

Joint Council Committee's decision to exclude public from meeting not justified

Legislation	Local Government Official Information and Meetings Act 1987, sections 47, 48, 7(2)(h) and 7(2)(i)
Agency	Tasman District Council
Ombudsman	Peter Boshier
Case number(s)	529879
Date	September 2021

Public excluded from meeting under section 48(1) of the Local Government Official Information and Meetings Act 1987 – Ombudsman found that application of section 48(1) not justified – the likelihood of harm to the Councils' commercial operations and negotiations could not be made out under sections 7(2)(h) and 7(2)(i) – Council accepted the Ombudsman's opinion – Council made changes to process to avoid similar situations

Background

Tasman District Council (the Council) and Nelson City Council are equal part owners of Nelson Port Limited (the Port).¹ Each Council appoints representatives to the Joint Shareholders Committee (the Committee). Administration of the Committee alternates between the two Councils on an annual basis.

Under section 47 and 48 of the Local Government Official Information and Meetings Act 1987 (LGOIMA), meetings of the Committee must be open to the public unless a resolution to exclude the public is passed.

On 20 May 2019, the Committee meet via Zoom, and passed a resolution that the public be excluded from the meeting. The reason for this was a planned discussion around recommended amendments to the Port's constitution, as well as a discussion around the transition of new Port board members.

¹ Port Nelson Limited provides core port facilities and services to the Nelson and Tasman region.

A person complained to the Chief Ombudsman about this decision. The Ombudsman decided to investigate this complaint. The Council was notified, as it held the administrative responsibilities for the Committee at the time.

Investigation

Jurisdiction to investigate

Under section 13(1) of Ombudsmen Act 1975, an Ombudsman does not have jurisdiction to investigate decisions made by a council “*committee of the Whole*”, when the entire membership of the relevant committee is present. In this case, the Committee included representation from each of the two Councils and did not constitute a committee of the Whole. This meant that the Ombudsman was able to investigate the decision of the Committee to exclude the public.

Grounds for excluding the public

The grounds for excluding the public from meetings under section 48 of the LGOIMA include where public conduct of the meeting would be likely to result in disclosure of information there would be good reason to withhold under sections 6 or 7 of the LGOIMA, excluding section 7(2)(f)(i) (the protection of free and frank opinions).²

In this case, the Committee relied on sections 48(2)(ii) and 7(2)(h) of the LGOIMA to exclude the public, to protect the ability of the Port to carry out commercial activities. The Committee also relied on sections 48(2)(a)(ii) and 7(2)(i) of LGOIMA, to protect the ability of the Port to carry on negotiations.

Under section 7(2) of the LGOIMA, it must be ‘*necessary*’ to withhold the information to prevent harm to the interests recognised by sections 7(2)(a) to 7(2)(j). The term ‘*necessary*’ means reasonably necessary as held by the High Court in *Television New Zealand v Ombudsman*.³

Commercial activities – section 7(2)(h)

The Council said the Committee was engaged in commercial activities through the Port. The Council considered that it was ‘*moderately likely*’ that allowing the public to view the discussions around the recommended amendments to the constitution would be harmful. The Council said that:

An open discussion could have led to a loss of confidence or the injection of uncertainty over the board and governance of the company. In particular by its customers and suppliers. This would have ongoing financial implication for the Port in carrying out its commercial activities.

² Section [48\(1\)\(a\)\(i\)](#) LGOIMA.

³ *Television New Zealand v Ombudsman* [1992] 1 NZLR 106, 118.

The Ombudsman accepted that the Port, and by extension, the Committee (and Councils), were engaged in commercial activities. Broadly speaking, the harm to the Port's commercial activities cited by the Council appeared plausible. However, the Council presented no evidence or material to corroborate this. The threat of the harm to the Port's commercial activities was of a moderate and hypothetical nature. In the circumstances, it could not be said that it was 'necessary' to exclude the public to prevent harm to the Port's commercial activities. Overall, the Ombudsman was not persuaded that section 7(2)(h) applied.

Negotiations – section 7(2)(i)

The negotiations concerned the composition of the Port board and the transition between members. The Council said there is often a lively debate on these topics and that '*[c]onfidence in the Companies board and in the board appointment processes is of significant commercial interest*'.

The Ombudsman accepted that the Committee was involved in negotiations. However, it was difficult to make out the harm of allowing the public to view those negotiations taking place. The underlying concern seems to be one of public perception of the Committee rather than prejudice or disadvantage to the actual negotiations. It was difficult to see why public disagreements between Committee members would harm the negotiations concerning the Port board composition. Again, the Ombudsman concluded that it was not necessary to exclude the public to prevent harm to the Committee's negotiations.

Outcome

The Council accepted the Ombudsman's view that sections 7(2)(h) and 7(2)(i) of the LGOIMA did not apply and that the public should not have been excluded from the meeting under the provisions of section 48 of the LGOIMA. The Council circulated the Ombudsman's opinion to staff, and published an article providing guidance about the issue on its intranet. The Council also discussed the issue with the Committee, and shared the opinion with Nelson City Council.

As the Council had undertaken these steps, and had already shared the meeting minutes with the complainant, the Ombudsman did not make any recommendations.

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