

## Request for RMA side agreement between Council and iwi

<b>Legislation</b>	Local Government Official Information and Meetings Act 1987, ss 7(2)(c)(ii), 7(1)
<b>Agency</b>	Horowhenua District Council
<b>Ombudsman</b>	Peter Boshier
<b>Case number(s)</b>	480675
<b>Date</b>	4 October 2019

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*Section 7(2)(c)(ii) LGOIMA applied—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 required release of summary, including maximum financial commitment*

### Background

The Environment Court was asked to decide Horowhenua District Council’s application for resource consent to enable the treatment and discharge of wastewater from the rural township of Foxton.

Te Rūnanga o Raukawa (TRoR) objected to the Council’s application. Its environmental unit was initially a party to the proceedings, but it withdrew from those proceedings pursuant to a confidential side agreement with the Council.

A draft copy of that agreement was leaked, and key aspects were covered in the local newspaper. A journalist for a national news outlet requested a copy of the final agreement between the Council and TRoR under the Local Government Official Information and Meetings Act 1987 (LGOIMA).

The Council refused the request under a range of withholding grounds, including section 7(2)(c)(ii) of the LGOIMA. The requester complained to the Ombudsman.

## Investigation

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

The Council commented:

*...there are good policy reasons for councils to engage in agreements with parties in RMA processes, especially iwi because:*

- *it supports iwi's cultural and environmental protection role and achieving the best environmental outcomes within cost constraints (taking into account that the agreement reduces cost spent as part of the RMA proceedings and through implementation of the consent);*
- *to reach agreement on both sides, the parties require confidentiality to promote open discussions in good faith and avoid constraining future agreements by 'precedent setting' and isolating other parties due to terms agreed in the particular context of one agreement (i.e. accepting the areas of significance to a party);*
- *it is in the public interest that councils negotiate with iwi in good faith and can keep to their promise of confidentiality (for information sharing, future agreements and managing relationships).*

*This logically extends to the necessity to withhold the information to prevent the harm occurring, because any disclosure fails to keep the information confidential and will undermine Council's ability to engage with iwi, in the public interest, in accordance with the points above.*

## 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'.

Having confirmed that the agreement was subject to an express obligation of confidence, the Chief Ombudsman considered whether disclosure would be likely to 'damage the public interest'.

He commented that 'Ombudsmen have accepted in a number of previous cases that it is generally in the public interest that parties should be able to resolve differences that may arise between them by negotiation, rather than by recourse to litigation'.

The Chief Ombudsman accepted that the mutually agreed obligation of confidence played a key role in achieving the agreement in this case, and that there was a public interest benefit to be gained in protecting that confidentiality. The agreement benefitted the resource management process. It ensured that cultural effects were addressed to the satisfaction of iwi, enabled matters to progress, and at less cost, and enhanced the relationship between the

parties. The agreement was a major contribution to the resolution of a historical issue for Foxton.

The Chief Ombudsman was satisfied that release would be likely to ‘*damage the public interest*’ by creating mistrust amongst iwi and other parties as to the robustness of the Council’s confidentiality undertakings, leading them to be less willing to engage with the Council in this way, and making it more difficult for the parties to reach a negotiated outcome in the future.

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 Council argued that transparency was achieved through:

- The Resource Management Act 1991 and the Environment Court process.
- The Council’s legislative planning, reporting and auditing requirements. The Foxton Wastewater Project featured in Council’s Long Term and Annual Plans, and at the end of each financial year the expenditure for this project was reported in the Council’s Annual report. There was also regular independent auditing.

The total value of the agreement was within the Chief Executive’s financial delegation, and the Council noted that, as the decision was considered to be part of Council’s routine operations, it was not reported.<sup>1</sup> The Council stated:

*HDC operates a number of water treatment plants, waste water treatment plants, landfill and other various land-holdings which are all subject to resource consents and the consenting process. It is routine for Council to review, renew and amend these as required to meet Council’s ongoing and future operational requirements. ...It is not uncommon for Council to reach agreement with land-owners and other interested parties on how Council will manage the relationship with those parties going forward or what operational work will occur, particularly during the consenting process which serves as a trigger for such discussions.*

The Chief Ombudsman accepted that the processes identified by the Council went some way to meeting the public interest in disclosure to promote accountability for the Council’s handling of this matter. However, he considered that there was a strong public interest in the release of summary information which covered:

- the Council’s maximum financial commitment under the agreement;

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<sup>1</sup> The Council’s Delegation Register provides that ‘*Decisions, other than on minor or routine matters, made under delegated authority will be reported to the Council or a relevant Committee*’.

- the signatories;
- the effect of the agreement on the proceedings; and
- some information about the how the cultural effects of the proposal were addressed.

He reached this conclusion for the following reasons:

- Notwithstanding the ‘*routine*’ nature of the agreement, the amount of money involved was not minor and therefore there was an inherent public interest in its release: ‘*It is fundamental to the Act that the public are to be given worthwhile information about how the public’s money and affairs are being used and conducted, subject only to the statutory restraints and exceptions*’.<sup>2</sup>
- A draft of the agreement had been leaked and the issue generated public disquiet and speculation. There was a public interest in disclosure of summary information to complete the picture and provide public assurance.
- There was a public interest in the availability of information about the approach of public agencies to matters affecting the environment and matters of cultural interest. In November 1998, the Parliamentary Commissioner for the Environment raised some concerns about the impact of side agreements on the resource consent process.<sup>3</sup> The topic had also been the subject of debate amongst Resource Management Act (RMA) stakeholders. In an article published by McCaw Lewis Lawyers, that firm concluded:

*To ensure that the purpose of the RMA ultimately continues to be upheld, it is important that these agreements are subject to a least some public scrutiny.*<sup>4</sup>

## Outcome

The Chief Ombudsman formed the opinion that the Council was entitled to withhold a copy of the side agreement under section 7(2)(c)(ii) of the LGOIMA. However, summary information should have been released in the public interest. The Chief Ombudsman recommended the disclosure of information to be included in a summary. The Council complied with the Chief Ombudsman’s recommendation.

*This case note is published under the authority of the [Ombudsmen Rules 1989](#). It sets out an Ombudsman’s view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.*

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<sup>2</sup> *Wyatt Co (NZ) Ltd v Queenstown Lakes District Council* [1991] 2 NZLR 180 at 191.

<sup>3</sup> *Side Agreements In The Resource Consent Process: Implications for Environmental Management*, November 1998, available from [www.pce.parliament.nz](http://www.pce.parliament.nz).

<sup>4</sup> *Resource Management Act side agreements: Is it acceptable to purchase approvals?*, July 2013, available from [www.mccawlewis.co.nz](http://www.mccawlewis.co.nz).