

EVENTS FUNDING BY LOCAL AUTHORITIES – OFFICIAL INFORMATION ACT IMPLICATIONS

Background

Local authorities, as a matter of course, contribute financially and in kind (for example, by providing facilities) to the promotion of events in their localities. These events may be of a cultural, sporting, recreational or other nature. Local community groups benefit from support of this kind. In many cases they would not be able to function without it.

But over and above what may be seen as funding or helping to fund local groups to carry out activities within their own communities, local authorities (or at least a number of them) promote or help to promote events that are not necessarily organised by groups located within their community (though they may be) and are not tied to being carried on only in that locality. They are potentially peripatetic. In respect of these events, not only could they be held in other parts of New Zealand, they could be held in Australia or even Asia, rather than in the area of the local authority promoting them. On the other hand, without local authority funding, they might never eventuate at all.

The justification for local authorities promoting events of this nature falls into two broad categories, though ultimately these tend to merge: raising the profile of the city or area involved, and promoting economic activity, whether through direct employment or increased tourism. Profile raising could, of course, be seen as another means of stimulating the economic development of the locality.

In promoting such events, local authorities are, in effect, competing with each other as well as with, in some cases, potential overseas funders. Whether local authority competition of this nature is a good thing or a bad thing from a national perspective is a matter for debate at a political level. It is certainly consistent with the trend in recent times to greater local authority trading activity and to enhancing local authorities' powers ("the power of general competence"). Whatever one thinks about it, it is a fact that local authorities are engaged, within limits, in competing with each other to attract events to their localities.

Implications for official information requests

This background to funding events of a national or international nature (as opposed to funding events of an intrinsically local nature) is relevant to the consideration of requests for information from local authorities on the contributions, particularly the financial contributions, that they make to those events.

Local authorities which engage in this type of activity (and not all do) argue strongly that disclosure of the full details of their participation is not necessarily in the interests of the residents of their communities. They argue that full disclosure may put them at a disadvantage with competing venue funders and in negotiating with the promoters or organisers of the events themselves. If disclosure occurred this would, it is said, make promoters or organisers unwilling to deal with local authorities in the future by revealing the promoters' negotiating positions to other potential venue funders and establishing a "benchmark" as to what they would be prepared to accept in the future. At the same time, other potential venue funders would be given an insight into the funding positions of local authorities that had secured events in the past.

These concerns make local authorities reluctant to reveal all of the information they possess about such events. In regard to revealing information to potential competitors, a level playing field of sorts could be achieved, in New Zealand at least, by not permitting any withholding of information at all. But this would put local authorities that had already secured events at a disadvantage, as they would see it, because they would still not know how much competing local authorities might be prepared to pay. It would definitely put local authorities in New Zealand at a disadvantage in respect of events of an international nature.

Any blanket approach of this sort would need to be imposed legislatively. The Ombudsmen in reviewing decisions by local authorities to decline requests for events funding information do not see that it is open to them to impose a policy of disclosure in all circumstances. Apart from anything else, local authorities are entitled to have their claims to withhold information judged against the applicable legislation – the Local Government Official Information and Meetings Act 1987 (the LGOIMA). That Act, while declaring a principle of availability, recognises that there may be good reasons to withhold information. It is necessary therefore to consider the application of the LGOIMA to events funding information and it is desirable to indicate what the Ombudsmen's general approach to this question will be.

Good reason for withholding

Section 7(2) of the LGOIMA identifies a number of situations in which, subject to an overall public interest test, good reason for withholding official information exists.

In responding to requests for events funding information, local authorities may invoke a number of these grounds and in every case in which review by an Ombudsman is sought, it will be necessary to consider whether that ground is established. But, in the main, there is one withholding ground set out in section 7(2) that is particularly pertinent to a decision to withhold such information. This is section 7(2)(c)(ii). This note is addressed to the application of that provision.

Section 7(2)(c)(ii) provides that good reason for withholding official information exists –

....if, and only if, the withholding of the information is necessary to –

- (c) Protect information which is subject to an obligation of confidence....,
where the making available of the information –
 - (ii) Would be likely otherwise to damage the public interest.

The word “otherwise” in subparagraph (ii) is in contrast to the more specific detriment identified in subparagraph (i) that relates to inhibiting the future supply of information from the source that is owed an obligation of confidence. Subparagraph (i) may be raised by local authorities as a justification for withholding information, but it is, in this context, in the Ombudsmen’s opinion, a less applicable reason than subparagraph (ii).

The reason section 7(2)(c) is commonly invoked is that often the agreement that the local authority has with the event promoter or organiser will contain a confidentiality provision, obliging the local authority, so far as consistent with its own statutory obligations, to keep all or some of the agreement’s details confidential.

The existence of an obligation of confidence in these circumstances is thus not difficult to establish, it is part of a contractual relationship. What raises more difficult considerations is whether it is necessary to protect that information from release because release would damage the public interest.

There is, in a fundamental sense, a high public interest in contractual obligations being observed and, if necessary, enforced by the state. In this sense, any breach of an obligation based in contract damages the public interest. But the law makes some contracts unlawful or unenforceable and statutes often impinge on or override contractual obligations. The point has been made that no one can contract out of their obligations under the LGOIMA (*Wyatt Co v Queenstown Lakes District Council* [1991] 2 NZLR 180). It would render the legislation redundant if they could. Everyone who enters into a contract with a local authority knows or should know that they do so against the background of the LGOIMA. A confidentiality term cannot be absolute.

But this is not to say that it should be lightly overridden either. Section 7(2)(c) defines the circumstances militating against this.

There are a number of words that together make up the interest protected by section 7(2)(c)(ii): “necessary”, “likely”, “damage”, “public interest”. A construction of the application of the provision could proceed on an individual analysis of these words. The Ombudsmen believe that the application of the provision should be approached more holistically. If a public interest in confidentiality can be established at this point in considering a request for official information, breach of it would be likely to damage that public interest and thus necessitate its withholding, subject to the overriding public interest test mandated by section 7(1). It is thus principally to what the public interest in section 7(2)(c)(ii) comprises that attention must be paid in applying that provision to events funding.

An immediate point to acknowledge is that the term “public interest” is also used in section 7(1) where a balancing exercise must be carried out to see if there are circumstances that render it desirable “in the public interest” to release information that would otherwise be withholdable under one of the grounds set out in section 7(2). The test for applying the public interest at that point will be dealt with below, but in the Ombudsmen’s view the “public interest” for the purposes of section 7(2)(c)(ii) is not nearly as extensive a concept as it is for the purposes of section 7(1).

First, it is not a balancing exercise. One is not weighing the public interest in withholding against the public interest in release (as in section 7(1)). Section 7(2)(c)(ii) is a threshold provision. For it to apply there must be a public interest of substantial enough a nature for it potentially to suffer damage through a breach of the applicable confidence. But once this threshold is reached the test is satisfied. It is not offset by any countervailing public interest considerations. These enter into the equation when one proceeds to section 7(1).

Secondly, while there must be a public interest that can be damaged, a large measure of appreciation to the identification of that public interest should be given to the agency concerned. An Ombudsman on reviewing withholding on this ground will be concerned to ensure that a legitimate public interest is served by the local authority entering into the obligation of confidence and that damage will result if it is broken. But provided that the local authority has considered whether there is a need for confidence, and a rational and significant basis for according it can be identified, the Ombudsman will not substitute the Ombudsman's view of the public interest for one that a local authority considers is tenable. Again, offsetting arguments will largely be reserved for consideration under section 7(1).

So, in considering whether section 7(2)(c)(ii) is a valid withholding ground, the Ombudsmen will recognise that confidentiality can be an ingredient of an events funding agreement for the benefit of both the authority and the promoter/organiser. But confidentiality in each case must be rationally based. Confidentiality is not a convenience by which a local authority avoids scrutiny. Where it is desired or conceded by the authority, the authority will be required to demonstrate the public interest it considers is served and this interest must be real. In addition, where the promoter/organiser has sought confidentiality the promoter/organiser's reasons for this will be sought. Confidentiality as a factor in obtaining the event, in obtaining the event on the terms negotiated, or in preserving an important ongoing relationship, will need to be demonstrated for section 7(2)(c)(ii) to apply.

Public interest

Even if section 7(2)(c)(ii) is established, good reason to withhold the information will not exist under section 7(1) if –

.... 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.

Unlike the public interest test in section 7(2)(c)(ii), the public interest in section 7(1) *does* involve a balancing exercise. Furthermore, while the public interest identified by a local authority for according confidentiality will enter into that balance, it is only one factor and any other relevant factors, whether favouring withholding or release, will be considered too.

Section 7(1) emphasises that the public interest operates “in the particular case” so there may always be factors peculiar to or surrounding the particular event that change the public interest balance in that case. The existence of these can never be excluded. But the Ombudsmen have developed some principles that they will apply in considering whether the public interest in withholding information relating to an event is outweighed by the public interest in release. Information requested about events funding usually relates to or includes the size of the funding

contributed by the local authority. Thus these considerations are expressed largely in funding terms, but they apply in respect of any information about an event which a local authority seeks to withhold.

The relevant factors to consider include:

- the source of any grant or payment;
- the size of any grant or payment;
- the nature of any grant or payment.

Source

All local authorities will as part of their budgeting process establish accounts or funds out of which disbursements can be made. These will be for different purposes (promoting tourism, community projects, developmental projects, etc).

The means of authorising payments from these funds will be defined (who may approve a payment, up to what level, etc) and these rules may be different depending upon the source of funds being accessed.

Regardless of the quantum of a payment for an event there will in all cases be a strong public interest in knowing that the payment is made in accordance with established procedures. The fact that a payment was made from a fund that is established to make payments of that nature and that all procedures for authorising payments out of that fund have been followed, is of the highest public interest. It is unlikely that any withholding of information about event funding that denies the public the ability to establish that a payment was made in accordance with proper requirements will be upheld.

Size

Obviously the larger that a grant or payment is, and the more significant it is in terms of the authority's financial position, the stronger are the public interest arguments in favour of disclosure. Indeed a certain size of payment becomes material in an accounting sense and will be required to be disclosed in the local authority's accounts by the Auditor-General. However, the accounting threshold for a disclosure of this nature is relatively high and it is not suggested that it equates to a threshold for overriding a withholding ground in the OIA. This may be required at a far lower level. Rather, it illustrates that size is a relevant disclosure consideration in weighing the public interest.

Nature

The nature of the payment is also significant in considering the public interest.

A payment that is in the nature of a speculative investment in an event, especially an investment committing the local authority to a potential obligation to make further payments in the future, raises greater ongoing accountability issues than a one-off payment. Where a local authority assumes a financial risk or incurs a contingent liability the public interest in a full disclosure of that risk, notwithstanding section 7(2)(c)(ii), is thereby enhanced. Conversely, where a local authority gives a grant to assist with an event but assumes no ongoing liability as to that event's

profitability or financial outcome, the public interest in a full disclosure (though still present) is the lesser.

Thus, in determining the public interest balance where good reason for withholding information as to the quantum of a payment by a local authority for events funding has been established, the Ombudsmen will consider the source, size and nature of the payment, and what is publicly known about these, in reaching a decision.



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