

16 March 2020

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**ATTENTION:** Nick Swallow

## CODE OF CONDUCT

We refer to your instructions of 12 March 2020 seeking our advice that a Code of Conduct matter about the conduct of the Mayor be considered by Council with the public excluded.

### Background / your questions

1. On 8 March 2020 Cr Hollis sent a complaint to the Chief Executive alleging that the Mayor had breached the Council's Code of Conduct (**the Code**) in respect of remarks directed to him during the Executive Briefing held on 5 March 2020. The Chief Executive responded promptly to the complaint, informing the parties of his actions, and appointing Campbell Gourlay as an independent investigator as provided for at Step 1 of the *Process for the determination and investigation of complaints* in the Code. We understand that the investigation has found there to have been a material breach of the Code (Step 4 of that process), and that as a consequence the investigator's report will be referred to the Council<sup>1</sup>, "which will meet to consider the findings" and determine what if any penalty will be imposed or other action taken<sup>2</sup>.
2. The complaint involves an allegation that the Mayor directed some quite robust language at Cr Hollis during the Executive Briefing that constitutes bullying behaviour in breach of the Relations provisions in the Code. A query has been raised whether the nature of the interaction is such that the Council consideration of the matter ought properly to be undertaken with the public excluded. You have sought our advice as to whether the Council can exclude the public from its consideration of this matter?

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<sup>1</sup> The Code also provides for the possibility of such a complaint being referred to a Code of Conduct Committee established at the start of a triennium, but we note from Council's website that there is no such Committee at the present time.

<sup>2</sup> As provided for in Step 4.

3. We note for the avoidance of doubt that it is not part of our brief to consider the merits of the complaint.

### **The Code**

4. Where a breach of the Code is found to be material Step 5 of the *Process for the determination and investigation of complaints* states, to the extent relevant:

Depending upon the nature of the complaint and alleged breach the investigator's report may be considered by the full council, excluding the complainant, respondent and any other 'interested' members, or a committee established for that purpose.

...

The council or committee **will consider the chief executive's report in open meeting, except where the alleged breach concerns matters that justify the exclusion of the public, such as the misuse of confidential information or a matter that would otherwise be exempt from public disclosure under s.48 of the LOGOIMA**, in which case it will be a closed meeting.

5. The Code requires the report on the investigation to be considered in "open meeting" except in the limited circumstances described. Those circumstances are that the breach concerns matters "that justify the exclusion of the public". This is apparently very broad, but it is limited by the words "such as the misuse of confidential information or a matter that would otherwise be exempt from public disclosure under section 48 of the Local Government Official Information and Meetings Act 1987 (LGOIMA)". We have therefore to consider whether circumstances exist that would in this case justify the exclusion of the public.
6. Neither of the two 'examples' stated above apply in our view. The alleged breach of the code does not concern the misuse of confidential information. It concerns allegedly bullying comments. No question of confidentiality applies. We have been invited to consider the nature of the Executive Briefing at which the offending comments were made. It is quite clear to us, from the information made available, that the Briefing was not a meeting to which Part 7 of LGOIMA applies by virtue of the provision in section 45(2) of that Act which states that "any meeting of a local authority or of any committee or subcommittee of a local authority, at which no resolutions or decisions are made is not a meeting for the purposes of this Part [7]". The Briefing was not held in public, nor was there any requirement for it to be held in public. It was a private meeting, to the extent to which it was limited to invited Council officers and members. It may be that some of the information shared and discussed was confidential, but there is no suggestion that the comments complained of concerned confidential information.
7. We have also considered whether the complaint concerns a matter that would be exempt from public disclosure under section 48 LGOIMA. The relevant provisions of that section read:
  - (1) Subject to subsection (3), a local authority may by resolution exclude the public from the whole or any part of the proceedings of any meeting only on 1 or more of the following grounds:
    - (a) that the public conduct of the whole or the relevant part of the proceedings of the meeting would be likely to result in the disclosure of information for which good reason for withholding would exist,—

- (i) where the local authority is named or specified in Schedule 1, under section 6 or section 7 (except section 7(2)(f)(i)):
- ...
- (b) that the public conduct of the whole or the relevant part of the proceedings of the meeting would be likely to result in the disclosure of information the public disclosure of which would—
  - (i) be contrary to the provisions of a specified enactment; or
  - (ii) constitute contempt of court or of the House of Representatives:
- (c) that the purpose of the whole or the relevant part of the proceedings of the meeting is to consider a recommendation made to that local authority by an Ombudsman under section 30(1) or section 38(3) of this Act (in the case of a local authority named or specified in Schedule 1) ...
- (d) that the exclusion of the public from the whole or the relevant part of the proceedings of the meeting is necessary to enable the local authority to deliberate in private on its decision or recommendation in any proceedings to which this paragraph applies.
- (2) Paragraph (d) of subsection (1) applies to—
  - (a) any proceedings before a local authority where—
    - (i) a right of appeal lies to any court or tribunal against the final decision of the local authority in those proceedings; or
    - (ii) the local authority is required, by any enactment, to make a recommendation in respect of the matter that is the subject of those proceedings; and
  - (b) *[Repealed]*
  - (c) any proceedings of a local authority in relation to any application or objection under the Marine Farming Act 1971.

8. None of the circumstances in section 48(1)(b), (c) or (d) or (2) are applicable. That leaves us to consider whether, in relation to section 48(1)(a)(i), the public consideration of the investigation report would lead to the disclosure of information for which conclusive reasons for withholding exist under section 6, or good reason for withholding exists under section 7 LGOIMA. There are no grounds for withholding under section 6. Section 7 requires more consideration, but it is immediately apparent that none of the good reasons for withholding pursuant to section 7(2)(b)-(e) or (g)-(j) apply.
9. The ground for withholding in section 7(2)(f)(i) involving the “free and frank expression of opinions” can also be dismissed. Although this is a very common ground for withholding information pursuant to an official information request, it is specifically excluded from consideration under section 48(1)(a)(i) – see boldened words in the quoted section above. This is because the debate in Council meetings is always, by its very nature, a free and frank expression of opinions. This exception, if applicable as a ground for exclusion of the public, would allow almost any Council or committee meeting to be conducted with the public excluded. The application of section 7(2)(f)(ii) is also excluded because the withholding of the information is unlikely to be required to protect the effective conduct of public affairs by protecting any persons from improper pressure or harassment.
10. We have also considered whether section 7(2)(a) might apply. That provision says that good reason for withholding information may be necessary to protect the privacy of natural persons. In this case we are considering the privacy of the Mayor, since Cr Hollis can be assumed to have waived any privacy requirement for himself by submitting a complaint that the Code requires be deliberated upon in public. Section 7(2)(a) LGOIMA provides good reason for withholding information about natural persons if, and only if:

- the withholding of the information is necessary to *"protect the privacy of natural persons, including that of deceased natural persons"*; and
- this interest is not *"outweighed by other considerations which render it desirable, in the public interest, to make that information available"*.

11. We do not think section 7(2)(a) applies in this case. The information that could be made public is not the Mayor's personal information. Rather it is likely to reveal comments he made in front of all those present at the Executive Briefing, which is a discussion forum to which Council executive officers and elected members are invited. Those comments did not concern any aspect of his personal affairs. Rather they were made as part of an exchange with another elected member. The Mayor is aware that his comments and conduct, like those of other elected members of Council, are subject to the Code, and by extension that any complaint made under the Code will be considered in a public meeting unless extraordinary circumstances apply.

**Any other matters that would justify the exclusion of the public?**

12. It is useful to note that the exact wording of the exception to a public process in Step 5 is, "where the alleged breach concerns matters the justify the exclusion of the public". The nature of the breach is that comments were made by the Mayor that were allegedly in breach of the section of the Code dealing with relationships and behaviours. We are unable to find any matter concerning the alleged breach that would justify the exclusion of the public. It seems to us that the purpose of this exception is to protect the release of information that could be damaging to the interests of Council, or potentially so deeply damaging to other parties that at least the deliberative process ought to be undertaken without the public being present. But the Council has, in adopting the Code, expressed a clear preference that such deliberations be part of a public process. That being the case the possible embarrassment to one or other of the parties cannot be sufficient reason to exclude the public. Similarly, the mere fact that the report is likely to disclose discord amongst elected members is not enough reason to exclude the public since an element of discord is an inherent part of the complaint process.

**Conclusion**

13. For the reasons set out above we have concluded that there are no grounds for the exclusion of the public from the meeting at which the complaint by Cr Hollis is considered by Council.

We would be happy to discuss any of the issues raised at your convenience.

Yours faithfully  
**BROOKFIELDS**



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