

24. 10. 2007

## REPORT OF THE LEGAL SERVICES MANAGER

### 1. EXPLANATION OF STATUTORY REQUIREMENTS

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| <b>General Manager responsible:</b> | General Manager Regulation Democracy Services, DDI 941-8549 |
| <b>Officer responsible:</b>         | Legal Services Manager                                      |
| <b>Author:</b>                      | Chris Gilbert Legal Services Manager                        |

#### PURPOSE OF REPORT

1. The purpose of this report is to provide the general explanation of various statutes as required by the Local Government Act.

#### EXECUTIVE SUMMARY

2. The Local Government Act 2002 requires that at the first meeting of the Council following the triennial general election a general explanation must be given of the Local Government Official Information and Meetings Act 1987 and appropriate provisions of:
  - (a) the Local Authorities (Members' Interests) Act 1968;
  - (b) sections 99, 105 and 105A of the Crimes Act 1961;
  - (c) the Secret Commissions Act 1910; and
  - (d) the Securities Act 1978.

#### FINANCIAL IMPLICATIONS

3. Not applicable

#### Do the Recommendations of this Report Align with 2006-16 LTCCP budgets?

4. Not applicable

#### LEGAL CONSIDERATIONS

##### Local Government Official Information and Meetings Act 1987

5. As follows:

##### (a) General Principle

The stated purpose of this Act is to make official information held by local authorities more freely available, to provide for access to that information, to provide for admission to meetings of local authorities and to protect official information held by local authorities consistent with the public interest and preservation of personal privacy.

The Act is very broad. It does not define the word "information". It sees official information as any item of information held by a local authority. So official information is not limited to documents letters, reports, memoranda or files but includes electronic/digital data, sound tapes, video tapes, computer tapes and discs, maps, films, photographs and plans.

The heart of the Act is contained in the "principle of availability" set out in Section 5 of the Act: "The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act **and the principle that the information shall be made available unless there is good reason for withholding it.**"

The fundamental principle of the Act is that information must be made available unless there is "good reason" under the Act to withhold it.

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**(b) Requests**

Anyone can make a request for official information. If the information sought is not held by the Council or a Council officer believes the request to be more closely connected with another organisation then the officer must, within **10** working days transfer the request to the other organisation. Where the Council holds the information a decision on whether to release the information must be made within 20 working days of receipt of a request. Charges may be made for supplying information. Where the information sought is large or consultations necessary for a proper response are needed then the Chief Executive or an authorised officer may extend the time limit for a "reasonable period". The requester must be told the period of extension, the reasons for the extension and the fact that the extension can be referred to the Ombudsman.

Every request must be dealt with on its merits and a decision whether to refuse is made on the circumstances of each case. Generally, where the information is released then it must be released in the manner requested.

**(c) Refusals**

In considering a refusal of a request for official information the Act places the responsibility on the Chief Executive or an officer authorised by him. While the statutory responsibility is placed on the Chief Executive that officer is not prevented from consulting the Council or any other person in relation to a decision to refuse. The Chief Executive may delegate the responsibility to release or refusal to an officer. At present that delegation is held by the Legal Services Manager.

The Act sets out approximately 25 "good reasons" why official information can be refused. If the grounds for refusal do not fall within one of these "good reasons" the information **must** be released. "Good reasons" include:

- (a) protecting the privacy of natural persons;
- (b) maintaining the effective conduct of public affairs through free and frank expressions of opinions by or between elected members and officers;
- (c) enabling a local authority to carry out, without prejudice or disadvantage, commercial activities;
- (d) enabling a local authority to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations); and
- (e) to maintain legal professional privilege.

All of the reasons outlined above are subject to a "public interest" test, ie even if the information sought falls within one of the refusal categories it must be released where the withholding of the information is outweighed by other considerations rendering it desirable in the public interest that the information be released.

The Act also contains a number of administrative grounds as to why a request can be refused. These include the fact:

- (a) the information is or will soon be publicly available;
- (b) the information requested cannot be made available without substantial collation and research.

If a request is refused the Council must give the requester:

- (a) the reason for its refusal;
- (b) the grounds in support of that refusal; and
- (c) advice as to the right to apply to the Ombudsman to seek a review of the refusal.

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**(d) Ombudsman's Investigation**

Under the Act the Ombudsman can investigate any refusal by the Council to provide information and can investigate the charges made by the Council.

If the matter cannot be resolved during the investigation the Ombudsman may make a recommendation to the Council. The Council is under a public duty to observe that recommendation unless, within 21 working days of receiving the recommendation, it resolves not to accept it.

A decision not to accept an Ombudsman's recommendation must be notified to the applicant and the Ombudsman and published in the New Zealand Gazette together with the Council's reasons for its decision. The applicant may apply to the High Court for a review of the Council's decision. Whatever the result of the High Court hearing, the applicant's legal costs must be paid by the Council unless the Court is satisfied the application was not reasonably or properly brought.

**(e) Other Rights of Access**

The Act also gives every person a right of access to any document, including manuals which the Council holds containing policies, rules, or guidelines by which decisions or recommendations are made. There are limited rights of refusal available to the Council. Section 22 of the Act provides that where the Council makes a decision or recommendation in respect of any person in that person's personal capacity, that person has the right on request to have within a reasonable time a written statement from the Council of:

- (a) the findings on material issues of fact;
- (b) a reference to the information on which the findings were based; and
- (c) the reasons for the decision or recommendation.

**(f) Access to Meetings**

The Act provides that the public and media have a right of access to all meetings of the Council, committees, sub-committees (with power to act) and community boards unless the meeting resolves to exclude the public. Copies of meeting agendas must be available for the public and the media.

The grounds for excluding the public and the media from a meeting can only be those provided in the Act and essentially are the same grounds as for withholding official information. A motion to exclude must state the subject matter of the "non-public" matter and the specific reason provided in the Act.

Even where a meeting has resolved to exclude the public a person can request a copy of the minutes of the meeting and that request must be treated in the same way as a request for official information and subject to review by an Ombudsman.

**(g) Order Papers**

Order papers for meetings must be publicly available at least two working days before the meeting. Generally, supplementary reports cannot be dealt with unless agreed to by the meeting and unless the chairperson explains why the report was not in the order paper and why the subject cannot wait until the next meeting.

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**(h) Order at Meetings**

Section 50 of the Act provides that the chairperson of a meeting may require a member of the public to leave the meeting if the chairperson believes on reasonable grounds that person's behaviour is "likely to prejudice or continue to prejudice" the orderly conduct of the meeting.

The chairperson may call on a police constable or Council officer to remove a person from the meeting.

**(i) Qualified Privilege**

Sections 52 and 53 of the Act provide **that written or oral** statements on any matter before a meeting of the Council, committee or community board are privileged unless the statement is proved to be motivated by ill will. This type of privilege is known as qualified privilege.

Qualified privilege is a protection afforded by the law on certain occasions to a person acting in good faith and without any improper motive who makes a statement defamatory about another person. It is established law that meetings of local authorities are privileged occasions. This would now include community boards. The reason given by the Courts is that those who represent local government electors should be able to speak freely on any matter they believe affects the interests of their residents. The situation regarding statements made outside a formal meeting is not so clear. Certainly the statutory protection of sections 52 and 53 would not necessarily extend outside a meeting. What is required for qualified privilege to apply is a positive belief in the truth of what is said, and that there is no suggestion of personal spite or ill-will by the maker.

**Local Authorities (Members' Interests) Act 1968**

6. This Act contains provisions relating to contracts between elected members and the Council and provisions relating to elected members voting on matters where they have a pecuniary interest.

**(a) Contracts**

The Act provides that no person can be an elected member if the total of all contract payments made or to be made by the Council in which that person is "concerned or interested" exceeds \$25,000 in any financial year. Contracts include sub-contracts.

There are provisions regarding contracts between the Council and a company in which an elected member or spouse has an interest. Generally, a person will be concerned or interested in a contract where that person or spouse holds 10% of the issued capital of the company or a controlling company, or the member or spouse is a shareholder and is either a managing director or general manager.

Certain exclusions are provided for such as where the member and spouse are living apart, or the member did not know and had no reasonable opportunity of knowing the spouse was a shareholder and managing director or general manager. The limit of \$25,000 may be extended by the Audit Office in special cases. Such approval can be given retrospectively.

Provision is made for contracts entered into by the Council before an election and for continuing contracts. If a person breaches the \$25,000 limit that person is disqualified from holding office and an extraordinary vacancy arises. The disqualification remains until the next triennial election. Where a disqualified person acts as a member an offence is committed with a maximum fine of \$200.

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**(b) Pecuniary Interest**

The Act provides that no elected member shall vote on or take part in the discussion of any matter in which that person has, directly or indirectly, any "pecuniary interest" other than an interest in common with the public.

The prohibition applies where the member's spouse has a pecuniary interest and where the member or spouse holds 10% or more of the shares in a company or a controlling company which has a pecuniary interest, or either person is a shareholder and is managing director or general manager of the company. Members who are prohibited under the Act from voting on or discussing a matter are under a duty to declare to the meeting their pecuniary interest and their abstention from discussion or voting must be recorded in the minutes.

The prohibition against discussing or voting on a matter does not apply in certain situations, such as:

- (a) members' remuneration where the maximum rate has already been fixed;
- (b) election or appointment of any member to a Council, or community board, office notwithstanding that remuneration is payable; and
- (c) the preparation, approval, or review of a district scheme or district plan, unless the matter relates to any variation or change or departure from a district scheme or district plan or to the conditional use of land.

The Audit Office has the power to declare that the prohibition shall not apply in respect of any particular matter if the Office is satisfied the prohibition would impede the business of the Council or that it is in the interest of the electors that the prohibition not apply. Any member who contravenes the prohibition commits an offence liable to a fine of \$100. Upon conviction the member vacates office and an extraordinary vacancy is created.

**Sections 99, 105 and 105a Crimes Act 1961**

7. As follows:

**(a) Section 99**

Section 99 defines, for the purposes of the Crimes Act 1961, an "official" as any member or employee of any local authority. Member here would include a community board member.

**(b) Section 105**

Section 105 provides that it is an offence punishable by seven years' imprisonment for an "official" to corruptly accept or obtain, or to attempt to obtain, any bribe in respect of anything done or omitted to be done by the official in an official capacity. A person making or attempting to make the bribe is liable to three years' imprisonment.

**(c) Section 105A**

Section 105A provides that every official is liable to seven years' imprisonment who corruptly uses any information acquired in an official capacity, to obtain, directly or indirectly, an advantage or a pecuniary gain for the official or any other person.

**Secret Commissions Act 1910**

8. This Act puts in legislation the principle that a person holding a position of trust, such as elected members, should not make a profit through their office. The Act provides that elected members and officers are "agents" of the Council and that every agent commits an offence who corruptly accepts or obtains or solicits, for themselves or any other person, any gift or other consideration as an inducement or reward for doing or not doing any act in relation to the Council's affairs, or for having shown favour or disfavour to any person in relation to the Council's affairs.

**1 Cont'd**

9. Any agent who diverts, obstructs or interferes with the proper course of the Council's business, or fails to use due diligence in the prosecution of such business with intent to obtain for themselves or any other person any gift or other consideration shall be deemed to have corruptly solicited a consideration. While "gift" is not defined, "consideration" is. It includes discounts, commissions, rebates, bonuses, deductions, percentages, employment and money (including loans). Generally, trade practices or customary gifts do not constitute a defence to a charge under the Act.
10. Section 5 of the Act provides that the agent, who makes a contract on behalf of the Council must disclose to the Council any pecuniary interest in the contract. This provision is similar to that contained in the Local Authorities (Members' Interests) Act 1968. Also, it is an offence to advise the Council with intent to induce it to enter into a contract with a third person, and receive any gift or consideration from the third person, without disclosing to the Council the fact of payment. Upon conviction for any offence under the Act an agent is liable to a maximum fine of \$2,000 or two years' imprisonment and would vacate their office.

**Securities Act 1978**

11. The Securities Act 1978 imposes on entities (including local authorities) which solicit funds from the public an obligation to prepare, register and distribute a prospectus and an accompanying investment statement. However, this is only required where there is "an offer of securities to the public". Offers of securities to financial institutions on a wholesale basis, or to "habitual investors", are expressly excluded from the ambit of the term "offer of securities to the public". Therefore, there are no Securities Act implications where the Council borrows from institutions on a wholesale basis. This is generally the case even if the institutions on-sell the stock to members of the public. If the Council ever decides to venture into the area of retail fund-raising, it will have to comply with the requirements of the Securities Act.

**Have you considered the legal implications of the issue under consideration?**

12. Not applicable

**ALIGNMENT WITH LTCCP AND ACTIVITY MANAGEMENT PLANS**

13. Not applicable

**Do the recommendations of this report support a level of service or project in the 2006-16 LTCCP?**

14. Not applicable

**ALIGNMENT WITH STRATEGIES**

15. Not applicable

**Do the recommendations align with the Council's strategies?**

16. Not applicable

**CONSULTATION FULFILMENT**

17. Not applicable

**STAFF RECOMMENDATION**

It is recommended that this report be received.