

15 July 2015

To

Tim Power
Senior Legal Counsel
Kāpiti Coast District Council

From

Peter Chemis
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By Email

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Dear Tim

Advice on Code of Conduct process

1. You have asked for our advice on a conflicts of interest question that relates to the Council's process for managing complaints under the Code of Conduct. Specifically, your question is:

"whether or not all Councillors (including Councillors who are the subject of the complaint) should participate and vote on any resolutions contained in reports into Code of Conduct complaints".

2. We set out the background and our advice below.

Background

3. We previously assisted you to investigate and respond to a Code of Conduct complaint. In the context of that complaint, a query arose about whether it was appropriate for the Councillor who was the subject of the complaint to participate in the Council's discussions about the complaint and to vote on the Council's resolutions.
4. At the time we reached the view that it was acceptable for that particular Councillor to take part in the Council's discussions and to vote. We didn't provide formal advice because the matter arose and was dealt with during the meeting. However, our conclusion was broadly based on the fact that the Code of Conduct is the Council's own document and that all Councillors should therefore be afforded the opportunity to express their views on whether certain conduct amounts to a breach of that Code. We were also of the view that when dealing with Code of Conduct issues the Council was not subject to the more stringent procedural standards that would apply if the Council was acting in a more judicial or quasi-judicial capacity.

Your current question

5. You recently submitted a paper which sets out a recommended process for Code of Conduct complaints. The paper is due to be discussed in the Council's meeting tomorrow.

6. In the paper you addressed the issue discussed above. In particular you stated (at paragraphs 26 and 27):

Voting

Another issue that has arisen is whether or not all Councillors (including Councillors who are the subject of the complaint) should participate and vote on any resolutions contained in reports into Code of Conduct complaints. The Code of Conduct provides guidance to all Councillors on standards of behaviour that are expected of members. The Code of Conduct is "owned" by all Councillors and to that extent all Councillors will have their own views on what constitutes acceptable and unacceptable behaviour. It is important that all Councillors have the opportunity to express their view on standards of behaviour and they should not feel the need to abstain from voting on a resolution because of a perceived conflict of interest.

Ultimately each individual Councillor will need to reach a view as to whether they wish to participate and vote on a resolution regarding a Code of Conduct complaint where they are the subject of the complaint, or the complainant.

7. These paragraphs have given rise to debate. You have received feedback from a number of individuals who are of the view that a Councillor who is the subject of a complaint should not participate in discussions or voting, either because they have an actual conflict of interest or because there is a risk of perceived bias. Given the debate on this point, you have asked for our advice.

Discussion

8. Your specific question is: "*whether or not all Councillors (including Councillors who are the subject of the complaint) should participate and vote on any resolutions contained in reports into Code of Conduct complaints*". You also asked about conflict and bias issues when Councillors are otherwise involved in complaints, including when a Councillor is the complainant or when they are involved in a less direct sense (such as being a 'witness of fact' or being on the investigation committee).
9. This is a complex issue. There is no blanket rule that can be applied. To the contrary, whether or not a Councillor's involvement in a complaint gives rise to a conflict of interest is a context-specific question that will depend on all the facts at hand.
10. At the highest level, what each Councillor needs to ask is whether their involvement in the complaint means that "*a fair-minded lay observer might reasonably apprehend that [the Councillor] might not bring an impartial mind to the resolution of the question the [Council] is required to decide*".¹ In simple terms, if the answer to this question is 'yes' then the Councillor should refrain from discussing and voting on matters relating to the complaint. Naturally however the application of this question in each specific situation will not be straight forward. We therefore set out some general principles that may assist below:

¹ See *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35 (SC).

- (a) First, simply based on the usual application of the law on conflicts of interests and bias, we agree with the feedback that you have received. That is, in situations when a Councillor is either the complainant or the subject of a complaint, there is a strong argument that the Councillor has a conflict of interest or at least, that they may be reasonably perceived to be biased.
- (b) We also note that the Office of the Controller and Auditor-General's Guidance suggests that members should generally take a cautious approach in potential conflict situations: "*to avoid risk to the authority's decision ... the safest advice is if in doubt, stay out*".² This more cautious approach was also reflected in a relatively recent Ombudsman decision, where the Ombudsman concluded that a Mayor and Deputy Mayor should not have participated in the Council's decisions relating to a Code of Conduct complaint because there was, in that particular case, a reasonable apprehension of bias on their part.³
- (c) However, although a cautious approach may often be recommended, there is a very real possibility that taking too strict an approach could give rise to practical difficulties that will ultimately frustrate the Code of Conduct process. For example, if a complaint was made about a large number of Councillors and all of those Councillors excused themselves from the decision making process, this could result in the Council having insufficient members to make any decision. It is even possible to conceive of circumstances where the process could be manipulated, such that there is no member able to vote at all. Clearly, such an outcome would be impractical and untenable.
- (d) Further, when the Council is making decisions about a Code of Conduct complaint, it is not acting in a judicial or quasi-judicial capacity. A less exacting approach can therefore be justified when making decisions about conflicts of interest and possible bias.
- (e) There is also at least an argument that in a situation such as this, where a non-judicial decision is being made by a 'multi-member decision maker' (such as the Council), then the question of whether the Council's overall decision is 'tainted' by one member's bias depends on whether that member had a casting vote.⁴ Although this particular principal is not established in New Zealand law, it is certainly accepted that the decision making process for local authorities is quite different in nature from more judicial decision making bodies. As noted in the Office of the Controller and Auditor-General's Guidance:

"the democratic status of a local authority, the representative nature of the members of a local authority's governing body, and the practice where decisions are often made by a committee of members by majority vote must be recognised when applying general principles of administrative law about bias and fairness in the decision-making process. Some care must be taken when drawing principles from cases involving courts and

² Refer to the 'Good Practice Guide – Guidance for members of local authorities about the Local Authorities (Members' Interests) Act 1968 at part 5, in particular 5.34. This more cautious approach is also reflected in the Kāpiti Coast District Council's own Code of Conduct (at 7.1).

³ See *Opinion ref number 333185 (Dame Wakem, October 2014)*.

⁴ For discussion of this notion in the Australian context see *McGovern v Ku-Ring-Gai Council* [2008] NSWCA 209.

judges, or other public bodies and officials that are required to adopt a court-like procedure".

Similar statements were also made in the recent Ombudsman's decision mentioned above, where the Ombudsman said:

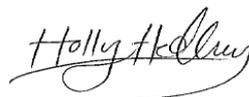
"The fact that both [the mayor] and [the deputy mayor] may have robustly criticised [the Councillor's] views on Council policies and actions, without more, does not establish in terms of the Saxmere case a basis for an objective observer concluding they could be perceived to be biased. It is a fact of life that politicians from time to time clash with one another – such clashes do not mean they should be perceived to be biased against those they have criticised."

- (f) Further, as mentioned above, the Code of Conduct is the Council's own document. It sets the standards by which Councillors are expected to behave. Accordingly, it is important that all Councillors are afforded an opportunity to express their views on whether certain conduct amounts to a breach of that Code. Equally, as a matter of natural justice, it is important that those Councillors who are the subject of a complaint have a full opportunity to present their views and to hear and understand the Council's reasoning (both in terms of the substance of the complaint and also in regard to the 'sanction' that should be applied).
11. Overall, as demonstrated by the various principals set out above, this issue is far from clear cut. It is not possible to articulate a blanket rule. Instead, as is often the case with conflicts of interest questions, a judgement call will be required.
12. The greatest difficulty is likely to arise in cases involving a large number of Councillors. In these types of cases, the Council could decide that it is necessary to treat each 'complaint' separately, so that each Councillor can withdraw from the aspect of the complaint that relates to them but continue to participate in the discussions and voting on others. However, this type of approach will not always be workable. Ultimately, it may be that the Councillors involved consider the conflicts issue but decide to continue to participate in the discussions and the vote. The right approach will depend on particular facts at hand. The key point is that a fair, flexible and dextrous approach is required.
13. We trust that this high level advice assists as a starting point for your meeting tomorrow.

Yours sincerely



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