

Maintaining privilege

By PAUL ROBERTSON

Councils are required to keep records. The public can gain access to those documents by making requests under the Local Government Official Information and Meetings Act 1987 (LGOIMA). The council will also be obliged to disclose relevant documents once court proceedings are issued. A prudent council will want to prevent confidential advice from experts and legal advisors from being disclosed. This article explores a council's right to maintain privilege for such documents so that it is not required to disclose them.

A common scenario (?)

The 'Greater South Island District Council' (a recently amalgamated unitary council) has issued a building consent for a block of adobe brick motels. The motel is completed and the council issues a code compliance certificate. Some months later the council receives a letter from the owner – Mr Ivaleaky - with concerns about cracks in the walls. The senior council inspector – Mrs Inspectaleaky - inspects the motels and prepares a memorandum recording serious breaches of the building code. The council then instructs an expert – Mr Findaleaky – who prepares a lengthy report with schedules discussing the apparent breaches of the building code.

Mr Ivaleaky instructs solicitors. They request a copy of all information held by the council relating to the motels pursuant to the LGOIMA.

Privilege and the Local Government Official Information and Meetings Act 1987

Under the LGOIMA councils are required to store and to safeguard the information that they hold and to make it available to the public upon request.

Information held by the council is public information and must be disclosed unless there is a good reason for withholding the information.

Sections 6 and 7 of the LGOIMA provide that there are good reasons for withholding official information when:

- (a) The purpose is to maintain solicitor client privilege or;
- (b) Disclosing the information would prejudice the maintenance of the law or;
- (c) When information is subject to an obligation of confidence or;

Once court proceedings are issued then there is a further obligation to disclose documents. The rules of the courts - and tribunals such as the weathertight homes tribunal - require the parties to provide sworn lists of all relevant documents and to produce copies of them on request. Once again a claim for privilege can be raised to resist disclosure. There is a limited ability to rely on confidentiality.

What then is privilege?

The two types of privilege - solicitor client privilege and litigation privilege

Confidential communications between a council and their legal adviser for the purpose of giving or obtaining legal advice are considered to be privileged. This type of privilege is set out in section 54 of the Evidence Act 2006 and is commonly referred to as solicitor client privilege (or sometimes legal professional privilege). This privilege is based on a client's need to be able to make complete disclosure to their legal adviser without fear of prejudice in the future.

Legal advice given by in-house lawyers is also protected by solicitor client privilege.

It is important to remember that privilege is not the result of simply putting the word "privileged" at the head of a document. The determining factor is whether the role played by the legal adviser in creating the document in the course of their relationship with their employer is that of a solicitor.

The LGOIMA specifically recognises solicitor client privilege as a grounds for not disclosing information – section 7(2)(g).

Where legal proceedings are involved, either because the proceedings have already been commenced, or because proceedings are reasonably apprehended, a separate ground of privilege comes into existence. Once again this privilege includes communications between the council and its legal advisors. In addition this privilege extends to communications with third parties, such as experts, and includes reports prepared by them. This type of privilege is set out in section 56 of the Evidence Act 2006 and is

Leaders in the Design, Delivery & Management of Risk Solutions for Local Government

Insurance

design . negotiation . placement

Risk Advisory

contracts . construction risks . infrastructure

Risk Management

risk profiling . identification . assessment . training

Self Insured Funds

design . management

Employee Benefits

group life . salary continuance
superannuation . keyman/trauma . medical

Claims Management

incident management . settlements
third parties - negotiation and recoveries
mediation . under excess losses



JARDINE LLOYD THOMPSON

Auckland - 09 379 5376
Wellington - 04 495 8210
Christchurch - 03 366 4866

more commonly referred to as litigation privilege.

The LGOIMA does not specifically mention litigation privilege, but it is usually accepted as falling within the exception that allows a council to withhold information on the basis that disclosing the information would prejudice the maintenance of the law. Litigation privilege is more limited than solicitor client privilege in one very important way. Litigation privilege only extends to communications where the

Losing privilege

The Evidence Act 2006 codifies the earlier, the common law rules in relation to waiver of privilege. Under the Act a person may waive privilege if he or she voluntarily produces, discloses or consents to the production or disclosure of any significant part of the privileged communication (section 65).

The key purpose of the LGOIMA is to make information held by local authorities more freely available and

advise on imminent court proceedings. A file note prepared before legal action was anticipated will not be privileged. The report prepared by Mr Findaleaky. Once again, the question is whether the report was prepared with the dominant purpose of assisting the council's legal adviser.

Best practice

The LGOIMA obliges the council to assist the public in obtaining relevant information and to disclose documents. Unfortunately when the plaintiff is a ratepayer, the council needs to take reasonable precautions to prevent information gathered for its defence being disclosed.

This means ensuring that any communication shared between the council and its legal advisors / experts stays far away from the public file. It would be prudent for the council officer dealing with the matter to keep a separate file of correspondence relating to the claim or potential claim.

When the council obtains advice on potential claims, it needs to take care to ensure that any advice obtained is privileged. The best practice is to insure that any documents generated are addressed the council's in-house counsel, or to its legal advisers. Similarly, if an expert is instructed, then their report should be addressed to the legal adviser.

Storing documents protected by legal privilege in a place where they could easily be made available to the plaintiff could result in a waiver of that privilege. This could be a potentially fatal blow to the council's defence. Therefore, the best practice is to be proactive in taking steps to ensure that privilege is maintained.

Paul Robertson – associate Heany & Co.

“ There is a limited ability to rely on confidentiality. ”

dominant purpose underlying such communications is to assist the lawyer to conduct or advise on the proceedings.

Privilege and confidentiality

Although communication can be both privileged and confidential this is not always the case.

A confidential communication is a communication which, when shared, there is an express or implied obligation not to disclose it again without the permission from the other party. The LGOIMA recognizes confidentiality as a reason not to disclose a document. However, it is not a conclusive reason. Similarly section 69 of the Evidence Act 2006 does allow a court to direct that confidential information should not be disclosed. However, unlike with claims for privilege, a court is less likely to allow a council to withhold a document on the grounds of confidentiality.

to allow access to information. Once a document that should be privileged is made available pursuant to a LGOIMA request, then this is likely to be considered a waiver of privilege. The waiver is likely to mean that the document can be used against the council in subsequent litigation.

Mr Ivaleaky's request for information

The file note prepared by the inspector - Mrs Inspectaleaky is not a legal adviser, so the council cannot rely upon the defence of solicitor client privilege. The file note will obviously be helpful to the council's legal advisers. For this reason it may be covered by litigation privilege. However, this defence will only be available where the memo was prepared with the dominant purpose of assisting the council's legal adviser to conduct or

TOOVEY EATON & MACDONALD LIMITED

Level 6
44 Victoria Street
PO Box 44
WELLINGTON

Phone: 04 494 2390
Fax: 04 494 2399
Website: www.taxteam.co.nz

THE PRACTICAL SOLUTION TO LOCAL AUTHORITY TAXATION ISSUES

Contact us....

Richard Toovey Tax Director 04 494 2394	Jeff Eaton Tax Director 04 494 2391	Michelle Macdonald Tax Director 04 494 2393	Mike Brunner Senior Tax Manager 04 471 6456	Phil Fisher Senior Tax Manager 04 494 2396	Rochelle Roddick Tax Manager 04 471 6452
---	---	---	---	--	--