

Our ref CASE-004519
Contact Rebecca Fulton
10 February 2025



Mary Anne Gill
Senior Writer
Good Local Media Ltd
By email: MaryAnne@goodlocal.nz

Dear Ms Gill

Local Government Official Information and Meetings Act investigation Request to Waipa District Council for certain official information

I write in relation to your complaint, regarding the Waipa District Council's (the Council) decision on your request for information relating to public excluded workshops and weekly mail-outs.

Chief Ombudsman Peter Boshier has decided to investigate your complaint and has asked me to advance this matter on his behalf.

Having considered all the available information, it is likely that the Ombudsman would form the opinion that the Council was entitled to refuse your request pursuant to:

- section 7(2)(c) of the Local Government Official Information and Meetings Act 1987 (LGOIMA), on the basis that the information is subject to an obligation of confidence;
- section 7(2)(f)(i) of the LGOIMA, on the basis that the information is free and frank in nature; and
- section 7(2)(g) of the LGOIMA, on the basis that the information is legally privileged.

I have set out the relevant details below. You have the opportunity to comment on this letter, before the Ombudsman finalises his opinion on your complaint.

Ombudsman's role

An Ombudsman has authority under the LGOIMA to investigate and review, on complaint, any decision by which an agency subject to the LGOIMA refuses to make official information available when requested.

An Ombudsman's role in undertaking an investigation is to evaluate the grounds for refusing requests for official information in terms of the tests set out in the LGOIMA, and to form an opinion as to whether the request was properly refused.

Background and complaint

On 7 August 2023, you made the following request to the Council:

1. *Of the workshops and briefings held since February 2023, how many have included closed door sessions where elected members had/have the opportunity*

to pass on any feedback from the community, decide who is going to what events, discuss correspondence etc.

2. *How long did these closed-door workshops, which you say did not deal with any substantive issues, last for?*
3. *Please provide copies of topics discussed and actions required by either staff or elected members at these closed-door workshop and briefings.*
4. *Specifically I would like to ask whether one of the topics discussed at any of the closed-door workshop and briefing days was whether Waipa should continue with First Past the Post or the Single Transferable Vote System.*
5. *In addition, please provide copies of emails sent to all elected members by Council staff in 2023 as part of the members "Friday mail out".*

On 14 September 2023, the Council responded and advised that it was partially refusing your request pursuant to sections 7(2)(a), 7(2)(b)(ii), 7(2)(c), 7(2)(f)(i), 7(2)(g) and 7(2)(i) of the LGOIMA.

You have requested an investigation and review of the Council's decision.

Council's new decision on your request

On 29 February 2024, I understand that the Council reconsidered its decision and released further information to you that had previously been withheld pursuant to sections 7(2)(a)¹, 7(2)(b)(ii)², 7(2)(c)³, 7(2)(f)(i)⁴, 7(2)(i)⁵ of the LGOIMA.

As a result of the Council's new decision, there is no outstanding information withheld pursuant to sections 7(2)(b)(ii) and 7(2)(i) of the LGOIMA. Accordingly these withholding grounds will not be addressed further.

Analysis

Section 7(2)(a) – Privacy

It is acknowledged that the Council relied on section 7(2)(a) of the LGOIMA to withhold names and identifying details of certain individuals. However, the information that was withheld pursuant to section 7(2)(a) was also withheld pursuant to section 7(2)(f)(i). As section 7(2)(f)(i) seems to apply to the withheld information (which I discuss further below), I do not consider it necessary to discuss the Council's application of section 7(2)(a) further.

¹ Pages 114, 265 of the 587 page document.

² One item in the May 2023 Workshop and Briefing Day Agenda.

³ Pages 439, 443, 444, 445 of the 587 page document.

⁴ Pages 523–580 of the 587 page document.

⁵ Pages 16, 21, 22 and 23 of the 587 page document.

Section 7(2)(c) – Obligation of confidence

Subject to section 7(1) of the LGOIMA, section 7(2)(c) provides that there is good reason to withhold information if it is necessary to protect information which is subject to an obligation of confidence.

In this case, the information at issue is public excluded meeting minutes, as well as a housing sub-committee presentation, made to the Council by mana whenua.

The Council states that in some cases the minutes were '*public excluded*' in accordance with LGOIMA, as per the grounds set out in the minutes and other minutes were '*public were excluded*' as they did not come from formal committees. They were also withheld on the basis that they contain sensitive preliminary information, provided to the Council on a confidential basis. In relation to the housing sub-committee information, the Council states that this information was shared on the basis that it remain confidential and, was for information only purposes (that is, no decisions arose from this information).

From review of the information, it is clear that it was generated and then shared with the Council in confidence. This is evident by the wording at the beginning of each piece of information withheld pursuant to section 7(2)(c). Such wording provides an objective signpost of the parties' shared understanding that the information is intended to be subject to an obligation of confidence. Therefore, in short, it seems clear that the information is confidential in nature.

However, there are other key factors that must be met, before section 7(2)(c) provides good reason for withholding, as follows:

- Release must '*be likely*' to prejudice the future supply of information that is in the public interest, or damage the public interest in some other way; and
- The need to withhold must not be outweighed by the public interest in release.

In terms of the publically excluded meeting minutes, the Council considers that releasing information where there is lawful grounds for withholding, would be likely to prejudice the supply of similar information in the future. This is because the minutes are not from formal committees constituted under the Local Government Act 2002, meaning that meetings are not held in public. As these are not decision making forums, any recommendation arising from these meetings will be progressed through the Council's normal decision-making processes. In other words, these matters will likely be discussed in future, in public included meetings, or via other publically accessible means.

In the case of the other publically excluded meeting minutes, the Council advises that the information within these minutes relates to partially formed ideas. The Council considers it important to be able to discuss such matters, with other Councils, prior to such information being made publically available. The Council also notes that the minutes in these circumstances, were properly withheld in accordance with the requirements in LGOIMA, as noted above.

In relation to the housing subcommittee information, the Council advises that no members of the public were present during the meeting, nor was it livestreamed. Following your request, the Council consulted the suppliers of the information who expressly advised that they do not wish for the information to be shared. The Council considers that, in the circumstances, the sharing of

this information would damage the trust and confidence between the parties – noting that the information was provided on a voluntary basis, with no obligation on the parties to provide further information. The Council considers it important that it is able to keep abreast of such detailed, voluntary updates on this subject matter.

Following review of all of the minutes, it seems that there is an express understanding of confidentiality in the information. As noted above, this is documented at the beginning of each document and also from the wishes expressed by one of the suppliers of the information. In terms of the housing information, it is noted that the information appears to be reliant on goodwill and an ongoing relationship of trust and confidence. In the circumstances, it does seem likely that the sharing of this information would be likely to prejudice the supply of similar information in the future.

In conclusion, the Ombudsman is likely to form the opinion that this information warrants the protection of section 7(2)(c).

Section 7(2)(c) – Public interest test

In withholding the information under section 7(2)(c) of the LGOIMA, the Council has considered the public interest favouring release.

It is the Council's position that there is a low public interest in the public receiving this information and a high public interest in the free flow of information of a similar nature in the future.

In this case, the public interest that could apply is transparency and accountability.

However, as noted by the Council, there are no decisions contained within any of the information discussed above. Rather, the information was provided on a confidential basis for informative purposes only or relates to early discussions on a subject.

In the circumstances, it is likely that the Ombudsman will agree with the Council's position that, on balance, there is little public interest in the content of the information and that there is a higher public interest in ensuring the ongoing supply of similar information.

Section 7(2)(f)(i) – Free and frank

Subject to section 7(1), section 7(2)(f)(i) provides good reason to withhold information where it is necessary to withhold that information to '*maintain the effective conduct of public affairs*' through '*the free and frank expression of opinions*'.

The Chief Ombudsman recognises that effective conduct of public affairs requires the candid and unreserved expression of opinions, and that public exposure of those opinions can potentially inhibit people's willingness to express themselves openly, honestly, and completely in the future.

For this withholding ground to apply, the agency must have reason to believe that:

1. the release of the information would inhibit the exchange of free and frank opinions in the future; and
2. such opinions are necessary for the effective conduct of public affairs.

In making this assessment, consideration is given to various factors that include, but are not limited to, the nature and content of the information, who generated or supplied the information, and the context in which the information was generated.

The information withheld under this provision is the Council's weekly staff mail-outs.⁶

The Council considers it necessary to withhold the mail-outs as they replicate an *'informal staff catch up'*, in lieu of it not being possible to discuss current topics with all Council staff members. As such, the Council considers it to be an effective and valued tool to disseminate information. The Council also considers that the mail-outs help staff feel connected to the Chief Executive and the Council, by ensuring that they are fully informed, which in turn contributes to individual staff efficacy and thus, the effective conduct of public affairs.

The Council states that if it was required to release the *'mail-outs'* to the public, this would have a chilling effect on the ability of the Chief Executive to continue this form of communication with staff. This is because the *'mail-outs'* would lose their informal and personal tone, and would either be *'sanitised'* so as to be more *'public facing'* or would stop being produced.

When considering the nature, content and context of the information, it is clear that it is an informal update for staff, written in a free and frank manner. It follows, that such information would be a useful tool, by which to collectively update all Council staff on a regular basis. As such, the Ombudsman is likely to conclude that release of the information would inhibit the exchange of free and frank opinions in the future. This is supported by the Council's above outlined view on any potential release.

The next point to consider is whether the information is necessary for the effective conduct of public affairs.

As noted above, the purpose of the information is to keep all staff fully and consistently informed of relevant, topical information specifically relating to internal Council matters. The Council advises that it considers this information important in aiding staff to effectively do their jobs. From review of the information, it is clear how keeping staff fully abreast of such information would be necessary for the effective conduct of public affairs.

The Ombudsman recognises that the effective conduct of public affairs can be prejudiced if agencies:

- don't get the information and advice they need to do their jobs and make good decisions;
- get some information and advice, but it's not as open, honest or complete as it could be, making it harder for them to do their jobs and make good decisions; or
- the information and advice is received orally rather than in writing – again, making it harder for agencies to do their jobs and make good decisions, and to hold them to account for the decisions they have made.

The chilling effect, discussed above, arising from public release of the weekly mail out could be that staff would not get the information, or only receive limited information.

⁶ Item 5, as set out in your original request to the Council on 7 August 2023.

In the circumstances, the Ombudsman is likely to conclude that release of the information could prejudice the effective conduct of public affairs

Section 7(2)(f)(i) – Public interest test

Section 7(2)(f)(i) of the LGOIMA is subject to the countervailing interest test in section 7(1). It is only where the public interest in disclosure outweighs the need to withhold the relevant information that it must be released.

In this case, the Council has considered the public interest of release and considers that there is little, if any public interest in the information. This is because it is an internally facing document, very informal, and directed at staff in order to assist them to do their jobs. In other words, the information is not relevant for, or directed at the public. Finally, the Council advises that information which is of public interest is disseminated to the community through other means.

Following review of the information, the Ombudsman is likely to form the opinion that much of the information is staff focussed and that the public interest is addressed by the dissemination of public facing information via other means.

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

Subject to section 7(1), section 7(2)(g) of the LGOIMA provides that there is good reason to withhold information if it is necessary to maintain legal professional privilege. Legal professional privilege is designed to protect confidential communications between a solicitor and client. It is based on the impossibility of conducting legal business without professional assistance and the need for full and unreserved confidence between advisor and client in order to receive the assistance effectively.

In this instance, the Council is relying on solicitor-client privilege, which applies to confidential communications between a solicitor (acting in that capacity) and a client for the purpose of obtaining or giving legal advice.

In this case, the Council has withheld confidential updates from its in-house legal counsel.

Having reviewed these updates, it is clear that they relate to confidential communications between the Council and its legal counsel. Further, I can see no evidence indicating that the privilege attached to these emails has been waived. Therefore, it is likely that the Ombudsman would form the opinion that these updates sit comfortably within the scope of the privilege afforded by section 7(2)(g).

Section 7(2)(g) – Public interest test

Section 7(2)(g) of the LGOIMA is subject to the countervailing public interest test in section 7(1). It is only where the public interest in disclosure outweighs the need to withhold the relevant information that it must be released.

The public interest in ensuring the maintenance of legal professional privilege is very high, as it has long been regarded as a fundamental element in the administration of justice. Any public interest consideration would therefore need to be particularly strong to outweigh the interest section 7(2)(g) is designed to protect.

Nevertheless, the countervailing interests that could apply to this case relate to transparency and accountability. However, it seems that the final outcome on this particular matter is in the public domain.

In the circumstances, the Ombudsman is likely to form the opinion that the public interest has been addressed by the release of the Council's final position on the matter and that that the Council was entitled to withhold the underlying conversations pursuant to section 7(2)(g).

For the reasons set out above, and subject to your further comment, it appears that the Council was entitled to refuse your request.

Your comments

I invite you to comment before the Ombudsman forms a final opinion on this matter. If you do wish to comment, please respond by **24 February 2025**.

Please note that Ombudsmen must conduct their investigations in private,⁷ and are required to maintain secrecy in respect of all matters that come to their knowledge. This is subject only to specific exceptions, one of which relates to explaining to parties the outcome of an investigation.

This information is provided to you in confidence, in order to seek your comment before the Ombudsman forms an opinion on your complaint. Confidentiality should be maintained until the outcome of the investigation is finalised. This does not prevent you from seeking legal advice or support when preparing your response.

Yours sincerely



Tinus Schutte
Manager—Investigations and Resolution

⁷ Section 18(2) Ombudsmen Act 1975. This also applies to OIA and LGOIMA investigations: see sections 29 and 28, respectively.