

Request for record of ‘without prejudice’ meeting

Legislation	Local Government Official Information and Meetings Act 1987, ss 7(2)(g) and 7(2)(c)(ii)
Agency	Tauranga City Council
Ombudsman	Peter Boshier
Case number(s)	502663
Date	12 March 2020

Section 7(2)(g) LGOIMA did not apply—‘without prejudice’ privilege is not an aspect of legal professional privilege—s 7(2)(c)(ii) applied—obligation of confidence attaches to information subject to without prejudice privilege—release would make people reluctant to enter into discussions to resolve disputes, which would damage the public interest—public interest in transparency and accountability met through the conduct of external reviews and release of summary information about the meeting

Background

A journalist made a request for information about a meeting held between Tauranga City Council and Bella Vista Homes Limited in December 2016.

The Council released information about the date and time of the meeting, and the identities of the participants, but withheld the minutes of the meeting under section 7(2)(g) of the Local Government Official Information and Meetings Act 1987 (LGOIMA), in order to maintain legal professional privilege.

The journalist complained to the Ombudsman.

Investigation

On investigation, the Council advised that it withheld the minutes on the basis of ‘without prejudice’ privilege, as the meeting was held for the purpose of resolving issues around the Bella Vista development, and to avoid legal proceedings. The Council took the view that legal professional privilege includes without prejudice privilege.

The Council also considered that section 7(2)(c)(ii) of LGOIMA applied to the minutes, to protect information subject to an obligation of confidence.

The Council recognised that, in light of the later events concerning the Bella Vista development, there was a high public interest in the release of the information. However, it took the view that this did not outweigh the need to withhold the information.

Section 7(2)(g)—Legal professional privilege

Section 7(2)(g) applies where withholding is necessary to maintain legal professional privilege.

Legal professional privilege is a public policy privilege designed to protect confidential communications between solicitor and client. There are two aspects to the law relating to legal professional privilege:

- *'solicitor/client privilege'* which extends to all communications between a solicitor (acting in that capacity) and the client for the purposes of seeking or giving legal advice or assistance, irrespective of legal proceedings; and
- *'litigation privilege'* which extends the privilege to communications with third parties where that communication has, as its dominant purpose, the object of enabling a legal adviser to advise a client on the conduct of litigation that is current or anticipated.

The Chief Ombudsman found that without prejudice privilege is not an aspect of legal professional privilege. As such, section 7(2)(g) did not apply to the minutes of the meeting.

Section 7(2)(c)(ii)—Obligation of confidence

Section 7(2)(c)(ii) applies where withholding is necessary to protect information which is subject to an obligation of confidence, where the making available of that information would be likely to damage the public interest.

Without prejudice privilege allows parties seeking a compromise in a dispute or having a bearing on settlement negotiations to engage in full and frank discussions, without fear that this information would be brought before a court. The purpose of this privilege is to encourage settlements and avoid litigation. This is in the public interest as it reduces pressure on the courts and the need for further resources to be expended on the administration of justice from public money. Successive Ombudsmen have considered that an obligation of confidence attaches to information subject to without prejudice privilege.

The document at issue was marked *'Without Prejudice'*. The meeting was held for the purpose of resolving various issues about the Bella Vista Homes development in order to prevent legal proceedings. Notwithstanding the fact that concerns subsequently arose about the arrangements set up during the meeting, there is undoubtedly a public interest in agencies being able to enter into similar out of court resolution of disputes or potential disputes. Disclosure of the information would be likely to damage this public interest, as it would have the effect of creating mistrust in the confidentiality of discussions intended to achieve resolutions.

On this basis, the Chief Ombudsman considered that section 7(2)(c)(ii) applied to the minutes of the meeting.

The 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 acknowledged the high public interest in accountability and transparency. However, he considered that the interest in accountability was met through the published reviews of the Bella Vista development by the Ministry of Business, Innovation and Employment, and the former High Court Judge Paul Heath QC. He also noted that the Council had proactively released a summary of the meeting, and that the summary was a fair reflection of all the pertinent points discussed at the meeting. The public interest in transparency was met through release of the summary.

Outcome

The Chief Ombudsman formed the opinion that while section 7(2)(g) of the LGOIMA did not apply, there was good reason to withhold the meeting minutes under section 7(2)(c)(ii).

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