

18 March 2020

By Email: Nick.Swallow@tauranga.govt.nz

Tauranga City Council
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ATTENTION: Nick Swallow

CODE OF CONDUCT

We refer to our letter of 16 March 2020 concerning the Code of Conduct (**Code**) by Cr Hollis, and to the additional questions in your two emails of the same date.

Background / your questions

1. Cr Hollis has made a complaint about the conduct of the Mayor at an Executive Briefing held on 5 March 2020. We do not need to reproduce the background to this matter, which is covered in our letter of 16 March. That letter addressed whether or not the Council consideration of the independent report on the complaint ought to be in a meeting with the public excluded pursuant to section 48 of the Local Government Official Information and Meetings Act 1987 (**LGOIMA**), and we concluded that the report should be considered in a public meeting in accordance with the Code.
2. You have asked us to consider the following additional questions that relate to the same complaint:
 - Is it permissible to meet beforehand to discuss the matter?
 - Can the Mayor be suspended from committees or other bodies given his role as mayor?
 - If left with an even number of councillors to determine the matter, what should happen in the event of an even split?
 - Should Cr Kiddle participate in consideration of the report on the complaint?

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Is it permissible to meet beforehand to discuss the matter?

3. We would consider this extremely inappropriate. Given that the stated forum for consideration of the investigation report is the Council or a Code of Conduct Committee, and that the member must be given an opportunity to “appear and speak in their own defence”¹, we do not see what would be achieved by such a meeting. The Code does not allow for any preliminary meeting in the sense of a meeting provided for in Part 7 of LGOIMA (i.e. a meeting where any resolution or decision is made), and the process itself is clearly described in the Code itself and so not subject to debate. Nor is there any need for a workshop or other informal meeting to familiarise Councillors with the issues, since these are clearly laid out in the complaint, the Code and the investigator’s report. Any such meeting, whether formal or informal, is likely to give rise to a perception of predetermination and to expose the outcome of the process to judicial review.
4. If there are uncertainties about the correct procedure to be followed, we would suggest a briefing note might be prepared for Councillors and circulated beforehand if necessary. This would allow any questions arising to be addressed directly. Our concern about doing this in some kind of informal meeting is that it could all too easily morph to a debate on the contents and requirements of the Code which would be inappropriate during the course of a complaint process, or worse still on the merits of the complaint itself.
5. Having said this, we recognise that there is nothing that can be done to prevent Councillors discussing the complaint informally and independently. The process they are embarking upon is one where the principles of natural justice – fairness, lack of predetermination, the right to a fair hearing – are applicable. In short, they must consider the complaint, the investigator’s report, and any defence presented before drawing any conclusions in order to ensure the process is not procedurally flawed.

Can the Mayor be suspended from committees or other bodies given his role as mayor?

6. The Code says that in the case of material breaches the Council may require a number of censures to be applied, including “suspension from committees or other bodies”². Where the member concerned is the Mayor, this creates a difficulty. Pursuant to section 41A(5) of the Local Government Act 2002 (LGA):

A mayor is a member of each committee of a territorial authority.

7. A local authority is obliged by clause 15 of Schedule 7 LGA to adopt a code of conduct for its members, and although it is common for such documents to include provision for actions that can be taken when there is a breach, there is no statutory or regulatory power to impose a penalty or censure. The penalties and censures set out in the Code are no more than an agreed set of provisions that the elected members have agreed may be an appropriate response to its breach. Those provisions cannot overrule a direct statutory right. Thus, the right of the Mayor to membership of each one of Council committees, cannot be suspended pursuant to a complaint under the Code.

¹ Code at *Step 5: Process for considering the investigator’s report*

² *Ibid*

If left with an even number of councillors to determine the matter, what should happen in the event of an even split?

8. Our understanding of Step 5 of the *Process for considering the investigator's report* is to consider the findings and determine whether a penalty, or some other form of action, will be imposed. That being the case, and given the possibility that there will be an even number of members considering the matter once interested parties abstain from that process, there is potential for an even split as to the outcome/s. Other than voting systems for certain appointments³ the method of voting at Council and committee meetings is set out in clause 24 Sch 7 LGA. Clause 24 reads:

- (1) The acts of a local authority must be done, and the questions before the local authority must be decided, at a meeting by—
 - (a) vote; and
 - (b) **the majority of members that are present and voting.**
- (2) For the purposes of subsection (1), **the mayor or chairperson or other person presiding at the meeting—**
 - (a) has a deliberative vote; and
 - (b) **in the case of an equality of votes, does not have a casting vote (and therefore the act or question is defeated and the status quo is preserved).**
- (3) An act or question coming before the local authority must be done or decided by open voting.
- (4) **Subsections (1) and (2) apply unless—**
 - (a) this Act provides otherwise; or
 - (b) **the standing orders of the local authority expressly provide otherwise.**

[Emphasis added.]

9. In the case of a tied vote there would be no 'majority' as provided for in clause 24(1). Although the default position in clause 24(2)(b) is that the person presiding at the meeting (in this case it will be the Deputy Mayor) does not have a casting vote, the Council has adopted in its standing orders an express provision for a casting vote as permitted by clause 24(4)(b). It is not, however, obligatory for the casting vote to be used. If there is an equality of votes, and the Deputy Mayor were to decline to exercise the casting vote, the situation would be as set out in parentheses in clause 24(2)(b), i.e. the act or question is defeated, and the status quo is preserved. In the case of a decision whether to accept the results of the investigator's report, this would effectively mean that the report was not accepted. This is not the same as saying the findings are refuted, but rather that Council will take no action on the matter. If this situation occurs, the question of censure or penalties does not arise.
10. In other words, it is possible for the person presiding at the meeting to decline to utilise the casting vote, but the person in this position should be aware that the outcome of doing so will still determine the Council's position on the complaint. They should also perhaps consider that their action or inaction will be in the public domain and open to criticism whichever course they determine is appropriate.

Should Cr Kiddle participate in consideration of the report on the complaint?

11. The basic premise, emphasised when I spoke to your newly elected Councillors, is that a decision-maker must come to the table with an open mind. There must be no actual pre-determination or bias, and no perception of pre-determination or bias. The risk, once

³ Clause 25 Sch 7 LGA.

again, is that the outcome of Council's decision-making could be at risk of judicial review by the High Court. In this instance Cr Kiddle is not the complainant. She was, however, named by Cr Hollis in his complaint as the joint target of the comments said to have been made by the Mayor that are the subject of complaint. It is not clear what, if any, position Cr Kiddle has adopted in respect of the complaint. We note that the independent investigator was invited to interview Cr Kiddle as part of the investigation and presumably did so.

12. The Code states:

Members with an interest in the proceedings, including the complainant and the respondent, may not take part in these proceedings.⁴

13. Cr Kiddle is neither the complainant nor the respondent, but it is difficult not to conclude that she has an interest in the proceedings. She is specifically named in the complaint as a person to whom the allegedly offending comments were directed, and she has directly participated in the investigation process on that basis. Whether she supports Cr Hollis' complaint or not, she is certain to have formed a view on the matter based on her involvement, and thus is unlikely to be able to come to the proceedings with an open mind. Whereas in a potential conflict of interest situation the member must always be allowed to make up their own mind whether to declare an interest and abstain from participation in a debate or voting, the situation is somewhat different in this case because the Code specifies that no person with an interest in the proceedings may participate.

14. We are of the view that Cr Kiddle's involvement in the subject matter of the complaint and the investigative process is such that she is more likely than not to have an interest in the proceedings that ought to preclude her from participation on the consideration of the investigator's report. We also note, that the fact that she has had an opportunity to provide input into that report weighs against any suggestion that she is disadvantaged by being excluded from such participation.

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

Yours faithfully
BROOKFIELDS



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⁴ Step 5 Process for considering the investigators report