

Residents 2010 Conference

Notes prepared to assist delegates in discussing the issues of managing complaints about local government processes and practices and citizens' access to information.

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Introduction

Thank you for inviting me to help bring to a close events at the first ever conference of residents' associations in New Zealand. The very fact that this conference is occurring demonstrates both a growing concern by residents' associations about ratepayers' interactions with their Councils and a willingness to engage at a regional, and perhaps a national level, to contribute more vigorously to the debate about governance and policy development which will shape the society we live in. Particularly to respond proactively to the changes which may affect the structure of local government in the wake of the establishment of a "super city" in Auckland and the merging of DHB's – among two recent developments.

From where I sit as an Ombudsman, looking out over New Zealand and the nature and quality of transactions between the governed and the governing, I am more than ever convinced that residents' associations play a very valuable role, in what is an increasingly fragmented society, in educating the wider community about issues which will affect them and in reflecting their concerns to Councils at every level.

None can question the motivation and dedication of people who freely give their time and effort to advocate for, and represent their local communities. They represent in their membership, talents, skills and know-how which not only bear upon their function of advocating on behalf of ratepayers, but are also a fruitful source of expertise for Councils that is, I suspect, not drawn on often enough by those bodies.

Many residents' associations are already very active and sophisticated operations – with their own websites, Wikipedia pages, newsletters, online forums and bulletin boards – even sponsors. Today has set the scene for even greater levels of coordination, support and information dissemination between residents' associations.

I was once a member of something called The Commission for the Future. What struck me then is that all over New Zealand there were people beavering away on common issues but without any linkage to one another to share ideas about processes and practices that worked well in specific situations. I suspect that's still a prevalent experience.

Local bodies have Local Government New Zealand to use (among other things) as a clearing house for ideas and best practice, and importantly to speak on their behalf on matters of national importance.

It would be a good outcome of today's discussions if a national Residents and Ratepayers group was to emerge to begin a conversation about matters which affect us all and which will enable a more considered participation in the democratic process than is sometimes our experience.

Delegates have already learnt a lot today about effective ways of engaging with local councils and communities and the main themes which have emerged are not news to anyone here.

I would like to add some information about the work we do as Ombudsmen in the area of local government, and some tools you may be able to use to become more effective advocates for your communities. In the workshop on aspects of local government law and the use of the Ombudsmen Act and the Local Government Official Information and Meetings Act (LGOIMA) and in conversation with delegates throughout the day, it became clear to me that knowledge of how you can use these Acts to assist your work may not be as widespread as it should be. That presents a challenge for my Office and it is one we are attempting to address in a variety of ways.

So, to start the process, here are a few thought starters on key issues such as complaints about maladministration, requests for official information and local authority meetings.

Complaints about maladministration

Local government – comprising regional, district, and city councils, community boards, and many other local organisations – carries out a huge range of functions, the exercise of which can have a big impact on the lives of citizens: resource management; roading and transport; civil defence; community well-being and development; environmental health and safety; building control; and infrastructure planning and maintenance. It's not surprising then that citizens sometimes feel aggrieved about decisions, acts, recommendations or omissions that have affected them personally.

The Ombudsmen Act

In the Ombudsmen Act 1975, Parliament has given the Ombudsmen the function of investigating the administrative acts and decisions of central and local government agencies that affect a person or persons in their personal capacity. Our jurisdiction covers regional, district, and city councils, as well as community boards and council-controlled organisations within the meaning of the Local Government Act 2002. After investigating, we form an opinion on whether the act or decision was:

- contrary to law;
- unreasonable, unjust, oppressive, or improperly discriminatory, or in accordance with a law or practice that was unreasonable, unjust, oppressive, or improperly discriminatory;
- based on a mistake of law or fact; or
- just plain wrong – that is, a decision that no one in their right mind could have made.

We may also form the opinion that a discretionary power has been exercised for an improper purpose, or on irrelevant grounds, or has taken into account irrelevant considerations; or that in the exercise of the discretionary power reasons for the decision should have been given and were not.

We can make any recommendation we consider appropriate in the circumstances; for instance that an 'omission' should be rectified, a decision cancelled or varied, practices

should change, laws should be reconsidered, or any other step should be taken. So while our recommendations may address an individual's specific grievance, they can have a wider impact too if the source of that grievance is a systemic issue. Although our recommendations are not binding, they are usually accepted.

There are, however, some limitations on our powers under the Ombudsmen Act.

Committees of the whole

A significant one in the local government context is that Ombudsmen can only investigate the acts or decisions of a committee of the Council – but not where that committee is a committee of the whole Council – and actions of Council officers, employees or members. This limitation also applies to all other local organisations subject to the Ombudsmen Act.

The effect of this limitation is to put outside our oversight decisions concerning such matters as the setting of rates and various fees (e.g. dog registration fees, building and resource consent application fees), which are decisions that cannot be delegated downwards by the agency concerned.

However, an Ombudsman may investigate recommendations provided to a Council or an organisation by its officers or committees. Such an investigation may lead to a recommendation that the chief executive ask the Council or organisation to reconsider the matter afresh in light of new or different information.

Appeal rights

Another significant limitation is that Ombudsmen are not authorised to investigate acts or decisions for which there is a statutory right of appeal to a court or tribunal (unless there are special circumstances that would make it unreasonable for that right to have been exercised).

For this reason, the involvement of the Ombudsmen in Resource Management Act (RMA)-related complaints is limited, because there are extensive rights of review and appeal to the Environment Court. However, an Ombudsman can investigate some RMA-related complaints, such as the enforcement of conditions on consent, refusals to reduce or refund fees or concerns about the standard of service provided in assessing resource consent applications.

An Ombudsman can also investigate decisions not to notify applications for resource consents. However, this does not affect the decision to approve the resource consent. The only way to overturn or modify resource consents that have already been granted is to seek judicial review. It is for this reason that in a number of our annual reports we have urged councils to take care when deciding not to notify a resource consent application.

Adequate alternative remedy

An Ombudsman also has the discretion not to investigate a complaint if there is an adequate remedy or right of appeal to which the complainant could reasonably resort. This discretion reflects the position that an Ombudsman's investigation is a "remedy of last resort". An Ombudsman will not usually commence an investigation until a complainant has first raised their concerns with the agency.

Complaining to the agency first

This means that it is important that agencies – including those in the local government sector – have in place effective internal complaints-handling processes. We made this point in our last annual report when we noted that we were seeing a number of complaints (mostly noise and drainage-related complaints) where the issues raised by the complainants were not sufficiently addressed by local authorities until a complaint was made to us. We will be pursuing the issue of effective internal complaints-handling processes in our ongoing interactions with central and local government.

It also means that complainants need to know how to raise their concerns effectively – and that is potentially where residents’ associations may have a useful role to play. Some key components would be:

1. Knowledge – arm yourself: Ask for information about the issue. Do you have all the facts? Make sure there is not a simple misunderstanding. It is good to find out about the organisation’s policies. This is where LGOIMA or the Privacy Act can be helpful.
2. Think things through: Identify the key issues in the complaint. Think about what actually happened. When and where did it happen? Clarify the issue – what is it that affects you? What outcome do you want? For example do you want an apology, a change in policy, a change in the decision? Identify some options for resolving your complaint.
3. Keep records: It’s a good idea for you to record information about the issue, what you have done to try to sort it out and who you have been dealing with. Make a folder for all correspondence. It is usually best to write a letter of complaint, particularly if you are dealing with a large organisation. However, an initial phone call may help to clarify some of the issues.
4. Follow the Process: Find out what process the organisation has for people who want to make a complaint and follow it.
5. Be persistent: If nothing happens, call or write again to the organisation to check on the progress of your complaint. If they are unable to provide you with an update, make it clear to the person you are dealing with that the problem will not go away unless it is resolved.
6. If you’re unsuccessful: If your concerns have not been resolved you can take them to the Ombudsmen.

Requests for official information

No doubt many of you are very familiar with the Local Government Official Information and Meetings Act (LGOIMA). There are some obvious provisions with which you will already be familiar. However, there are some lesser known or used provisions of LGOIMA, which may be useful tools for residents’ associations.

First, I observe that the numbers of complaints under LGOIMA have been tracking upwards in recent years. Last year saw an increase of 11 per cent over the previous year to 231. While this still seems a relatively small number given the size of the local government sector in New Zealand, the increase could signify a greater degree of interest

in decisions of local authorities and greater use of LGOIMA by individual ratepayers and media to seek information about those decisions.

In the past year, we had two high profile LGOIMA investigations. There was a request by the Christchurch Press for the amount paid by Christchurch City Council for the Ellerslie Flower Show. I formed the opinion that the request should not have been refused and recommended disclosure. The Council complied with my recommendation. This case led my colleague, Ombudsman David McGee, and I to develop general principles of application to requests for information about local authority events funding (available on our website www.ombudsmen.parliament.nz).

There was also a request by the Dominion Post for Hawkes' Bay Regional Council's Hazardous Activities and Industries List (listing potentially contaminated sites). In that case, Dr McGee formed the opinion there was no good reason to withhold the list (his detailed finding in this regard is also available on our website). He did not consider that commercial interests or confidentiality justified withholding. While he accepted there may be a privacy interest in some information pertaining to individual landowners, he considered this was outweighed by the public interest in the public having access to information about potentially contaminated sites, so that they are in a position to assess for themselves whether there are any risks to the environment or to their person.

In the current context – with the significant changes that are underway in relation to governance arrangements, and with Councils' increasing involvement in commercial enterprises – I expect the upwards trend in LGOIMA complaints will continue.

Now, to those lesser known provisions. Your ordinary everyday LGOIMA request is one made under Part 2 of that Act. There are other parts, particularly Parts 3 and 4, which often escape people's attention.

Requests for internal rules affecting decisions

In Part 3 of LGOIMA, section 21 provides a “right” of access to internal rules affecting decisions – that is, to any document (including a manual), which is held by a local authority and which contains policies, principles, rules or guidelines in accordance with which decisions or recommendations are made in respect of any person or body of persons in their personal capacity.

This is different from Part 2 under which people “may request” official information held. Section 21 provides for a “right of access”. The reasons for refusing a request for internal rules affecting decisions are more limited. Those reasons relate to maintenance of the law, safety of persons, privacy, commercial prejudice, confidentiality, commercial activities and negotiations.

Requesters and agencies are often unaware that special provisions apply to this particular type of official information.

Requests for statements of reasons

Also in Part 3, there is another “right of access” by a person to reasons for decisions affecting that person. Section 22 provides that where a local authority makes a decision or recommendation that affects a person in his or its personal capacity, that person has a right to be given a written statement of:

- the findings on material issues of fact;

- a reference to the information on which the findings were based; and
- the reasons for the decision or recommendation.

The proviso is that the request must be made within a reasonable time after the decision or recommendation.

Again there are limited reasons for refusing such requests, relating to maintenance of the law, the safety of persons, and commercial prejudice. There are also certain circumstances in which a local authority is justified in not providing a reference to the information on which the findings were based.

The thing that makes section 22 different is that it is not just a right to request official information already held. Compliance with section 22 requires an agency to create information in order to respond to a request.

Section 22 is a useful, but often overlooked, tool for people wanting to know why a local authority has taken a particular decision that affects them. By using it effectively, people can better “arm themselves” with the knowledge necessary to pursue their complaints.

For instance, someone may be aggrieved that a Council has declined to exercise the discretion to waive a fee. They may request all information held by the Council in relation to their request under Part 2 of LGOIMA and the Privacy Act. They may request the Council’s policies or guidelines on waiving fees under section 21 of LGOIMA. They may request a statement of the Council’s reasons for declining their request under section 22 of LGOIMA. Armed with this information they can decide whether they think the Council has acted reasonably, or whether it is worth pursuing a complaint with the Council, and ultimately the Ombudsman.

I should note that the rights conferred by sections 21 and 22 are statutory rights that may be enforced through the courts. I should also note that an Ombudsman’s recommendations under Parts 3 and 4 do not create a public duty.

Requests by bodies corporate for personal information

Part 4 of LGOIMA gives a person a right to access information about that person, and a right to request the correction of that information. This should sound familiar to those of you who know about the Privacy Act. When the Privacy Act came into force in 1993, “natural” people’s rights to access information about themselves, and to request the correction of that information, went into that legislation. LGOIMA continued to provide those rights to “legal” people – or bodies corporate. Again, the reasons for refusing requests for personal information about bodies corporate are limited, so, for instance, a request could not be refused on the grounds of section 7(2)(f)(i) – free and frank expressions of opinion necessary for the effective conduct of public affairs. I understand that most residents’ associations are bodies corporate, and they may at times be interested in obtaining official information about themselves. Such requests must be considered under Part 4 of LGOIMA, not Part 2.

Council-controlled organisations

At this point, I note that the application of LGOIMA to council-controlled organisations has been a hot topic lately. Council-controlled organisations are nothing new, but the

issue attracted some attention recently in the context of the Auckland super city when the Government legislated for three council-controlled organisations.

I would like to clarify that council-controlled organisations are subject to Parts 1 – 6 of LGOIMA, by virtue of section 74 of the Local Government Act 2002. So people can request official information from them, including “internal rules” and statements of reasons. However, council-controlled organisations are not subject to Part 7 of LGOIMA, which contains the meetings provisions.

Local authority meetings

Part 7 then, places certain obligations on local authorities with regard to the conduct of meetings, including obligations relating to the notification of meetings, availability of agendas and minutes and public admission to meetings.

Most of you will be quite familiar with the requirements around notification of meetings and availability of agendas and minutes. I thought I would focus on the often contentious area of public exclusions from local authority meetings.

When is a meeting a meeting?

Part 7 of LGOIMA only applies to “meetings” as defined in the legislation. Section 45(2) makes it clear that “a meeting ... at which no resolutions or decisions are made is not a meeting” for the purposes of Part 7. So if there are no resolutions or decisions made, it is not a meeting, and the obligations set out in Part 7 don’t apply.

This has caused some confusion in the past when local authorities held “workshops” to which the public were not admitted. The meetings provisions in Part 7 cannot be avoided just by calling a meeting a workshop. If a “workshop” meets the definition of “meeting”, including the requirement that resolutions or decisions are made, then Part 7 applies. However, local authorities are entitled to hold private workshops to debate and find out more about an issue.

Ombudsmen have commented on this issue in previous annual reports (2002 and 2003):

“...it was noted that local authorities needed to be careful where a ‘workshop’ has been held to discuss an issue, ... not [to] create a perception that the matter has been predetermined when the issue is brought to an open meeting for deliberation and decision.”

When can local authorities exclude the public from meetings?

So when can local authorities exclude the public from meetings?

The starting point, in section 47 of LGOIMA, is that every meeting of a local authority shall be open to the public. This is consistent with section 14(1)(a)(i) of the Local Government Act, which states that a local authority should conduct its business in an open, transparent and democratically accountable manner. However, this does not mean that all Council business must be conducted in public. Section 48 of LGOIMA sets out the specific circumstances in which local authorities can exclude the public from meetings.

These circumstances are:

1. that public conduct of the meeting would be likely to result in disclosure of information there would be good reason to withhold under sections 6 or 7 of

LGOIMA (there is one exception to this: the public cannot be excluded from a meeting because of a concern to protect the free and frank expression of opinions);

2. that public conduct of the meeting would be contrary to the provisions of an enactment or constitute contempt of court;
3. that the purpose of the meeting is to consider an Ombudsman's recommendation under LGOIMA;
4. if it is necessary to enable the local authority to deliberate in private on its decision or recommendation in proceedings where there is a right of appeal to a court or tribunal against the authority's decision, or the authority is required by an enactment to make a recommendation.

Public exclusions must be done by resolution stating the general subject matter to be considered while the public is excluded and the reason for the exclusion (mostly this will be in relation to the particular interests protected by section 6 or 7 of LGOIMA).

A resolution must:

- be put when the meeting is open to public;
- be available to any member of public present; and
- form part of the minutes of the local authority.

In addition, section 50 of LGOIMA provides that a member of the public may be required to leave a meeting if the person presiding at the meeting "...believes, on reasonable grounds, that the behaviour of any member of the public attending that meeting is likely to prejudice or to continue to prejudice the orderly conduct of that meeting....".

What if you are unhappy with a decision to exclude?

So what can be done if you are unhappy with a decision to exclude? Well there is nothing to preclude you from requesting information pertaining to the meeting.

Section 51(3)(a) states that any request for the minutes of any part of a meeting where the public has been excluded is deemed to be a request for official information under LGOIMA. Such requests must be considered on their own merits. The fact that the public has been excluded from part or all of a meeting does not mean the relevant minutes and associated material can automatically be withheld if requested. Often the need to withhold official information can abate over time and as circumstances change.

There are also limited circumstances in which a decision to exclude the public may be the subject of a complaint to the Ombudsmen. If the decision was taken by a full Council, community board, or other agency, then, as noted above, we will have no jurisdiction to consider the matter. But if the decision was taken by a committee we may. Of course, being a remedy of last resort, we would expect a complainant to first raise their concerns with the relevant local authority. If, having done so, the complainant remained dissatisfied, we may consider investigating.

Such an investigation would look at the information available to the committee during the public excluded session, and consider the committee's reasons for excluding the

public. We would form a view as to whether, in light of this information, the committee's decision was one that was reasonably open to it.

In one of my cases, a local authority decided to exclude the public during consideration and discussion of a report on a commercial venture. The report and discussion canvassed detailed Council-prepared cost estimates which, if disclosed, would have been likely to prejudice anticipated negotiations with successful tenderers. I formed the opinion that it was reasonably open to the committee to decide under section 48 to exclude the public in terms of section 7(2)(i) of LGOIMA, which applies where withholding is necessary to enable a local authority to carry on negotiations without prejudice or disadvantage.

An example of an unlawful exclusion came up on one of Ombudsman David McGee's cases. In that case, the relationship between a committee and a particular member of the public had unfortunately broken down. As a means of managing that, the committee met on private business premises, effectively excluding the member of the public. The committee had not utilised section 48 (which sets out the circumstances in which a public authority may by resolution exclude the public), or section 50 (which provides for a member of the public to be excluded if the presiding officer believes on reasonable grounds that their behaviour is prejudicing the orderly conduct of the meeting). The Ombudsman therefore concluded the committee had acted "contrary to law", specifically, contrary to section 47 of LGOIMA which provides that local authority meetings shall be open to the public.

Central government

Now I have made an assumption that your primary area of interest will be in the local government area, so before concluding, I want to acknowledge that the actions of central government agencies too will be of interest and concern to residents' associations. For instance, former Chief Ombudsman John Belgrave once considered a complaint by a residents' association concerning a decision by Transit New Zealand not to proceed with construction of a roundabout. I would simply say that central government agencies are also subject to the Ombudsmen Act, and to the Official Information Act, and therefore the same principles I have discussed today (barring the local authority meetings provisions) apply to them.

Conclusion

I hope that this analysis will be helpful to you in the process of engaging with your local, district or regional council.

Finally, I would say, "It's OK to complain" but you also have a responsibility to do so in a manner that is focussed and constructive.

It's also OK and is your right to have access to information that will help you to participate fully in the democratic process.

To councils I would say, make sure your officials understand and abide by the requirements of the Local Government Act, the Ombudsmen Act and LGOIMA. Too often, in my experience, there is variable knowledge of these important legislative instruments that govern your work. With increasing turnover of staff, core knowledge is being diluted, and for some newer staff – particularly those from a private sector background, these

Acts are not well known and, in some extreme cases, are clearly ignored. That will lead to unnecessary exposure for Councils.

Today's conference and the discussions and information exchange which has taken place will, I am sure, contribute positively to the health of democracy in New Zealand and to better informed decisions at every level of governance.

Beverley Wakem
Chief Ombudsman
April 10th, 2010