

# Complaint about Council's investigation into a councillor's alleged breaches of its Code of Conduct

## Chief Ombudsman's opinion

<b>Legislation:</b>	Ombudsmen Act 1975, ss 13, 22 (see appendix for full text)
<b>Agency:</b>	Horowhenua District Council
<b>Ombudsman:</b>	Dame Beverley Wakem DNZM, CBE
<b>Reference number:</b>	333185
<b>Date:</b>	October 2014

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## Summary

The complainant, Ms Anne Hunt, was a Horowhenua District Councillor. The Council resolved to accept the findings of an investigation by its Code of Conduct Committee (the Committee) that Ms Hunt had breached the Council’s Code of Conduct (the Code). It then censured Ms Hunt and excluded her from all Council subcommittees. I have formed the opinion that two members of the Code of Conduct Committee were affected by a perception of bias and, for that reason, should have disqualified themselves from participating in the Committee’s investigation of the alleged breaches of the Code by Ms Hunt. Their failure to do so was unreasonable in terms of the Ombudsmen Act.

## Ombudsman’s role

1. Under section 13(1) of the Ombudsmen Act (OA), I have the authority to investigate the administrative acts, decisions, omissions and recommendations of the Horowhenua District Council. (I am unable to investigate full decisions of the Council.)
2. My role is to consider the administrative conduct of councils, and to form an independent opinion on whether that conduct was fair and reasonable (section 22(1) and (2) of the OA refer).
3. The relevant text of these statutory provisions is set out in the [Appendix](#).
4. My investigation is not an appeal process. I would not generally substitute my judgment for that of the decision-maker. Rather, I consider the substance of the act or decision and the procedure followed by the Council’s staff, and then form an opinion as to whether the act or decision was properly arrived at and was one that could be reasonably made.

## Background

5. The complainant, Ms Anne Hunt, was a Horowhenua District Councillor in 2011 and 2012 when the events forming the background to her complaint to this Office are said to have occurred. The Council’s then Chief Executive, Mr David Ward, received three complaints alleging Ms Hunt had breached the Council’s Code of Conduct. The thrust of these complaints was:
  - a. The unauthorised provision to [A] of information relating to ‘the Pot’, being information which it is alleged that Ms Hunt received in the knowledge that it was

- part of material discussed in-committee by the Council (complaint one). ('The Pot' is the description local people give to Lake Horowhenua and nearby land.)
- b. The unauthorised disclosure to [A] of the in-committee agenda for the Council meeting held on 4 May 2011 which it was alleged she provided to [A] in a sealed envelope marked 'confidential' (complaint two).
  - c. The unauthorised provision of information to [A] relating to an in-committee Council meeting held on 5 October 2011, that is, the disclosure by Ms Hunt to [A] of the fact that the Council was considering complaints against her under the Code (complaint three).
6. The Council resolved at a meeting held on 5 October 2011 (with the public excluded) to refer complaints one and two to the Council's Code of Conduct Committee (also called the Strategic Planning and Policy Committee).
  7. The Committee resolved at a meeting held on 11 November 2011 (with the public excluded) to investigate complaint three.
  8. The Council resolved on 4 July 2012 to accept the findings of the Committee set out in a report of 20 April 2012 of Mr Alastair Hall, a solicitor, (the Report) that Ms Hunt had breached the Code in the respects referred to in complaint two and complaint three. The Council censured Ms Hunt and resolved to exclude her from all Council Committees of which she was a member.

## Code of Conduct

9. By a resolution of 31 October 2007 the Council resolved to adopt the Code. Clause 15(1) of Schedule 7 to the Local Government Act 2002 obliges all councils to have a Code of Conduct. The Code, among other things, describes matters which Councillors must keep confidential and gives the Committee responsibility for receiving and investigating Code complaints. (The Council has called this Committee in resolutions and correspondence with this Office "*the Code of Conduct Committee*".) The Committee, under the Code, consists of the Mayor, Deputy Mayor and "*one member of the public with appropriate expertise*". At the time Mr Brendan Duffy was the Mayor and Mr Barry Judd was the Deputy Mayor. On 5 October 2011, the Council resolved to appoint Mr Hall to be the third member of the Committee and to have the Committee investigate the complaints against Ms Hunt.

## Code of Conduct complaints: procedure contemplated

10. In summary, the Code contemplated the following steps be taken concerning breaches of the Code:

- a. The complaints be reported to the Committee.
- b. Prior to the commencement of the Committee's investigation, the Committee would give Ms Hunt written notification of the alleged breaches of the Code and explain when and how Ms Hunt would have the opportunity to give her version of events.
- c. The Committee would investigate the alleged breaches of the Code and consider any submissions by Ms Hunt in response to the allegations.
- d. The Committee would submit its report to the full Council for the Council's consideration.
- e. Finally, the full Council would consider the Committee's report and decide on its response to that report.

## Complaints

11. Ms Hunt made a number of complaints to the Ombudsman, Dr David McGee, about both procedural and substantive aspects of the investigation into the three complaints. On his retirement from his position as Ombudsman on 31 May 2013, I assumed responsibility for this investigation.
12. Among other things, Ms Hunt complained that:
  - a. there was inadequate evidence in support of the complaints;
  - b. the Committee's members had conflicts of interest or were affected by a perception of bias of such a nature as to disqualify them from being members; and
  - c. there were a number of procedural errors relating to the way the investigation was conducted.
13. Dr McGee advised Ms Hunt (and I agree with this advice) that an Ombudsman could not investigate the Council's resolution to investigate the complaints against her or the resolutions on 4 July 2012. That is the case as, under section 13(1) of the Ombudsmen Act 1975, while it is a function of Ombudsmen to investigate –

*“any decision or recommendation made, or any act done or omitted ... by any committee (other than a committee of the whole) or subcommittee of any organisation named or specified in Part 3 of Schedule 1,”*

the reference in parentheses to *“other than a committee of the whole”* means that an Ombudsman cannot investigate full council decisions. (The Council is an *“organisation named or specified in Part 3 of Schedule 1”*.) These decisions were full Council decisions.
14. As Mr Hall is not a council officer or employee, I am unable to investigate his actions as such, but I am able to investigate whether it was reasonably open to the Committee, if it did, to adopt the conclusions in the Report.

## Investigation

15. Dr McGee, in a letter of 5 December 2012 to the Council, notified the following complaints:
  - a. *“whether it was reasonably open for Mayor Duffy to participate in consideration of the complaints against Ms Hunt.*
  - b. *whether it was reasonably open for the investigating committee to conclude that Mr Hall was not conflicted and thus was able to carry out the investigation. (As Mr Hall is not an officer or employee of the Council, I am not investigating Mr Hall’s actions such as whether it was reasonable for him to make the conclusions in his report to the investigating committee.)*
  - c. *whether it was reasonably open to the investigating committee to adopt the conclusions in Mr Hall’s report.*
  - d. *whether Ms Hunt was given an adequate opportunity to respond to the allegations of breaches of the Code which were made against her.”*
16. During the course of this investigation, its scope widened to include Mr Judd’s participation in the consideration of the complaints against Ms Hunt.
17. In light of the opinion I have formed on the complaints referred to in a) and b) of Dr McGee’s letter of 5 December 2012, and Mr Judd’s role in the processes there referred to, I have not provided an opinion on the other two complaints.
18. On 27 June 2014 I provided my provisional opinion to the Council on the complaints. It provided its comments on 14 July 2014.
19. On 25 July 2014 I provided my provisional opinion to Ms Hunt. She provided her comments on 7 August 2014.

## Analysis and findings

### Procedure followed by the Committee

20. The principal steps taken by the Committee to investigate the complaints were:
  - a. On 17 October 2011, the Committee met for the first occasion. (Mr Ward had provided the Committee with material giving rise to the Council’s concern that Ms Hunt had breached the Code.)
  - b. At the Committee’s first meeting, both Mr Duffy and Mr Judd raised concerns about their involvement in the process, to which I will refer later. Because of these concerns, the Committee appointed Mr Hall to be its Chair, despite the Code’s requirement that the Mayor (Mr Duffy) be its Chair. The Committee resolved also that Mr Hall would –

*“explore the validity of the Code of Conduct complaint against Cr Anne-Marie Hunt and report back to the Code of Conduct Committee.”*

- c. The Committee at its first meeting discussed Ms Hunt’s allegation that Mr Hall had a conflict of interest or could be perceived to be biased. It rejected that allegation.
  - d. At its meeting of 11 November 2011, the Committee again considered whether Mr Hall should be a member of the Committee because of Ms Hunt’s concerns, but, despite these concerns, it decided Ms Hunt had a *prima facie* case to answer and minuted it would investigate complaint three.
  - e. The Committee had correspondence with Ms Hunt’s lawyer, Mr Steven Price, who made submissions on her behalf.
  - f. At its meeting of 20 April 2012, the Committee resolved “to receive” the Report and to seek Ms Hunt’s comments on it, on receipt of which the Committee resolved to refer Mr Hall’s report to the Council.
  - g. Ms Hunt did not make any comments on the Report, and the Committee referred the Report to the full Council.
21. I will now elaborate on the steps taken by the Committee.

### **Committee meeting of 11 November 2011**

22. At the Committee’s meeting of 11 November 2011, from which the public was excluded, it is recorded:

*“The Committee again considered the issue of bias raised by Cr Hunt in relation to Mr Hall being involved as a member of the Code of Conduct Committee as he had in the past represented Dr Jonathan Procter in relation to a matter before the Māori Land Court.*

*Mr Hall advised he had taken legal advice and did not believe there was a conflict. Whilst he had previously acted for Dr Procter, that matter was at an end and he was not currently holding any instructions. He had also never acted for or against Cr Hunt.*

*In relation to a possible issue of bias, the only connection he had had with Cr Hunt was to speak to her briefly about an unrelated matter over a year ago. He had come to this matter very much with an open mind.”*

23. On the motion of Mr Duffy, which was seconded by Mr Judd, the Committee resolved:

*“THAT having heard the report from the Chair following his exploration of the validity of the Code of Conduct complaint against Cr Anne-Marie Hunt from the documentary evidence available, including the further matter raised by Cr Good at the 2 November 2011 Council meeting, this Committee believes there is a prima facie case to answer.*

*THAT the Chair be appointed to carry out a more comprehensive investigation of the three incidents that constitute the breach and that, as set out in the Code of Conduct, his findings be reported back to the full Council*

*AND FURTHER that Cr Hunt be advised that the Committee, having considered the facts before it, has concluded that the Code of Conduct complaints require further investigation and she will be given an opportunity, during that investigation, to give her version of events.”*

*(The “further matter raised by Cr Good” formed the basis of complaint three.)*

## **Correspondence with Ms Hunt’s counsel**

24. Mr Duffy and Mr Judd left it to Mr Hall to carry out his investigation and to prepare the Report and did not participate in these parts of the investigation. In a letter of 22 December 2011, Mr Hall provided Ms Hunt’s lawyer, Mr Steven Price, with a summary of the Code complaints. (Ms Hunt had earlier advised that Mr Hall was not to make contact with her and all communications were to be directed to Mr Price.) In that letter, Mr Hall invited Ms Hunt to meet with him to discuss the complaints, but she chose not to do so.
25. In a lengthy letter of 20 February 2012 (six pages), Mr Price responded in detail to the complaints and questioned the appropriateness of Mr Hall’s investigating the complaints because of his involvement in a Maori Land Court case. I will refer later to that challenge to Mr Hall’s role.

## **Report of 20 April 2012 of Alastair Hall**

26. In the Report, Mr Hall made the following findings:

*“61.1 In relation to Complaint One, there is insufficient evidence to support a breach of the Code by Councillor Hunt. It is not clear that any information [A] obtained from Councillor Hunt in relation to The Pot was confidential or could only have come from In-Committee meetings.*

*61.2 In relation to Complaint Two, my view is that Councillor Hunt’s actions in passing the In-Committee agenda to [A], for attachment to his complaint(s), constitutes a breach of the confidentiality requirements of the Code. The In-Committee agenda was not supplied in order for it to be delivered to [A], for use by him in a complaint or complaints to external third-parties.*

*61.3 In relation to Complaint Three, my view is that Councillor Hunt’s discussion with [A] following the In-Committee meeting of 5 October 2011, including identification of the complainant, constitutes a breach of the confidentiality requirements of the Code. The information discussed and tabled at the In-Committee meeting was not supplied in order for it to be*

*passed on to [A]. As a result of the breach, Councillor Good received abusive phone calls from [A]."*

## **Committee's meeting on 20 April 2012**

27. The Committee met on 20 April 2012 with the public excluded. The minutes of this meeting recorded:

*"Mr Hall tabled his report and briefly summarised his findings and conclusions.*

*...*

*Mr Hall recommended that a copy of his report be provided to Councillor Hunt and her counsel for review and comment prior to it being submitted to the full Council.*

*In terms of his role on the Committee and his impartiality, whilst he had not addressed it in his report, he reiterated that he did not know Councillor Hunt and had come to the matter with an open mind.*

*In terms of transparency and process, Mr Ward confirmed that Cr Hunt was aware of today's meeting of the Committee.*

*MOVED by Mayor Duffy, seconded Cr Judd:*

*THAT the Investigation Report to the Code of Conduct Committee dated 20 April 2012 be received.*

**CARRIED**

*MOVED Mayor Duffy, seconded by Cr Judd*

*THAT a copy of the Investigation Report be forwarded to Councillor Hunt and her legal counsel requesting a response within ten (10) working days*

*AND FURTHER*

*THAT any comments from Councillor Hunt and her legal counsel be received and considered by the Code of Conduct Committee before the final investigation report is provided to the full Council.*

**CARRIED**

*As noted in his Report, Mr Hall said it would then be for Council to consider the report and whether it agreed or disagreed with its conclusions. If Council accepted that there had been a breach or breaches of the Code of Conduct, consideration would then need to be given to what would be appropriate action."*



28. The Council has, in correspondence with this Office, stressed that the Committee “received the Investigation Report to the Code of Conduct Committee” and did not adopt the Report and its findings as its own. In other words, the Council maintains the Report was Mr Hall’s, not the Committee’s. It stressed also that Mr Duffy and Mr Judd played no role in the preparation of the Report. By Mr Duffy’s and Mr Judd’s distancing themselves from the investigation as described, the Council maintained the Committee ensured it was not in the position of decision-maker and it was for the full Council to act on the Report as it saw fit.

### **Provision of draft report for comment**

29. With a letter of 20 April 2012, the Council’s Chief Executive, Mr Ward, provided Mr Price with a copy of the Report and asked Mr Price to provide any comments by 7 May 2012. In that letter, he stated:

*“Any comments will be considered by the Committee before the report is submitted to the full Council.”*

30. Neither Ms Hunt nor Mr Price provided any written comments on the Report. In a letter of 14 May 2012 to Mr Ward, Mr Price indicated Ms Hunt intended to complain to this Office about the Committee’s processes and recommendations and recorded Ms Hunt’s concern that the Committee had ignored many of the objections raised in his correspondence with Mr Hall.

### **Council meeting of 4 July 2012**

31. At its meeting of 4 July 2012, Ms Hunt was given an opportunity to respond to the Report’s findings. In her correspondence with this Office, Ms Hunt accepts that she was provided with that opportunity, although she considers the Council did not give any weight to her submissions.
32. Mr Duffy chaired the Council meeting, but did not vote on the resolutions arising out of the Committee’s Report. Mr Judd voted in favour of the Council’s resolution to accept the Committee’s findings, to censure Ms Hunt for breaches of the Code by way of a public statement, and to remove her from all Council subcommittees.

## **Discussion**

### **Participation of Mayor and Deputy Mayor in consideration of complaints**

33. This Office’s investigation focused on whether Mr Duffy or Mr Judd had conflicts of interest or could be perceived to be biased with the consequence it was not reasonable for them to take part in the Committee’s investigation. There is no evidence to support

any contention that Mr Duffy and Mr Judd had actual conflicts of interest disentitling them to participate in the investigation.

34. In his letter of 20 February 2012 to Mr Hall, Mr Price stated:

“26. ...

...

*g. The entire process seems to be plainly biased against Cr Hunt. The Chief Executive essentially solicited these complaints, and refused to show the [A] correspondence to Cr Hunt (or even tell her who it was from or to or what it said) after raising the matter at a HDC workshop on 19 May 2011, saying he was referring the matter to the Auditor-General, and announcing that Cr Hunt would no longer receive in-committee agendas or minutes. The mayor sits on the committee. He has often publicly criticised Cr Hunt. He has said he does not trust her. He has called for her to resign. He has brought criminal charges against [...]. How can he impartially determine this complaint? Cr Hunt has raised this concern but has been ignored.”*

35. The reference to Mr Duffy’s bringing “*criminal charges against [...]*”, is a reference to [A] being trespassed from the Council’s building and his subsequent prosecution for trespassing. ([A] was found not guilty by the District Court of that charge.) I am not satisfied that Mr Duffy’s involvement in that process means that he was conflicted. However, were Mr Duffy’s or Mr Judd’s roles in the Committee’s investigation affected by a perception of bias?

36. The New Zealand Supreme Court with reference to the test of apparent bias on the part of a Judge, held a Judge is disqualified from presiding in, or hearing, a case –

*“if a fair-minded lay observer might reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the question the Judge is required to decide.”*

*(Saxmere Company Ltd v the Wool Board Disestablishment Company Ltd.)<sup>1</sup>*

That test, by analogy, is appropriate to determine whether Mr Duffy or Mr Judd “*might not bring an impartial mind*” to the consideration of the complaints against Ms Hunt.

37. As the Council views this issue, both Mr Duffy and Mr Judd stood aside from the Committee’s investigation. I accept that they had no part to play in the actual preparation of Mr Hall’s report. However, that is not a complete answer to the allegation by Ms Hunt that, on an objective basis, they could be perceived to be biased.

38. Both Mr Duffy and Mr Judd participated in various Council and Committee resolutions as follows:

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<sup>1</sup> [2010] 1 NZLR 35, 43.

- a. Mr Judd moved the Council's resolution to refer complaints one and two to the Committee and the Committee's resolution to investigate complaint three.
  - b. Mr Duffy, while he did not vote on the resolution referred to in a., chaired that meeting.
  - c. They voted on the Committee's resolution that there was a *prima facie* case for Ms Hunt to answer in respect of the complaints.
  - d. They voted on the Committee's resolution to "receive" the Report.
  - e. They voted on the Committee's resolution to seek Ms Hunt's comments on the Report and that "[her] *comments be received and considered by the Code of Conduct Committee.*"
  - f. They voted on the Committee's resolution to refer to the Council the Report and to take what action the Council saw fit regarding the Report's findings. (I note that the Committee's resolution of 20 April 2012 describes the Report as being "*the investigation Report to the Code of Conduct Committee*" – it was not a report to the Council.)
  - g. Mr Judd voted in favour of the Council's resolutions of 4 July 2012 to accept the Committee's findings, to censure Ms Hunt, and to exclude her from all Council subcommittees.
  - h. Mr Duffy chaired the Council's meeting of 4 July 2012, although he did not vote on the resolutions arising out of the Committee's findings.
39. In a letter to the Council of 6 May 2013, Mr Hall described Mr Duffy's participation in the Committee as follows:
- "The issue of Mayor Duffy participating in the Committee and the perception that he was not impartial was discussed at the Committee's first meeting. Because the Mayor was required to be on the Committee, a deliberate decision was made to limit Mayor Duffy's involvement and avoid direct decision-making on the substance of the complaints. Decision-making on the substantive complaints was deliberately left as a matter for the full Council."*
40. The minutes of the Committee of 17 October 2011 recorded:

*“Prior to a Chairperson being elected, Committee Members discussed the Committee’s role in this investigation into the alleged Code of Conduct breach. The issue of perception was raised and whether the Mayor and Deputy Mayor would be seen by those observing the process as having bias or lacking neutrality. Because both the Mayor and Deputy Mayor had been involved in the process to date and there had been discussion around the Council table with regard to the merits of the complaint, would this be seen as a fair and transparent process?”*

*It was agreed that it would not benefit anyone if the decision reached, however valid, was attacked for want of form. However, if the alleged breach was proven, it may be that Cr Hunt would be critical of the result no matter who was on the Committee.*

*Mr Hall said to date he had done no work or investigation on this until the issues raised had been discussed and the Committee was clear on how it wanted to proceed.*

***Mayor Duffy said the issue of perceived bias was perhaps more of an issue than a conflict of interest. There was no way in the world, with the amount of media coverage over the last dozen or so years, anyone would expect him to be neutral. That was the way of politics; it was adversarial. However, to address any issues with regard to neutrality and fairness, there was a need to be clear about who would Chair this committee and who would be doing the investigation.” (Emphasis added)***

41. In his letter of 6 May 2013 to the Council, Mr Hall summarised the Committee’s discussion of its meeting of 17 October 2011 concerning possible perceptions of bias on Mr Duffy’s and Mr Judd’s part as follows:

*“One of the first matters discussed during the in-committee meeting was concerns raised by Mayor Duffy and Councillor Judd about perceptions of bias. **Mayor Duffy declared, in summary, that he had been critical of Councillor Hunt previously and did not expect anyone to see him as neutral. Councillor Judd expressed similar concerns.” (Emphasis added)***

42. The fact that both Mr Duffy and Mr Judd may have robustly criticised Ms Hunt’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.
43. The Council considers the steps Mr Duffy and Mr Judd took removed the perception of bias on their part. In my opinion, these steps were inadequate, as, in terms of the *Saxmere* test, both Mr Duffy and Mr Judd were affected by a perception of bias. (I stress I have not formed an opinion on whether they were *in fact* biased.)

44. The Code required Mr Duffy and Mr Judd to be members of the Committee (as they were Mayor and Deputy Mayor respectively) and the Committee to investigate Code complaints. The Council should have sought advice on the predicament it faced in the light of these requirements, but it did not do so despite Mr Duffy's and Mr Judd's evident unease about their participation in the investigation.

45. The Committee's minutes of its meeting of 17 October 2011 recorded Mr Duffy as saying that:

*"There was no way in the world ... anyone would expect him to be neutral."*

46. Mr Hall records in his letter of 6 May 2013 to the Council that Mr Judd expressed "*similar concerns*" to those expressed by Mr Duffy at the Committee's meeting of 17 October 2011. Mr Duffy's recorded comments and Mr Hall's recollection of Mr Judd's expression of "*similar concerns*" about their not being seen to be "*neutral*" created a perception of bias on the part of the fair-minded observer in terms of the *Saxmere* test.

47. Despite their concerns and that perception of bias, both Mr Duffy and Mr Judd were parties to the resolution of the Council to refer complaints one and two to the Committee, the Committee's resolution to investigate complaint three, the Committee's resolution that Ms Hunt had a prima facie case to answer, and the Committee's resolution "*to receive*" the Report and to refer it to the Council for consideration. By itself, their voting in favour of the Committee's resolution "*to receive*" the Report may not have mattered, but, viewed in conjunction with their participation in these resolutions, their doing so underlined they in fact played an active role in the investigation of the complaints against Ms Hunt. The fact that Mr Duffy and Mr Judd left it to Mr Hall to prepare the Report was insufficient to remove the perception of bias on the part of Mr Duffy and Mr Judd.

48. Mr Duffy and Mr Judd compounded the situation by participating in the Council's resolutions of 4 July 2012 in the way I have described. That is especially so in Mr Judd's case in that he voted in favour of these resolutions.

49. In my opinion, both Mr Duffy and Mr Judd should not have participated in the described Council's and Committee's resolutions as, in terms of the *Saxmere* test –

*"A fair-minded lay observer might reasonably apprehend that [they] might not bring an impartial mind to the resolution of the question[s] [they were] required to decide."*

50. In terms of the Ombudsmen Act, it was unreasonable for Mr Duffy and Mr Judd to participate in these resolutions. They should have disqualified themselves from taking any part in the investigation.

## **Role of Alastair Hall**

51. Ombudsman David McGee's notification concerning Ms Hunt's complaint about Mr Hall was restricted to whether –

*“It was reasonably open for the investigating committee to conclude that Mr Hall was not conflicted and thus was able to carry out the investigation.”*

This part of the investigation was wider than originally notified. The investigation examined also whether Mr Hall, in terms of the *Saxmere* test, could be perceived to be biased. In his letter of 5 December 2012 to the Council, Ombudsman David McGee referred to Mr Price’s comments in this regard and Mr Ward’s response to these comments:

*“b) Mr Hall’s ‘conflict’*

*At para 26(g) of his letter of [20] February 2012 to Mr Hall, Mr Price stated that:*

*‘... Cr Hunt has raised questions about your divided loyalties. Mr Ward has advised her that you do not act for Dr Jonathon Proctor (sic), a man who issued a trespass notice against [A] which resulted in a criminal prosecution, and who is engaged in acrimonious litigation in which [both] Cr Hunt and [A] are involved, which seeks to have him removed as Lake Trustee. If it is true that you do not act for him, I am puzzled as to why you filed documents, including an affidavit, on his behalf in that proceeding, and also made an appearance for him. I **attach** a copy of a letter from you to the Maori Land Court dated 17 August 2011. A fair-minded lay observer would clearly have a reasonable apprehension of bias in all these circumstances.’*

*Ms Hunt had earlier raised with you the same issue regarding Mr Hall. In response, in a letter of 7 December 2011 to Ms Hunt, [Mr Ward] stated:*

*‘The Committee has considered your view that Mr Hall has a conflict. Mr Hall has confirmed that he carries no instructions in relation to the matter you identified. He does not act for Dr Procter. Even if he did act, the Committee (excluding Mr Hall) does not see how any conflict can exist. The Committee, specifically Mr Hall, is charged with investigating your conduct. No other party is involved directly. Mr Hall has no conflict with you personally; he has never acted for or against you. Mr Hall has never acted against [A]. Again, even if he had, it is difficult to understand how a conflict arises. Mr Hall was clear that he holds no views about this matter or you personally. He has not been involved in any Council governance matters.*

*To be clear, the Committee’s view is that there is no problematic link between an alleged code of conduct breach and matters involving Dr Procter.*

*Having considered those points, the Committee sees no reason for Mr Hall not to continue with the investigation. He is a barrister and solicitor with significant investigative experience. He is suitably qualified*

*to assist us with this process. We have no doubt that he is committed to carrying out a fair and transparent investigation, before reporting back to the Committee. The remainder of the Committee is confident that he will give you an opportunity to be heard.”*

52. Mr Ward’s statements that “[Mr Hall] does not act for Dr Procter ... [and] Mr Hall has never acted against [A]” are not entirely accurate. I will explain why I am of that opinion.
53. In a Maori Land Court hearing held on 25 August 2011, [A] with others applied to the Maori Land Court to have Dr Procter dismissed as being a trustee of various trusts. Mr Hall represented Dr Procter at that hearing. The transcript of the hearing records that, on Dr Procter’s behalf, Mr Hall unsuccessfully sought a direction of the Court that [A] did not make submissions in support of that application. Mr Hall also made submissions to the Court opposing the application.
54. [A] appealed the Maori Land Court’s decision not to dismiss Dr Procter from various trusteeships. The Maori Appellate Court judgment recorded that Dr Procter represented himself at that appeal.
55. In his letter of 6 May 2013, Mr Hall states:

*“My only involvement with [A] had [been] reading his submissions to the Maori Land Court in relation to Dr Procter. I did not have call to cross examine him during the hearing and had never met him personally, nor was I a party to ‘acrimonious litigation’. The Committee accepted there was no objective basis for an allegation of bias.”*
56. I accept that Mr Hall did not have any instructions from Dr Procter while he was investigating the complaints. I also accept that he advised the Committee that he had obtained advice on what he describes as being “the conflict issue” from the Council’s lawyer and the Council’s lawyer advised him no such conflict of interest existed. It was not unreasonable for Mr Duffy and Mr Judd to rely on the Council’s lawyer’s advice.
57. Complaint two concerned [A], who was the alleged recipient of the in-committee agenda of 4 May 2011. Mr Hall had, only a matter of a few weeks before he accepted appointment as Chair of the Committee, acted for Dr Procter. In layman’s terms, however Mr Ward views it, Mr Hall acted “against” [A]. As must have been known to Mr Hall at the time of his appointment as the Committee’s Chair, certain Maori interests, including those interests represented by [A], had expressed considerable concerns about the pollution of Lake Horowhenua by the discharging of waste water from the Council’s sewers. While Mr Hall is recorded as advising the Committee that he would bring an open mind to investigation of the complaints, that is not the correct question to address. The correct question is whether a fair-minded lay observer would perceive him to be biased because of his involvement in the Maori Land Court hearing.
58. The fact that Judges have on previous occasions not accepted arguments made, or evidence given, by litigants or witnesses appearing before them or made adverse rulings against them, does not as such compel them to withdraw from hearing a case. See

*Siemer v Heron*<sup>2</sup> and *Muir v Commissioner of Inland Revenue*.<sup>3</sup> The fact that Mr Hall had acted for Dr Procter “against” [A] in the way I have described, did not mean he was disqualified from making findings, even though the second complaint concerned alleged disclosure of confidential information to [A].

59. In terms of the Ombudsmen Act, it was reasonably open for Mr Duffy and Mr Judd to conclude that Mr Hall was not conflicted and there was not an objective basis for a fair-minded layperson to perceive he was biased in respect of the complaints he investigated.

## Ombudsman’s opinion

60. It is my opinion that:
- a. A fair-minded lay observer would have reasonably apprehended that the Mayor, Mr Brendan Duffy, and the Deputy Mayor, Mr Barry Judd, might not have brought an impartial mind to the consideration of the complaints referred to the Committee. Accordingly, their failure to disqualify themselves from being members of the Committee was unreasonable in terms of the Ombudsmen Act.
  - b. As Mr Duffy and Mr Judd did not disqualify themselves from being members of the Committee, the Committee’s resolutions were unreasonable in terms of the Ombudsmen Act.
  - c. Since the Code of Conduct requires the Code of Conduct Committee to consist of the Mayor, and the Deputy Mayor, it would have been prudent to seek legal advice as to replacing the Mayor and Deputy for the consideration of this case.
  - d. Mr Alastair Hall, the Committee’s Chair, did not have a conflict of interest and was not affected by a perception of bias such as to disqualify him from being a member of the Committee.

## Recommendation

61. I recommend that before the Council refers any matter to its Code of Conduct Committee for consideration, it takes reasonable steps to ensure that Committee members are not potentially conflicted and, on an objective basis, are not actually biased or might not bring an impartial mind to the determination of the matter referred to the Committee.

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<sup>2</sup> [2012] 1 NZLR 293,295 (Supreme Court).

<sup>3</sup> [2007] 3 NZLR 495 (Court of Appeal).



## Appendix 1. Relevant statutory provisions

### Ombudsmen Act 1975

#### 13. Functions of Ombudsmen

- (1) Subject to section 14, it shall be a function of the Ombudsmen to investigate any decision or recommendation made, or any act done or omitted, whether before or after the passing of this Act, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the departments or organisations named or specified in Parts 1 and 2 of Schedule 1, or by any committee (other than a committee of the whole) or subcommittee of any organisation named or specified in Part 3 of Schedule 1, or by any officer, employee, or member of any such department or organisation in his capacity as such officer, employee, or member.
- (2) Subject to section 14, and without limiting the generality of subsection (1), it is hereby declared that the power conferred by that subsection includes the power to investigate a recommendation made, whether before or after the passing of this Act, by any such department, organisation, committee, subcommittee, officer, employee, or member to a Minister of the Crown or to any organisation named or specified in Part 3 of Schedule 1, as the case may be.
- (3) Each Ombudsman may make any such investigation either on a complaint made to an Ombudsman by any person or of his own motion; and where a complaint is made he may investigate any decision, recommendation, act, or omission to which the foregoing provisions of this section relate, notwithstanding that the complaint may not appear to relate to that decision, recommendation, act, or omission...

#### 22 Procedure after investigation

- (1) The provisions of this section shall apply in every case where, after making any investigation under this Act, an Ombudsman is of opinion that the decision, recommendation, act, or omission which was the subject matter of the investigation—
  - (a) appears to have been contrary to law; or
  - (b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
  - (c) was based wholly or partly on a mistake of law or fact; or
  - (d) was wrong.
- (2) The provisions of this section shall also apply in any case where an Ombudsman is of opinion that in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that, in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision.

- (3) If in any case to which this section applies an Ombudsman is of opinion—
- (a) that the matter should be referred to the appropriate authority for further consideration; or
  - (b) that the omission should be rectified; or
  - (c) that the decision should be cancelled or varied; or
  - (d) that any practice on which the decision, recommendation, act, or omission was based should be altered; or
  - (e) that any law on which the decision, recommendation, act, or omission was based should be reconsidered; or
  - (f) that reasons should have been given for the decision; or
  - (g) that any other steps should be taken—

the Ombudsman shall report his opinion, and his reasons therefor, to the appropriate department or organisation, and may make such recommendations as he thinks fit. In any such case he may request the department or organisation to notify him, within a specified time, of the steps (if any) that it proposes to take to give effect to his recommendations. The Ombudsman shall also, in the case of an investigation relating to a department or organisation named or specified in Parts 1 and 2 of Schedule 1, send a copy of his report or recommendations to the Minister concerned, and, in the case of an investigation relating to an organisation named or specified in Part 3 of Schedule 1, send a copy of his report or recommendations to the mayor or chairperson of the organisation concerned ...