

Our ref 542243
Contact Charlotte Leggett
21 December 2023



Mr Peter Newport
By email: peter.newport@scmt.org.nz;
peter.newport@crux.org.nz

Dear Mr Newport

**Local Government Official information and Meetings Act investigation
Queenstown Lakes District Council (the Council)**

I refer to my letter of 23 November 2023, concerning your complaints made on behalf of Crux under the Local Government Official Information and Meetings Act 1987 (LGOIMA) about the decision of the Council to refuse your requests for official information in relation to its:

- procurement policy and procurement of consultancy agency, ZQN7 Limited;
- response to a [Crux article](#); and
- Media Council complaint.

I have received your email of 6 December 2023, in which you state you do not consider there are any *'significant legal flaws'* in the provisional opinion and appear to accept that, in relation to the information that I considered a withholding ground applied to, this is not outweighed by the public interest in its release.

I advised you that I had written to the Council seeking some further comments. I have now received a response from the Council, and I am able to advise you of my final opinion on your complaint.

Having considered all the issues raised, I have now formed the final opinion that the Council was not entitled to refuse the requests to the extent it did.

Further details of my opinion are set out in Appendix 1.

I have recommended that the Council:

- redo the searches it has undertaken of its email archive in response to the information requests from you dated 25 February and 24 March 2021, which were refused under section 17(e), taking into account the points made in my provisional opinion, including:
 - using more generic search terms;
 - searching the body (content) of the emails;
 - widening the date range to include emails sent and received up to the date of your initial request; and

- searching the Executive Leadership Team's emails.
- carry out searches of all other forms of correspondence sent by Mr Stewart Burns and/or the Executive Leadership Team referencing the Council's procurement policy and guidelines; and
- release all of the information requested by you that I identified as there being no good reason for withholding.

I have asked the Council to notify me by **24 January 2024** what steps will be taken to give effect to my recommendation.

I have now completed my investigation.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Peter Boshier'.

Peter Boshier
Chief Ombudsman

Appendix 1. Extract from my letter to the Council, dated 23 November 2023

[...]

Part 4 of LGOIMA

I am treating Mr Newport's information requests as being made on behalf of Crux Media. Where a corporate entity requests information about itself, or the information provided in response to a request for information includes personal information about the corporate requestor, Part 4 of the LGOIMA is engaged.

Part 4 (section 23(1)) of the LGOIMA provides that a corporate entity has a right of access to any personal information about themselves that can be readily retrieved. Because there is a right of access, the reasons for refusing requests are more limited than the reasons for refusing requests under Part 2. The only reasons for refusing a request under section 23 are those set out in section 26. For example, Part 4 requests cannot be refused on the grounds that release would prejudice the effective conduct of public affairs through the free and frank expression of opinions (section 7(2)(f)(i) LGOIMA).

The responses to Mr Newport's requests have sometimes included a mix of personal information about Crux, and official information. To the extent information is about Crux (including Mr Newport), I have considered this under Part 4 of the LGOIMA.

[...]

Ground 573575 – section 17(e) – information does not exist

Section 17(e) provides that a request may be refused for the following reason:

that the document alleged to contain the information requested does not exist or, despite reasonable efforts to locate it, cannot be found.

Before refusing a request under section 17(e), agencies must:

- make reasonable efforts to try to locate the document; and
- consider whether consulting the requester would help them to locate the document.

Reasonable steps include searching email accounts, shared drives, document or content management systems, business systems, databases or other electronic repositories and using appropriate search terms.

Application of section 17(e)

Questions three, four, and six were as follows:

- Question 3 - Can we see emails between Mr Mayman and Peter Hansby and Mike Theelen regarding the 2016 Procurement Policy and Guidelines? [...]
- Question 4 - Can we see emails in 2020 between Mayor Jim Boulton and Council staff/managers that reference the subject of Procurement Policy and Guidelines, Ms Ruth Stokes, Ms Jendi Paterson or ZQN7 Ltd?

- Question 6 - Can we see any emails and correspondence from the Council Chief Financial Officer Stewart Burns and members of the Executive Leadership Team that reference the Council's Procurement, Policy and Guidelines?

The Council's response to me of 9 March 2022, and further enquiries, demonstrate it conducted a search of email archives between Mr Mayman, Mr Hansby and/or you for question three, a search of email archives sent and received by Mayor Boulton for question four, and a search of email archives sent and received by Mr Burns for question six, on the following basis:

- subject line searching was undertaken, rather than searching the body (content) of the emails;
- the whole search term 'Procurement Policy and Guidelines' was required to be present to return a result for questions three and six, and the whole search term 'Procurement Policy and Guidelines' or 'Ms Ruth Stokes' or 'Ms Jendi Paterson' or 'ZQN7 Ltd' was required to be present to return a result for question four; and
- the date range of the search was up to 31 December 2020, rather than 24 March 2021 (the date of the request).

On the basis of the search outlined above, my provisional opinion is that the Council failed to undertake reasonable efforts to search for the requested documentation. This is because Mr Newport's request in relation to questions three and six was not limited to the year 2020, as the Council has asserted, and the search terms used were not sufficiently wide to draw the conclusion, as the Council has done, that the documents requested do not exist.

In relation to question four, I consider failing to use more general terms such as 'procurement' or even 'ZQN7' (rather than 'ZQN7 Ltd'), and requiring the full names and titles of 'Ms Ruth Stokes' and 'Ms Jendi Paterson' to appear in each search, was unreasonably selective. As was conducting a search of only the subject lines of emails, rather than the email content as a whole.

Further, in relation to question six, no searches have been carried out of the wider Executive Leadership Team's email records, notwithstanding their clear inclusion in Mr Newport's request.

Finally, consideration ought to be given as to whether other forms of correspondence sent by Mr Burns and/or the Executive Leadership Team referencing the Council's procurement policy and guidelines exist, given Mr Newport's request in question six is not limited to only 'emails'.

Conclusion on section 17(e)

My provisional opinion is that the Council failed to undertake reasonable efforts to search for the requested documentation, and therefore was not entitled to refuse the requested information under section 17(e). In the event I confirm my opinion as final, I am proposing to recommend that the Council carry out its searches again taking into account the points above, including using more generic search terms, searching the body (content) of all emails, and widening the date range to include emails sent and received up to the date of Mr Newport's initial request.

I acknowledge that this may produce a large volume of documentation for the Council to assess for relevance in relation to the request. However, that is not an adequate reason for using

unreasonably narrow search terms. The LGOIMA provides several mechanisms for addressing requests that are administratively challenging to meet.¹

Ground 573576 – section 7(2)(f)(i) of the LGOIMA – free and frank opinions

[...]

Categories of emails withheld under section 7(2)(f)(i)

COUNCIL DISCUSSIONS ON HOW TO RESPOND TO INQUIRIES RECEIVED FROM MR NEWPORT

[...] However, to the extent recipients are simply acknowledging receipt of correspondence, or undertaking to take some action in relation to it, I do not consider that release of this information would impact the effective conduct of public affairs by inhibiting the free and frank expression of opinion.

Further, a number of the withheld emails contain a proposed or draft response to Mr Newport, circulated to others for comment and further editing. To the extent the response is in near final form, it is not necessary to withhold it.

[...]

INTERNAL COUNCIL DISCUSSIONS ON HOW TO RESPOND TO INQUIRIES RECEIVED FROM COUNCILLOR GLADDING

Councillor Gladding submitted four questions through the Council's 'Councillor Requests' email address, which were eventually forwarded to you, arising out of a Crux news item on the Council's procurement of ZQN7. Questions one to three were eventually included (and answered, at least partially) in the Council's internal review into the procurement of ZQN7 which, I understand, was released to Crux in February 2021. Accordingly, at the time the Council made its revised decision on Mr Newport's request, in 23 December 2021, the information was already in the public domain. It is therefore my provisional opinion that section 7(2)(f)(i) does not apply to such information.

Regarding question four, [...] I do note this topic was not covered in the Council's internal review and the Council has confirmed that this issue has not been traversed in the public domain.

It is in the interests of the effective conduct of public affairs that a Councillor has the confidence to initiate discussions with his or her council chief executive on sensitive topical issues and that they are able to exchange ideas and make comments in a robust and frank way. Arguably, disclosure of the full record of the exchange between the Councillor and you would impede the free and frank exchange of opinions between those parties.

On the other hand, the questions were considered and measured in tone; they were not 'off the cuff' remarks; and they stem from a meeting of the Audit, Finance and Risk Committee which was open to the public. The questions were also posited through formal channels. Therefore, I do not consider their release would impede Councillors from asking such questions in the future, or you from responding. By virtue of the seniority of your position, you would be expected to continue to

¹ A [guide to processing requests](#) for official information under the LGOIMA is available on the Ombudsman's website.

express such opinions freely and frankly in the future when required to do so. Similar considerations also apply in respect of Councillors who, by virtue of their positions as elected representatives, are expected to be more robust about the opinions they generate or questions they ask, knowing they may be made public. This has led me to form the provisional opinion that section 7(2)(f)(i) does not apply to emails pertaining to how to respond to (the majority) of Councillor Gladding's questions.

[...]

INTERNAL DISCUSSIONS ON THE SCOPE OF AN INTERNAL REVIEW INTO THE PROCUREMENT OF ZQN7

[...]

However, as stated above, to the extent the draft scope is substantially the same as the final agreed scope, it is my provisional opinion that section 7(2)(f)(i) does not apply.

CIRCULATING A DRAFT REPORT ON THE INTERNAL REVIEW INTO THE PROCUREMENT OF ZQN7

The drafts in issue here appear to be in near final form to the review into the Council's procurement practice, which, as set out above, was publicly available at the time of the Council's revised decision. Therefore, I do not consider that their release would affect future drafting processes by inhibiting the expression of free and frank opinions. As stated above, Ombudsmen have often rejected the withholding of late stage drafts that are substantially the same as the publicly available final documents. Accordingly, my provisional opinion is that section 7(2)(f)(i) of the LGOIMA does not apply to this information.

[...]

Ground 586366 – communications between elected members and council staff

[...]

information that I am of the provisional opinion sections 7(2)(c)(i) and 7(2)(f)(i) do not apply to and ought to be released. These emails either contain drafts in near final form such that it is not necessary to withhold them to protect the drafting and review process, or they contain information about Crux which cannot be refused on the ground that their release would prejudice the effective conduct of public affairs through the free and frank expression of opinions...

Ground 598467 – Crux article

[...]

Whilst I agree that some of the emails the Council has withheld qualify for protection under section 7(2)(f)(i), a large number are innocuous, for example, emails that simply confirm that action is required. Release of such information would not have an inhibiting effect on the free and frank exchange of opinions in the future.

Further, a large number of the emails that have been withheld are comments and revisions to draft documents and/or correspondence. As stated above, whilst section 7(2)(f)(i) is commonly applied to draft documents to protect the drafting and review process, it is still necessary to consider what, if any, harm will flow from their release.

I have therefore formed the provisional opinion that a number of the emails do not qualify for protection under section 7(2)(f)(i).

[...]

Ground 607428 – Media Council complaint

[...]

In relation to the email that it has withheld under section 7(2)(f)(i), the Council has stated:

Releasing the comment would prevent staff in the future from commenting candidly on emails from the media. The comment was informal and sent shortly after receipt of an email from the media. Release of information of this type would have a negative effect on quick free-flowing discussions between staff in relation to media enquiries. If released, staff would need to be more guarded in their communications when dealing with similar enquiries in the future....

...Staff need to be able to seek advice from senior leaders so that balanced responses, from a range of sources, are compiled for the media. The receipt of unchecked responses could mean that inaccurate information goes out to the media.

The email in question contains information about Crux. As stated above, where a corporate entity requests information about itself, or the information provided in response to a request for information includes personal information about the corporate requestor, Part 4 of the LGOIMA is engaged. Part 4 requests cannot be refused on the grounds that release would prejudice the effective conduct of public affairs through the free and frank expression of opinions. I am therefore of the provisional opinion that the Council did not have good grounds for withholding this information.

In relation to the emails withheld under section 7(2)(g), I am of the provisional opinion that some of this information is [not] necessary to withhold to maintain legal professional privilege. This is because no legal advice has been sought or proffered in these emails and therefore they do not qualify for protection under legal professional privilege. In several instances, where it is my provisional opinion that the withheld emails do not attract legal professional privilege, I have considered whether section 7(2)(f)(i) applies to some of the information contained in the emails, to protect the free and frank expression of opinions, but concluded that it does not. This is because the emails contain drafts in near final form such that it is not necessary to withhold them to protect the drafting and review process, or I do not consider that their release would impact the effective conduct of public affairs by inhibiting the free and frank expression of opinion, given the nature of the emails.

Alternatively, the emails contain information about Crux which cannot be refused on the grounds that release would prejudice the effective conduct of public affairs through the free and frank expression of opinions.

[...]

Costs – LPP

Mr Newport has requested *'All costs related to [the NZ Media Council complaints] against Crux whether with Wynn Williams or other external suppliers consultants.'*

The Council has withheld this information in reliance on section 7(2)(g) of LGOIMA. As outlined above, the elements of solicitor/client privilege are a communication between a lawyer and a client, made in confidence, and created for the purposes of giving or obtaining legal advice. As I understand it, Mr Newport is interested in the total spend incurred by the Council (on lawyers or otherwise) in relation to the complaints it has filed with the NZ Media Council about articles published by Crux. He has not expressly sought documentation, such as invoices, evidencing the costs the Council has incurred.

Accordingly, what he is seeking is unlikely to satisfy any of the elements required to attract solicitor/client privilege and therefore I am of the provisional opinion that section 7(2)(g) does not apply to this request. Even if Mr Newport was seeking invoices, a New Zealand case from the early 1990s found that that lawyers' bills of costs (i.e. invoices for work done) do not as a category of document attract legal professional privilege, although I acknowledge that particular documents or parts of documents may be protected if they reveal, either directly or indirectly, the content of privileged legal communications.²

Further, successive Ombudsmen have taken the view that there is a strong public interest in the release of information about the employment of consultants in the public sector, including the fees paid for their services. As the High Court found in *Wyatt*:³

It is fundamental to the [OIA] 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 statutory restraints and exceptions.

Accordingly, if I were persuaded that a section 7 withholding ground applied to the information at issue, which I am not, it would be my provisional opinion that the public interest considerations in transparency and accountability for public funds would outweigh the interests protected by withholding.

Finally, I note that the Council has relied on the Privy Council's decision in *B v Auckland District Law Society* [2002] 1 NZLR 326 to support its claim to privilege over the costs material. Whilst that case does concern legal professional privilege and the weighing of competing public interests, lawyers' invoices for work undertaken was not at issue, and therefore I am not persuaded of its relevance to the matters before me.

² *Re Merit Finance & Investment Group Ltd (in liq)* [1993] 1 NZLR 152.

³ *Wyatt Co (New Zealand) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180 at 190.