



## 23. Public Excluded Davison - Information Request

(Clr Dew) (Report prepared by A P Quirk)

1. This item refers to a request from a Mr M Davison for release of an engineering report completed on behalf of Council by Mr C C Davidson related to a land slip that occurred in November 1994.
2. The issues involved are considered far more serious than the previous item since in this present case it is considered that release may prejudice Council's position in the litigation that Mr Davison has indicated he is to commence relating to the damage.
3. The view of the Ombudsman is that the initial report commissioned by Council from Mr C C Davidson was prepared on the basis that Mr Davidson was in no doubt from the first that litigation was 'in prospect'.
4. The Ombudsman's view is that such a stance indicates that litigation at that stage was no more than a possibility.
5. The Ombudsman's view considers that privilege requires a definite prospect of litigation not just a threat.
6. As a result he has recommended pursuant to Section 30(1)(d) of the Local Government Official Information and Meetings Act that the Marlborough District Council make available to Mr M J H Davison the Engineer's report prepared by Mr C C Davidson dated 29 November 1994.
7. It is the view of Council officers and the District Solicitor that the Ombudsman has adopted too narrow a position.
8. Right from the outset there was an immediate or almost immediate indication by Mr Davison of an intention to litigate in the event of his demands from Council not being met.
9. Mr Davison met with Mr Penington almost immediately after the slippage had occurred in November 1994 and at that stage Mr Davison was threatening proceedings.
10. Council officers therefore were in absolutely no doubt that from day one litigation was likely or inevitable.
11. The concern that Council officers have, confirmed by the District Solicitor, is that if reports of this kind are to be made available to parties in litigation with Council then Council is placed at an impossible disadvantage since plainly any reports obtained by the other party in these circumstances would never be disclosed and therefore the rules do not impact evenly.
12. In addition it is a condition of Council's policy of insurance that no disclosures of any kind which could prejudice the position of the insurers be made.
13. It is our view that the release of the report would be prejudicial and this is confirmed verbally at this point by Council's insurers.
14. In these circumstances should Council proceed with the release of the report then it places its insurance in jeopardy and this we suggest is an untenable position for Council to place itself in.
15. Clearly the matter is going to fall within the jurisdiction of the Courts and the view held by the District Solicitor is that it is there that issues of discovery should be addressed and dealt with.
16. The provision of the Local Government Official Information and Meetings Act 1987 is not supportive of Council should it decide not to accept the recommendation.

17. Section 32 provides that Council must within 21 days after the date on which the recommendation is made, abide by the decision unless it has within the same time period by resolution of the Council, decided otherwise and recorded that decision in writing.
18. The process then is that if a decision is made not to adopt the recommendation in terms of Section 33 of the Act, the decision must be published in the gazette and also publicly notified within the Marlborough District.
19. The decision must set out the reasons for the decision, the grounds in support of those reasons and the source and purport of any advice on which the decision is based.
20. There is the added complication that in terms of Section 34 of the Act, the person who made the request, in this case Mr M Davison may apply to the High Court for a review of the Council decision.
21. The difficulty is that unless the High Court is satisfied that an application made by say Mr Davison in this case has not been reasonably or properly brought, it shall in determining the application and irrespective of the result of the application, order that the costs of the applicant on a Solicitor and client basis shall be paid by the Council that made the decision.

#### **RECOMMENDED**

**That Council pursuant to Section 32(1) of the Local Government Official Information and Meetings Act resolved not to accept the recommendation of the Chief Ombudsman that would require release of the C C Davidson report of 29 November 1994.**

**The reasons for that decision are that Council considers that the report is privileged.**

**It is considered that if reports of this kind are to be made available to parties in litigation with Council then Council is placed in an impossible disadvantage since plainly any report obtained by the other party in these circumstances would never be disclosed and therefore the rules do not impact evenly.**

**It is also vital that Council not place its insurance in jeopardy given that it is a condition of Council's policy of insurance that no disclosures of any kind which could prejudice the position of the insurers being made. The view held is that the release of the report required would be prejudicial.**

**The advice sought in relation to this decision has been based on verbal comments obtained by the District Solicitors and the Council insurers.**