

Memo

14 February 2016

TO: Devonport - Takapuna Local Board
FROM: Katherine Anderson, Director Legal and Risk
Phil Wilson, Governance Director

SUBJECT: Legal requirements and options for workshops or briefings outside of meetings and in closed session

1.0 INTRODUCTION

1.1 This memo has been prepared in response to a request from the Devonport-Takapuna Local Board for legal and other relevant advice concerning the use of workshops in closed session.

1.2 At its meeting on 15 December 2016, the board passed the following resolution (following a Notice of Motion moved by Chair Grant Gillon) [NOM - Community Forum, workshop/briefing CP2016/24331]:

That the Devonport-Takapuna Local Board:

- (a) Requests officers urgently provide legal and other relevant advice clarifying the position as to **whether the board can continue to hold workshops in the open**, and requests that the advice be based on legal opinion regarding relevant legislation and any relevant clauses in Standing Orders.
- (b) Requests that the advice sought in resolution (a) above be provided prior to the first business meeting in 2017 of the Devonport-Takapuna Local Board (noted as 21 February 2017), and prior to the board determining its community forum or workshop/briefing meeting timetables or processes.

1.3 Information on decision making and the requirements of the Local Government and Official Information Act 1987 (LGOIMA) is also available on the **Council Governance Manual** (governance.aucklandcouncil.govt.nz) should members wish to enquire further.

2.0 EXECUTIVE SUMMARY

- 2.1 It is orthodox and legally valid to hold workshops with the public excluded.
- 2.2 It is also an option, and as a matter of law not unlawful, to hold workshops with the public able to attend.
- 2.3 Considerations including the principles of openness, transparency, and democratic accountability must be balanced against the requirement for the Council and Local Boards to be able to conduct business efficiently and effectively. The Local Government and Official Information Act considerations, relevant to all decision making when deciding to exclude the public, will be relevant when deciding whether to exclude or hold a particular workshop on an open or closed basis.
- 2.4 We do not recommend a blanket approach to the issue.
- 2.5 Staff will be available to assist the Board when deciding whether it wishes to hold workshops on an open or closed basis, depending on the facts and context. Karen Lyons is happy to discuss in more detail with the Board at its next meeting.
- 2.6 Our full advice and information follows. For ease of reference, the relevant extracts from the Local Government and Official Information Act 1987 (LGOIMA) and the Local Government Act 2002 are attached in the Appendix.

3.0 BACKGROUND

- 3.1 Since 2010 closed workshops have been used at Auckland Council for both the governing body and local boards to complement the formal public decision-making meetings.
- 3.2 Workshops are used to enable discussion between elected members and between elected members and staff on complex and wide ranging topics. They enable questions and the understanding of issues to develop so that elected members can arrive at the public meetings prepared for debate and decision-making.
- 3.3 Workshops have been a useful forum for cross local board collaboration and for joint discussions between the governing body and local board members.
- 3.4 Feedback from elected members is that workshops are effective. They welcome the opportunity to engage informally with each other and staff and feel better prepared for the public decision-making meetings.
- 3.5 At the beginning of the 2016-2019 electoral term all local boards discussed how they would like to conduct their governance business. Local Board Services made recommendations, based on the experience of the first six years of Auckland Council, including a recommendation to continue with closed workshops. All local boards, with the exception of Devonport-Takapuna, favour workshops for the purposes of briefings, questions and informal engagement.

- 3.6 Through the 2016 induction process elected members have been reminded of their obligations to be open and transparent in decision-making. It is clear that closed workshops do not replace the decision-making meetings.
- 3.7 The holding of workshops does not mean that workshops are secret or inconsistent with the principles of transparency and openness. Any perception of predetermination or lack of transparency can be addressed through the proactive release of workshop information (where possible), restating information in subsequent open meetings and keeping records of the workshop.
- 3.8 The Local Government and Official Information and Meetings Act 1987 (**LGOIMA**) does permit (and it is therefore legal) for non-decision making workshops to be held in closed session (without the public present). This is because workshops or other non-decision making meetings have been purposefully excluded from the LGOIMA definition of “meetings”.
- 3.9 However, as a general proposition, Local Boards can legally hold “non-decision making workshops” in open and invite members of the public, media or stakeholders to attend.
- 3.10 Therefore from a legal perspective there is no reason why a local board cannot hold a closed workshop but also no reason why a local board cannot hold an open workshop.
- 3.11 While non-decision making workshops may be in open, there are legitimate reasons for why it is appropriate for items to be considered in a non-public setting and workshops can appropriately provide this forum. In particular, closed consideration may be needed for items which involve confidential, commercially sensitive or private information or privileged legal advice and for the provision of “free and frank” advice and discussion.

4 CAN WORKSHOPS BE OPEN TO THE PUBLIC?

- 4.1 In answer to the specific question posed in the Notice of Motion dated 30 November 2016, Local Boards can legally hold “non-decision making workshops” in open and invite members of the public, media or stakeholders to attend.
- 4.2 However, the Local Government and Official Information and Meetings Act 1987 (LGOIMA) does permit and it is therefore legal for non-decision making workshops to be held in closed session (without the public present). This is because workshops or other non-decision making meetings have been purposefully excluded from the LGOIMA definition of “meetings”¹.
- 4.3 Therefore from a legal perspective there is no reason why a local board cannot hold a closed workshop but also no reason why a local board cannot hold an open workshop.

¹ s45 LGOIMA 1985

- 4.4 If a matter is to be brought to an open workshop, there are legal considerations and requirements that must be thought through including confidentiality, privacy and commercial obligations. Depending on the facts and context it may legally be necessary for it to be discussed in a closed session.
- 4.5 The key matters that must be considered are reflected in sections 6 and 7 of LGOIMA and include:
- (a) Is the matter or issue subject to confidentiality obligations or requirements?
 - (b) Is closed consideration necessary to protect the privacy of natural persons, including deceased persons?
 - (c) Would it unreasonably prejudice the commercial position of council or the person who is the subject of the matter?
 - (d) Does the matter involve active commercial or industrial negotiations?
 - (e) Is consideration in a closed session necessary for the maintenance of effective conduct of public affairs though the free and frank expression of opinions?
 - (f) Would the public conduct of the matter constitute contempt of court or of the House of Representatives?
 - (g) Would it prejudice the maintenance of the law, including the prevention, investigation and detection of offences and the right to a fair trial?
 - (h) Would the public conduct of the matter endanger the safety of any person or result in improper pressure or harassment on members, officers or persons?
 - (i) Would it result in the disclosure of a trade secret?
 - (j) Does the matter involve information subject to legal professional privilege?
 - (k) Are any of the considerations in (a) – (j) outweighed by other considerations which render it desirable in the public interest to have the workshop in open?
- 4.6 There are consequences for breaches of confidentiality or privacy or other statutory or contractual obligations. These may include adverse findings and directions from the Ombudsman, financial penalties and impacts on the council's reputation.

5 RELEVANT CONSIDERATIONS FOR WHETHER WORKSHOPS SHOULD BE OPEN TO THE PUBLIC

- 5.2 As set out above, depending on the facts of the issue to be considered, it is legal for non-decision making workshops to be either open or closed.
- 5.3 When considering whether to adopt a general policy or standard approach to workshops, there are two relevant principles in the legislation that are particularly relevant. These are²:
- (a) Openness, transparency and democratic accountability (set out in sections 14 and 39 of the Local Government Act 2002); and
 - (b) Efficient and effective governance.
- 5.4 Effective public affairs requires free and frank expression of advice and opinions by, between or to elected members and council staff in the course of their duty, and the protection of elected members and council staff from improper pressure or harassment. The introduction and briefing of complex projects and issues that come before council in an informal forum, where questions can be asked and information worked through, also supports a good decision making process.
- 5.5 The importance of this is recognised in LGOIMA, which lists these as grounds for withholding official information requested under LGOIMA, unless the withholding of the requested information is outweighed by other public interest considerations.³
- 5.6 Further, the provisions of LGOIMA and the Standing Orders relating to the maintenance of public order at meetings do not apply to workshops, working parties or briefings, and therefore, the person presiding at one of these forums does not have the ability to require a member of the public to leave if they are disrupting the orderly conduct of the meeting. Accordingly, it may be desirable in some circumstances for elected members to receive information and advice from staff in a closed workshop or briefing rather than in a forum that is open to the public.
- 5.7 The Ombudsman has provided the following useful guidance around the use of workshops:⁴

² In particular, section 14(1)(a)(i) of the LGA states that “*in performing its role...a local authority should conduct its business in an open, transparent, and democratically accountable manner.*” Section 39(1)(b) of the LGA states that “*a local authority should ensure that the governance structures and processes are effective, open, and transparent.*”

³ See LGOIMA s 7(2)(f).

⁴ Office of the Ombudsman *The LGOIMA for local government agencies: A guide to processing requests and conducting meetings* (June 2016) at page 36.

There is nothing to prevent agencies holding ‘workshops’ on an issue. However, the meetings requirements in the LGOIMA cannot be avoided just by calling what is really a ‘meeting’ a ‘workshop’. Decisions and resolutions cannot lawfully be made outside the context of a properly constituted meeting.

Workshop participants should be careful to ensure they do not take any actions where compliance with the meetings requirements of the LGOIMA becomes necessary. Agencies should also be aware that holding workshops can create a perception that an issue has been predetermined when it is subsequently brought to an open meeting for deliberation and decision.

People have high expectations that local government agencies will conduct their business in an open and transparent manner, and they are likely to be suspicious and unhappy if agencies make excessive use of closed workshop to discuss issues.

Agencies should ensure accurate records are kept of workshops. This will help them to comply with their Public Records Act 2005 requirement [under s 17(1) of the Public Records Act 2005] to create and maintain full and accurate records of their affairs, in accordance with normal, prudent business practice. It will also provide helpful evidence if there is later a dispute about whether a workshop was in fact a meeting.

Agencies should also be aware that information generated in, or presented to, a workshop, may be subject to a request under the LGOIMA.

- 5.8 Any perception of lack of transparency or that an issue has been pre-determined when it is subsequently brought to an open meeting for deliberation and discussion, can be addressed by:
- (a) Only considering matters in a workshop where it is appropriate to do so; and
 - (b) Ensuring appropriate separation between the “workshop forum” at which local board members may be receiving and “workshopping” information and the decision making meetings; and
 - (c) Where appropriate resolving to make publicly available information provided in the workshop or briefing forum and repeat and make this information available in the open deliberation and decision making meetings; and
 - (d) Balancing the number and frequency of non-public workshops or briefings with open community forums and workshops.

Appendix A

Relevant Legislation and Standing Orders

1. Local Government Official Information and Meetings Act 1987

1.1 'Meeting' is defined in s 45 of the Local Government Official Information and Meetings Act 1987 (**LGOIMA**) as:

(a) any annual, biennial, triennial, ordinary, or extraordinary meeting of a local authority; and

(b) any meeting of—

(i) any committee or standing committee or special committee or subcommittee of a local authority; and

(ii) any meeting of any joint standing committee or joint special committee appointed by 2 or more local authorities, and any subcommittee of any such committee—

if—

(iii) any function, duty, or power is conferred or imposed on that committee or subcommittee by any enactment; or

(iv) that committee or subcommittee is empowered to exercise or perform, on behalf of any local authority or any committee of any local authority, any function, duty, or power conferred or imposed on any local authority, or on any committee of any local authority, by or under any enactment or bylaw

1.2 Part 7 of LGOIMA sets out the requirements that apply to local authority meetings (as defined in s 45 of LGOIMA, set out above), including that:

- Meetings must be publicly notified;⁵
- The agendas and reports related to a meeting must be publicly available (subject to a few exceptions);⁶
- Every meeting must be open to the public⁷, except where the public is duly excluded following a resolution of the meeting⁸;
- The person presiding at a meeting may require a member of the public to leave the meeting, if the person presiding believes on reasonable grounds

⁵ LGOIMA s 45A.

⁶ LGOIMA s 46A.

⁷ LGOIMA s 47.

⁸ LGOIMA s 48.

that the behaviour of the member of the public is likely to prejudice or to continue to prejudice the orderly conduct of the meeting if they remain in the meeting;⁹ and

- The minutes of every open meeting must be publicly available.¹⁰

2. DEFINITIONS OF ‘MEETING’ AND ‘WORKSHOP, WORKING PARTY OR BRIEFING’

2.1 Section 45(2) of LGOIMA makes it clear that a meeting at which no resolutions or decisions are made (i.e. a workshop, a working party or a briefing) is not a meeting for the purposes of Part 7 of LGOIMA.

2.2 Although the provisions in Part 7 of LGOIMA do not apply to workshops, working parties and briefings, information presented to, or generated in such a forum is “official information” as defined in section 2 of LGOIMA, and may therefore be subject to a request for information under Part 2 of LGOIMA.

2.3 The difference between a ‘meeting’ and a ‘workshop, working party or briefing’ is also explained in the Local Board Standing Orders (set by the Auckland Transition Agency on 27 October 2010) (**Standing Orders**), clause 1.5 of which contains the following definitions:

- **‘Meeting’** is defined as “any first or ordinary or extraordinary meeting of the Local Board; [and] any meeting of any committee, standing committee, joint committee, special committee or subcommittee of the Local Board”.
- **‘Workshop, working party or briefing’** is defined as “an informal forum held primarily for information and/or discussion purposes, as the case may be, and at which no resolutions or decisions are made.

3. LOCAL BOARD STANDING ORDERS

3.1 The Standing Orders apply to the proceedings of all local board meetings and any committees of a local board, including public excluded sessions. However, only clauses 1.4.2 and 2.15 of the Standing Orders apply to workshops, working parties and briefings.¹¹

3.2 In relation to workshops, working parties and briefings, clause 1.4.2 of the Standing Orders provides:

⁹ LGOIMA s 50.

¹⁰ LGOIMA s 51.

¹¹ Standing Orders clause 1.4.2.

Briefings:

A briefing shall be convened by written notice from the Chief Executive or his or her nominee, addressed to every member to attend, expressly:

- Convening the meeting as a briefing.
- Advising the date, time and place of the briefing.
- Confirming the briefing is not to reach any decision or pass or make any resolution but is primarily for the provision of information and discussion.

Workshop or Working Party

A workshop or working party shall be convened by written notice from the Chief Executive [or his or her nominee], or the chairperson of the Local Board.

The notice or resolution referred to above shall expressly:

- Convene the meeting as a workshop or working party.
- Advise the date, time and place of the workshop or working party.
- Confirm that the workshop or working party is not to reach any decision or consider, pass or make any resolution, but is solely for the provision of information and discussion.

Proceedings of a workshop, working party or briefing shall record the following:

- i. The names of members attending, and
- ii. A statement summarising the nature of the information received.

In all other respects, the conduct of a workshop, working party or briefing shall be determined by the presiding member or facilitator of the workshop.

3.3 Clause 2.15 of the Standing Orders sets out the process requirements for local board workshops, including how workshops are called¹², what notice must be given¹³, who will chair the workshop¹⁴, and what record of the workshop must be kept¹⁵.

3.4 Clause 2.15.5 of the Standing Orders reiterates that Part 7 of the LGOIMA does not apply to workshops of Local Boards or its committees as these are held solely for information and discussion purposes with no ability for any resolutions or decisions to be made.

¹² Standing Orders, clause 2.15.1.

¹³ Standing Orders, clause 2.15.2.

¹⁴ Standing Orders, clause 2.15.3.

¹⁵ Standing Orders, clause 2.15.4.