

Our ref 582427 (Complaint ground: 582428)  
Contact Lucy Moss-Mason  
2 September 2022



Mr Harry Wilson  
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Tēnā koe Harry

**Local Government Official Information and Meetings Act investigation**  
**Mrs Emily Ireland**  
**Report about a proposed shortlist for options for Featherston's wastewater treatment**

Thank you for your letter of 3 August 2022, concerning the Local Government Official Information and Meetings Act 1987 (LGOIMA) complaint made by Mrs Emily Ireland about South Wairarapa District Council's decision on her request for a report about a proposed shortlist of options for Featherston's wastewater treatment.

I have now had an opportunity to consider your letter and the relevant information that you have provided. Having considered all the issues raised, I have now formed the provisional opinion that the Council was not entitled to refuse Mrs Ireland's request under section 7(2)(f)(i) of the LGOIMA.

I have set out the details of my provisional opinion below.

**Background**

I understand that Featherston's wastewater treatment plant was built in 1975. The resource consent for the wastewater treatment plant expired in 2012. It is currently operating on an extended expired consent from Greater Wellington Regional Council that allows continued operation until a new wastewater management approach is consented. The extended expired consent will expire in 2023.

The treatment plant currently discharges treated effluent into the waterways and requires significant upgrade to meet modern compliance requirements. In 2017, the Council lodged a resource consent application for upgrades to Featherston's wastewater treatment. The application was subsequently withdrawn in 2020.

In March 2020, the Council commenced working with Wellington Water as its new infrastructure partner on the project. A longlist of 17 options for upgrading Featherston's wastewater treatment went out for public consultation in December 2020. However, there has not been a public update since then.

In February 2021, Wellington Water provided the Council with a recommended shortlist of options. Due to concerns about the cost and consentability of the options, the Council asked

Wellington Water to produce a new report. In December 2021, the Council and Wellington Water produced a new draft shortlist of options narrowed down from the longlist, focusing on options that are likely to be able to obtain resource consent.

### **Official information request**

On 22 March 2022, Mrs Ireland made an official information request to the Council for the December 2021 report.

On 27 April 2022, the Council advised Mrs Ireland it was refusing her request under section 7(2)(f)(i) of the LGOIMA, to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to members or officers or employees of any local authority.

On 4 May 2022, Mrs Ireland suggested to the Council that sections of the report could be redacted where appropriate. The Council advised her it would not reconsider its decision.

### **The complaint**

Mrs Ireland has complained to me about this decision. She considers that there is significant public interest in the wastewater project, particularly as there has been no public update on options for the project since December 2020.

Mrs Ireland considers the report is unlikely to express the available options in a manner that could be described as 'free and frank'. Instead, she states it is likely to be factual and highly technical, presenting the options in moderate and neutral terms. She also considers that the release of the report would be unlikely to negatively impact the Council's ability to maintain effective conduct.

### **Your comments**

The Council explained that the report is related to its ongoing examination of options, alongside Wellington Water, to replace Featherston's wastewater treatment system. However, it was not released to councillors as Council management did not consider that it contained sufficiently sound advice.

The Council acknowledged there were some public interest factors in favour of releasing the report, namely:

- the Featherston wastewater project involves a significant sum of public money;
- Mrs Ireland, as a member of the media, has a role in holding the Council accountable for its decisions; and
- release of the report may improve the Council's decision making through public scrutiny and feedback.<sup>1</sup>

The Council's view is that withholding the information is necessary to protect Council officers' ability to shape and finalise free and frank advice in confidence. It considers that it would be

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<sup>1</sup> Though I note that the public will also have the opportunity to provide feedback once the shortlist of options is finalised.

inappropriate to release the report to Mrs Ireland before it was received by councillors, and that doing so would undermine the Council's ability to provide free and frank advice to elected members. It further advised that releasing the document would *'create a dangerous precedent'* for similar official information requests.

Mr Stefan Corbett, Group Manager – Partnerships and Operations, confirmed that the Council's primary concerns with release of the report were:

- it may create a precedent that would compel the Council to release every major decision document that was requested under the LGOIMA; and
- the report was not released to councillors, and it is normal practice for a decision making process to remain confidential until it is presented to councillors.

Mr Corbett stated he did not consider that redactions or release of a summary were appropriate alternatives to refusing Mrs Ireland's request, due to the basic tenet of the confidentiality of advice. He considered that releasing the report would be equivalent to a central government agency releasing advice prior to the Minister having opportunity to consider it.

### **Free and frank expression of opinion**

As a starting point, I wish to highlight the purpose of the LGOIMA. Section 4 of the LGOIMA states that its purpose is *'to increase progressively the availability to the public of official information held by local authorities [...] to enable more effective participation by the public in the actions and decisions of local authorities'* and *'to promote the accountability of local authority members and officials'*.

Accordingly, subject to public interest considerations under section 7(1), section 7(2)(f)(i) of LGOIMA provides good reason to withhold information if, and only if, it is 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 [...] in the course of their duty;*

Section 7(2)(f)(i) recognises that maintaining the effective conduct of public affairs can require candid and unreserved expressions of opinion. It recognises that public exposure of such opinions can, at times, have a chilling effect on people's willingness to express themselves openly, honestly and completely in the future.

However, the material in the report appears to be highly technical, factual information that is expressed in moderate and scientific terms. It consists of a proposed shortlist of options, the criteria by which the options have been assessed, the approximate cost of each option, and an assessment of consentability and risks.

Additionally, some of the information contained in the report is already known to the public. For example, the public is aware of the longlist of options from which the proposed shortlist was formed. The lower and upper limits of the costs estimates for the draft shortlist have also been released to the public via a Wellington Water report.

I acknowledge that the report is a draft that was formed as part of the iterative process. Despite this, the information contained in the report does not have the characteristics typically associated with free and frank expression of opinion. For example, it does not offer unfiltered, candid, free and frank views or opinions on which wastewater treatment options should be shortlisted, nor does it contain 'off the cuff' remarks.

Consequently, I fail to see what harm would occur if the report was released to Mrs Ireland.

### **Inhibiting effect**

Your correspondence does not articulate why, if the report was released, those involved would feel inhibited or unwilling to fulfil their duties in the future.

I have noted your comments that release of the report would create a '*dangerous precedent*' for other official information requests. I disagree. The LGOIMA is clear that it is incumbent on local authorities, including the Council, to assess each request they receive on a case-by-case basis. In every instance a withholding ground under section 7 of the LGOIMA is identified as potentially applying to information at issue, local authorities must weigh the strength of the withholding ground against the public interest in favour of releasing the information.

You consider releasing the report would be equivalent to a central government agency releasing advice prior to the Minister having opportunity to consider it. Indeed, where appropriate and subject to public interest considerations, central government agencies may withhold information under section 9(2)(f)(iv) of the Official Information Act 1982, if withholding is necessary to

*maintain the constitutional conventions for the time being which protect [...] the confidentiality of advice tendered by Ministers of the Crown and officials;*

However, Parliament included no such a provision in the LGOIMA. It is not clear to me how your point about confidentiality of advice applies to section 7(2)(f)(i) of the LGOIMA, which relates exclusively to free and frank expression of opinion.

You have stated that free and frank expression of opinion between Council officers and councillors would be jeopardised if the report was released. Beyond this statement, I have received no substantive evidence or explanation to show what harm would occur, nor why that harm would be so likely to occur as to make it necessary to withhold the information.

If information is requested, an agency is not entitled to withhold it unless a specified reason in section 6 or 7 of the LGOIMA applies. Any reason to withhold under section 7 is subject to public interest, outlined in section 7(1) of the LGOIMA. It may be useful here to note that the public interest operates in one direction only, which is in favour of release.<sup>2</sup>

From the information provided, it is not clear that section 7(2)(f)(i) of the LGOIMA applied in this situation. Given this, it is not necessary for me to consider countervailing public interest considerations regarding the release of the information.

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<sup>2</sup> For further information on the public interest, see Office of the Ombudsman, [Public interest: A guide to the public interest test in section 9\(1\) of the OIA and section 7\(1\) of the LGOIMA](#), published August 2019.

If you remain concerned about the report being released to Mrs Ireland when it has not been viewed by councillors, it is open to you to provide the report to councillors at or before the time you release it to Mrs Ireland. Likewise, it is open to you to provide Mrs Ireland with appropriate contextual information such as a statement alongside the report, clarifying that it was later rejected and that the Council is awaiting revised advice from Wellington Water.<sup>3</sup>

### **My provisional opinion and recommendations**

My provisional opinion, for the reasons set out above, is that the Council was not entitled to refuse the request under section 7(2)(f)(i) of the LGOIMA.

If I confirm this as my final decision, then I may recommend that the Council:

- without delay, reconsider its decision on Mrs Ireland's request, with a view to releasing some or all of the information requested.

### **Your comments**

I invite you to comment before I form my final opinion. If you do wish to comment, please respond by 16 September 2022.

Please note that Ombudsmen must conduct their investigations in private,<sup>4</sup> and are required to maintain secrecy in respect of all matters that come to their knowledge. This is subject only to specific exceptions, as specified in the Ombudsmen Act.

I am providing you with my provisional opinion in confidence, in order to obtain your comment before I form my final opinion. I ask that confidentiality be maintained until the outcome of my investigation is finalised.

Nāku noa, nā



Peter Boshier  
Chief Ombudsman

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<sup>3</sup> For further information on releasing draft documents, see Office of the Ombudsman, [The OIA and draft documents: A guide to how the OIA applies to requests for draft documents](#), published April 2019.

<sup>4</sup> Section 18(2) Ombudsmen Act 1975. This also applies to OIA and LGOIMA investigations: see sections 29 and 28, respectively.