

26 August 2020

By Email: Marty.Grenfell@tauranga.govt.nz

Tauranga City Council
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ATTENTION: Marty Grenfell

Dear Sir/Madam

GOVERNANCE ISSUES - CONFIDENTIALITY

We refer to the questions raised about confidentiality in the email dated 24 August 2020 from Peter Winder of McGredy Winder & Co responding to the first draft Terms of Reference (ToR) for the Review and Observer Team that was discussed at the Council meeting on 21 August 2020.

Background

1. A draft ToR is currently being developed for consideration at a workshop tomorrow and adoption by the Council at a meeting next week. At the meeting last Friday some councillors suggested their support for the appointment of a Review and Observer Team might be contingent on the contents of the ToR. Mr Winder has suggested that one of the issues for elected members in adopting the ToR to move this matter forward is likely to be the question of confidentiality of the process.

2. He comments:

The key issue that I would like to explore however is confidentiality. I'm sure that as the team engages with elected members it will be provided a range of information and issues that, if disclosed could further undermine trust and confidence. Equally, it may be unhelpful if the nature of advice that is provided (certainly to any individual councillor or the mayor) in relation to ways to improve relationships was made public. I suspect that, in the absence of any assurances relating to confidentiality, the Council may either find it difficult to approve the terms of reference, or to engage fully in the process. Given the very public nature of issues that the Council has faced and the appointment of the Team we can also expect LGOIMA requests relating to the activities of the Team. It would be helpful to consider what grounds there might be under LGOIMA to withhold relevant information and how the Team can conduct itself in order to preserve an necessary level of confidentiality and for these to be reflected in either the Terms of Reference or in the advice that goes to council. This might be usefully provided as legal advice which can itself be privileged and withheld.

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3. As stated, the issues to be addressed have been played out to date in public, and it is likely to be counter-productive if all of the information exchanged between parties to the Review and Observer Team's role were to be liable to become public. For example, it is unlikely that elected members would feel comfortable sharing the details of their relationships with other members, including the Mayor, if they thought it likely those views could be shared in the public domain. Their recent experience with access through the Local Government Official Information and Meetings Act 1987 (**LGOIMA**) to information contained in emails and text messages shared with other members and third parties about the deputy mayoralty, will certainly have increased the degree of caution applying to the sharing of personal views on matters relating to Council.

What information might be sought?

4. Accordingly, we have considered the extent to which good reason for withholding information can or should be applied to the work of the Review and Observer Team. In doing so, we do not consider it necessary to review the wider provisions of LGOIMA, which are well known to all those engaged in local government in New Zealand. Suffice to say that pursuant to section 5 LGOIMA there is a presumption that where a request is made for official information that information "shall be made available unless there is a good reason for withholding it. Conclusive reasons for withholding information are set out in section 6 LGOIMA, and good reasons for withholding in section 7(2).
5. As we think it unlikely that either of the conclusive reasons for withholding information in section 6 LGOIMA will apply to the work of the Review and Observer Team, we will concentrate on the good reasons for withholding pursuant to section 7(2). It must be noted that where good reason for withholding official information is found to exist under section 7(2), consideration must also be given to whether "in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available"¹. If that is the case, the information must be released even if good reason for withholding exists under section 7(2) LGOIMA.
6. We should also point out that the Council considered the report on the Review and Observer Team at its meeting last week with the public present (including on-line live screening). The possibility of taking the item with the public excluded as provided for in section 48 LGOIMA was considered by Council officers, but was not put to the Council for consideration as it was clear that none of the grounds for exclusion set out in that section were applicable. None of the elected members raised this as an issue or called for a resolution to exclude the public. The same expectation would apply to the forthcoming meeting where the adoption of the ToR and the appointment of members of the Review and Observer Team will be considered².
7. There is a high degree of transparency around the problem it is proposed that the Review and Observer address and the proposed ToR. The question of the degree to which information generated during the work of the Review and Observation Team should

¹ Section 7(1) LGOIMA.

² Although some matters, such as the discussion of the details of persons proposed to be appointed to the Review and Observer Team, may be considered with the public excluded, and those appointments re-stated when the meeting is re-opened to the public.

remain confidential is a separate issue. To some extent, if the ToR are adopted, that work will be undertaken in a public forum, such as through attendances at Council and committee meetings, and potentially at other events hosted or promoted by Council and involving elected members. But other aspects of that work will be undertaken out of the public eye. We refer, for example, to –

- Meetings and discussions between members of the Team and elected members, whether individually or collectively.
 - Person to person interviews with the Chief Executive and officers.
 - Feedback provided to elected members and the Chief Executive, both formally (in a report) and informally.
 - Notes and observations, regardless of how recorded or held, gathered by Team members.
 - Advice provided to elected members or the Chief Executive outside of the formal reporting and recommendations process.
8. In addition, consideration ought to be given to the extent to which the quarterly and final reports, and any recommendations they contain, are to be given on a confidential basis, and the extent to which such confidentiality ought to prevail in the event of requests for that information under LGOIMA.
9. We must also note that the information obtained and held by the members of the Review and Observer Team in the course of their work under the ToR is deemed to be official information held by Council pursuant to section 2(6) LGOIMA³.

Good reasons for withholding

10. When considering withholding information on the good grounds for doing so in section 7(2) LGOIMA, the Council must have reached the view that all the relevant elements of the paragraph relied upon are applicable. For example, in order to rely upon section 7(2)(a) LGOIMA, the withholding of the information must be “necessary to protect the privacy of natural persons”, and not be outweighed by other considerations which render it desirable in the public interest to make that information available⁴. This is a high bar when it comes to elected members, because their role requires that they express their views in a highly public manner on matters of local affairs, and it will generally be considered to be in the public interest that those views are made known to rather than concealed from the public. Although elected members can reasonably rely upon this provision to protect from disclosure information that is purely private (e.g. health issues, family matters, personal finances that do not encroach on their functions, etc), it cannot be relied upon to protect information about the views they express in relation to governance issues.
11. However, other provisions in section 7(2) LGOIMA would be applicable in some circumstances to the work of the Review and Observer Team. We refer to section 7(2)(c) & (f)(i) LGOIMA.
12. Pursuant to section 7(2)(c) good reason to withhold information applies if necessary, to:

³ Any information held by an independent contractor engaged by any local authority in his or her capacity as an independent contractor is, for the purposes of this Act, deemed to be held by the local authority.

⁴ Section 7(2) LGOIMA.

protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information—

- (i) would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied;
or
- (ii) would be likely otherwise to damage the public interest;

13. No person can be compelled to supply information to the Review and Observer Team, but by the proposed ToR both elected members and the Chief Executive and executive management team will have effectively agreed to do so by undertaking to cooperate and comply with any reasonable and relevant request. It would be possible, in the ToR, to mandate that the cooperation and compliance of the participants in private discussions between individual elected members and the Team could be undertaken on a confidential basis upon request⁵. If that were the case any information provided in such a meeting would be subject to an obligation of confidence, but the remaining elements of the protection offered by paragraph (c)(i) or (ii) would still need to be established before information could be withheld in response to a request under LGOIMA.
14. To do so in terms of the first limb of paragraph (c) it would need to be shown that the making available of the information would be "likely to prejudice the supply of similar information, or information from the same source, and that it is "in the public interest that such information should continue to be supplied". Arguments in favour of both these elements can be made. It is certainly possible, and it may be "likely", that a person who thought the information they were sharing with the Team would be made public would not cooperate with a similar process in the future. It is also strongly arguable, given the nature of the problem being addressed by the Review and Observer Team, that it is in the public interest that such information should continue to be supplied. This argument is applicable both to any request for such information while the work of the Review and Observer Team is in train, and also to information obtained in the expectation of confidentiality in final reports to the Council, the DIA or the Minister. However, it is perhaps a stronger argument while that work continues since the Review and Observer Team is dependent on the ongoing cooperation of elected members to properly fulfill its function. That is not to suggest that it is not also a good reason to withhold information that might endanger the supply of similar information in the future.
15. A reasonable argument of withholding information obtained under an expectation of confidentiality may also be made under the second limb of section 7(2)(c), to the effect that the release of such information would be likely to damage the public interest. It is in the public interest that the governance issues to under examination by the Review and Observer Team are effectively addressed, and it might be considered unlikely that this will occur if information cannot be collected and retained on a confidential basis.

⁵ For example, by inserting a new paragraph 12 that reads:

The Review and Observer Team will conduct its discussions with and provide its advice to elected members and the Mayor on a confidential basis, and will not refer to any individual elected member by name in its reports to the Chief Executive, Council, DIA or the Minister.

16. Therefore, the inclusion of an option for confidentiality, while not a fail-safe protection against a complaint to the Ombudsman, could provide good grounds to withhold information obtained under such an obligation, subject of course to that ground being balanced against any public interest consideration under section 7(1) LGOIMA.
17. Pursuant to section 7(2)(f)(i) good reason to withhold information applies if necessary, to:
- maintain the effective conduct of public affairs through—
- (i) the free and frank expression of opinions by or between or to members or officers or employees of any local authority, or any persons to whom [section 2\(5\)](#) applies, in the course of their duty;
18. Again, to rely on this ground for withholding information, all elements must be established. In the first instance it must be necessary to withhold the information to maintain the effective conduct of public affairs. It is designed to protect the free and frank expressions of opinion “by or between or to members or officers or employees of any local authority, or any persons to whom [section 2\(5\)](#) applies”. This includes expressions of opinions by and to members or officers, but the information withheld is not confined to expressions of opinion. In practice much of the information collected in the course of the work of the Review and Observer Team may come into the category of free and frank expression of opinions, but this will inextricably be linked with factual information of the ‘he said, she did’ variety. This does not preclude the application of this provision, as long as the release of that factual information would be likely to affect the free and frank expression of opinion by or to elected members.
19. We think it can reasonably be argued that the withholding of much of that information is necessary to maintain the effective conduct of public affairs by virtue of assisting the Review and Observer Team to address the problem of dysfunctional governance.
20. Therefore section 7(2)(f)(i) could provide good grounds to withhold some of the information obtained from elected members and staff by the Review and Observer Team, but subject to that ground being balanced against any public interest consideration under section 7(1) LGOIMA.

Comment

21. While it may be possible to seek to withhold some of the information obtained and produced by the Review and Observer Team, and the likelihood of being able to do so could be increased to some degree by the introduction of an expectation of confidentiality, we cannot say with certainty that it is possible to protect all or any part of this information or the reports of the Team in the event of a request or requests for information under LGOIMA. Therefore, rather than assuming absolute protection of information under the provisions of the Act, it would perhaps be preferable to assume that all such information may be available pursuant to a LGOIMA request, and that while Council may decide that it has good grounds to withhold information in the first instance, such a refusal can be the subject of a complaint to the Ombudsman who may take a different view.
22. To that end, all persons involved should be made aware that information obtained or generated by the Review and Observer Team will become official information. This means

that the Council, or the DIA in the case of reports or information provided to it, may be required to release all or part of that information in response to a request under the LGOIMA or the Official Information Act 1982. The Council or the DIA may, however, withhold all or parts of any information supplied subject to an obligation of confidence.

Yours faithfully
BROOKFIELDS

A handwritten signature in blue ink, reading "Linda O'Reilly". The signature is fluid and cursive, with the first name "Linda" and last name "O'Reilly" clearly distinguishable.

Linda O'Reilly
Partner

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