Government Official Information and Meetings Act 1987, s 7(2)(c)(ii)  Agency Waikato Regional Council  Ombudsman Dame Beverley A Wakem  Case number(s) 382295  Date 16 March 2015 |

*Section 7(2)(c)(ii) LGOIMA applied—settlement agreement contained express obligation of confidence—release would be likely to damage the public interest in encouraging parties to settle their disputes without resorting to litigation—public interest in accountability met by release of total financial cost from prosecution*

# Background

A requester asked for information about costs incurred by Waikato Regional Council in an unsuccessful prosecution. The Council confirmed that the total financial cost from the prosecution was $75,206. It advised that a confidential settlement had been reached with the defendant, but refused to provide details of that settlement under section 7(2)(c)(ii) of the Local Government Official Information and Meetings Act (LGOIMA). The requester complained to the Ombudsman about the Council’s decision to withhold the amount of the confidential settlement.

# Investigation

The Chief Ombudsman requested the information at issue and an explanation of the reasons for withholding.

The Council advised that the settlement agreement contained an express obligation of confidence, and commented that:

…it is in the public interest for the Council to be able to reach settlement in this instance and allow for the same in other appropriate cases. This will give confidence to the public that the Council is open to negotiation in appropriate cases...

Furthermore, disclosure of the amount of costs settled ... would prejudice the ability of an agency to uphold a promise of confidentiality and, thereby, reach settlement…

The Council maintained that the countervailing public interest in accountability for expenditure of public money did not outweigh the need to withhold the information.

## Confidentiality

Section 7(2)(c)(ii) of the LGOIMA applies when releasing information that is *‘subject to an obligation of confidence’* would be likely to *‘damage the public interest’.*

The Chief Ombudsman was satisfied that under the terms of the settlement agreement, the Council was obliged to maintain confidentiality with regard to its contents.

She was also satisfied that, if information in that agreement were to be disclosed, it would likely damage the public interest.

Ombudsmen have accepted that it is in the public interest for agencies to be able to reach agreement in the context of disputes, in appropriate cases. If it is necessary to maintain the confidentiality of some information in order to achieve settlement, it may then be said that there is a public interest in an agency being able to honour that undertaking.

It follows, then, that where disclosure would prejudice the ability of an agency to uphold that undertaking, and thereby reach agreement in appropriate cases, disclosure *‘would be likely to otherwise damage the public interest’* for the purpose of section 7(2)(c)(ii).

It was in the public interest for the Council to be able to negotiate and reach settlement in order to avoid protracted disputes and litigation. Release of information relating to such settlements may have diminished the willingness of both parties to participate in this process. As settlement agreements commonly include a confidentiality clause, disclosure would also have affected the legal rights of parties to rely on the mutually agreed terms of an agreement.

The Chief Ombudsman concluded that section 7(2)(c)(ii) applied.

## Public interest

Section 7(2)(c)(ii) is subject to a public interest test. This means the need to withhold must be balanced against the countervailing public interest in release. If the countervailing public interest weighs more heavily, the information must be released. If not, it can be withheld.

The Chief Ombudsman accepted that disclosure would promote the accountability of the Council for the use of public funds. However, the public interest did not outweigh the need to withhold the settlement amount in this case. The public interest had, in her view, been met by release of the total financial cost to Council from the prosecution.

# Outcome

The Chief Ombudsman formed the opinion that section 7(2)(c)(ii) of the LGOIMA provided good reason to withhold the settlement amount.

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