

Case 542401 (Complaint ground: 542403, 555147)
Contact John Lindeman
22 September 2022



Ombudsman
Fairness for all

Ms Jo Miller
Chief Executive
Hutt City Council

By email: jo.miller@huttcity.govt.nz

Dear Ms Miller

Final opinion under the Ombudsmen Act
Complaint by Franks & Ogilvie Commercial & Public Law

I refer to recent correspondence between John Lindeman and Brad Cato, concerning the complaint made by Franks & Ogilvie on behalf of Councillor Chris Milne.

Having considered all the issues raised, I have now formed the final opinion that the Council has not acted unreasonably.

I have **enclosed** my opinion. I have now completed my investigation of this complaint.

Thank you for the assistance that has been provided.

Yours sincerely



Peter Boshier
Chief Ombudsman

encl My opinion

Chief Ombudsman's opinion under the Ombudsmen Act

Agency	Hutt City Council
Complaint about	the Council's handling of a Code of Conduct complaint made against Councillor Chris Milne
Case number	542401
Date	22 September 2022

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Investigation

1. I am investigating Franks & Ogilvie's complaint, made on behalf of Councillor Milne, about the Hutt City Council's (the Council) handling of the Code of Conduct complaint made against him. The scope of my investigation concerns the following administrative actions, decisions, recommendations, and omissions complained about:

- a. The actions taken by the Council in attempt to resolve the complaint in the first instance.
- b. The Chief Executive and Mayor's joint decision not to dismiss the Code of Conduct complaint under its Code of Conduct policy.
- c. The alleged omissions in the instructions provided to DLA Piper.
- d. The alleged omissions in the Chief Executive's report to the full Council on Code of Conduct complaint.
- e. The Chief Executive's decision to advise the full Council, in her report, that the Councillors had the option to resolve to impose multiple penalties and seek reimbursement of costs.
- f. The Chief Executive's recommendation to the full Council to exclude the public from the deliberation on the outcome of the Code of Conduct complaint.

Background

Background leading up to first complaint

2. On 20 February 2020, the Council opened a Request for Proposals (RFP) for rubbish and recycling services, and began a community consultation process at the same time.¹
3. On 20 February 2020, Mr Colin Cashmore wrote to the Mayor and Councillors, on behalf of two local waste collection companies (Low Cost Bins and Al's Litta Binz), requesting a meeting to discuss his concerns about the Council's proposed move to a rates-funded waste collection model.
4. On 26 February 2020, the Mayor emailed Councillors advising he planned to meet with Low Cost Bins and Al's Litta Binz to hear their concerns directly (along with the Chief Executive and a senior council officer). The Mayor stated that he appreciated the companies' apprehension regarding the proposed changes, and wanted to '*ensure they have had an opportunity to present their views – in addition to giving formal feedback during the consultation period*'. The Mayor advised he would also understand if Councillors would '*like to meet with the organisations separately*'.² I note the Mayor also subsequently emailed Cr Milne and advised that he '*appreciates Councillors interest in the subject and certainly encourages you to meet with both organisations separately*'.

¹ A summary of the actions taken by the Council as part of these changes is set out in the Hutt City Council's Future Recycling and Rubbish Collection Services report available [here](#).

² The Mayor noted in his email that he sought advice from council officers on the concerns raised by Low Cost Bins and Al's Litta Binz.

5. On 11 March 2020, the Mayor, Chief Executive, and a council officer met with Low Cost Bins and Al's Litta Binz to hear out their concerns.³

Cr Milne's call to Waste Management Limited

6. On 15 April 2020, Cr Milne made an unsolicited phone call to Mr David Howie, the Chief Executive of Waste Management Limited (the incumbent supplier to the Council and a prospective tenderer). The call lasted approximately an hour.
7. On 16 April 2020, Mr Howie contacted the Chief Executive of the Council to inform her of his call with Cr Milne. Mr Howie advised the Chief Executive that '*the timing [of the call] was probably inappropriate*' given it was during a live RFP.⁴

First meeting attempting resolution

8. On 21 April 2020, the Mayor, Chief Executive, Cr Basset (as a support person of Cr Milne), and a council officer met with Cr Milne.
9. During this meeting, there were attempts to understand and resolve the differing perspectives. In broad terms, Cr Milne's perspective was that the call was an innocuous information gathering exercise regarding wider waste industry issues. He also noted the tender was not discussed.⁵
10. Conversely, the Mayor and Chief Executive considered the call potentially raised reputational concerns given it was made during a live RFP, and that it was important that the tender was perceived to be open and robust.

Mayor seeks independent advice from DLA Piper

11. As the matter was not resolved in the first meeting, the Mayor decided to commission independent advice to assess the appropriateness of the call, and any potential legal risk that may have resulted from it. The Mayor advised that '*from there, my preference is to resolve this issue informally*'.⁶

³ At this point, as part of his further comments, Cr Milne has asked me to specifically consider a statement from Mr Cashmore recalling his conversations with the Mayor and Chief Executive. This included concerns raised about the criteria for Low Cost Bins and Al's Litta Binz to submit a conforming tender. Mr Cashmore states he subsequently raised these concerns in a public Council meeting on 9 April 2020, and sought a modification to the tender terms via the Government Electronic Tenders Service (GETS). This modification was granted on 20 April 2020, enabling Low Cost Bins and Al's Litta Binz to submit a conforming tender.

⁴ Cr Milne notes in his further comments that Mr Howie later clarified that he was not intending this contact to come across as complaint, but rather an 'FYI' to the Chief Executive. Cr Milne further notes that he disagrees with Mr Howie's characterisation that the timing of the phone call being 'probably inappropriate' given Mr Howie continued to speak with Mr Milne for an hour.

⁵ In the subsequent independent investigation, it was confirmed that the tender itself was not discussed.

⁶ The Mayor's email to Cr Milne on 24 April 2020 refers.

12. Cr Milne was invited to provide input to DLA Piper as part of the preparation of this advice.⁷

DLA Piper delivers advice on Waste Management call

13. On 13 May 2020, DLA Piper delivered its advice and concluded that the phone call was not appropriate from a legal or procurement perspective. It noted that irrespective of what might have been discussed on the phone call (it did not attempt to make a judgement on the content), Waste Management Limited could have been *perceived* to have gained an advantage.
14. DLA Piper concluded:

Ultimately, if Cr Milne had concerns about the procurement process including the lack of direct engagement with industry, the only appropriate course was to put these concerns to the officers (through the CEO) and work through the issues in a transparent way. Officers and their advisers could have then worked through the concerns and considered whether there was any way in which these concerns could be addressed without compromising the integrity of the procurement process.
15. DLA Piper noted that as part of formulating its advice it had spoken to Cr Milne and sought his input.⁸

Background leading up to second complaint

16. On 11 May 2020, Mr Bruce Hodgins, a senior council employee, emailed the Chief Executive raising concerns that Cr Milne had phoned him to talk about the potential sale of tennis court land at a Hutt Valley Tennis facility.⁹ Mr Hodgins was the primary contact for this matter.
17. Cr Milne's wife is the president of the Hutt Valley Tennis Management Committee. From Mr Hodgins perspective, Cr Milne was trying to 'push the sale' of some of the tennis court land.¹⁰ From Cr Milne's perspective, he was just seeking an update on the matter.
18. The Council considers that Cr Milne had a well-established conflict of interest in Hutt Valley Tennis matters, particularly given the Council had previously sought an independent opinion confirming this.

⁷ The Council's Chief Legal advisor's email to Cr Milne of 6 May 2020 refers.

⁸ Paragraph [10.2] of DLA Piper's advice of 13 May 2020.

⁹ Cr Milne also attempted to contact Mr Hodgins a second time but Mr Hodgins was not available so Cr Milne left a voicemail message. Cr Milne also later objected to the notion during the independent investigation that, at the time of the call, there was a 'formal proposal' in place regarding the sale. Rather, Cr Milne states the matter was in early-stage discussions.

¹⁰ Outlined in Mr Hodgins' email of 11 May 2020.

19. However, Cr Milne considers that this independent opinion was *'not compelling'* and that the Council was treating this matter inconsistently compared to other councillors.

Second proposed meeting and attempted resolution

20. On 13 May 2020, the Mayor invited Cr Milne to meet with him, the Chief Executive, and the Council's Chief Legal Advisor. The Mayor noted that as Cr Milne continued to disagree with the Council's position on matters (primarily about the appropriateness of Waste Management call), it was important to discuss further and reach resolution.
21. On 14 May 2020, Cr Milne responded stating that in the interest of resolving the matter, he would meet with the Mayor one-on-one.
22. On 15 May 2020, the Mayor noted this request, but advised the original arrangement stood (to have the Chief Executive and the Council's Chief Legal Advisor attend).
23. Cr Milne replied advising that he would only attend a one-on-one meeting with the Mayor as he had confidential information to share.
24. The Mayor invited Cr Milne to email any confidential information to a restricted email address (that only the Mayor had access to). Cr Milne ultimately declined to meet on these terms, and advised he was not prepared to put the confidential information in writing.
25. The Mayor advised the Chief Executive of Cr Milne's position. The Chief Executive wrote to the Mayor advising that *'it's disappointing that Cr Milne has declined to meet with you to resolve this matter informally because it does need resolution'*.

Code of conduct complaint made

26. On 25 May 2020, the Deputy Mayor made two formal complaints to the Mayor about Cr Milne's conduct in regards to the Waste Management call, and the Bruce Hodgins call.
27. The Deputy Mayor alleged that Cr Milne had breached the Council's Code of Conduct under the *'Roles and Responsibilities'*, *'Relationships'*, *'Conflicts of interest'* and *'Ethical behaviour'* categories. The Deputy Mayor stated that they had been kept apprised of unsuccessful attempts to try and resolve the two matters.

Final meeting and attempted resolution

28. On 28 May 2020, Cr Milne, the Mayor, the Chief Executive, and the Council's Chief Legal met in a non-prejudicial meeting to attempt to reach a resolution on both Code of Conduct grounds of complaint.
29. During this meeting, as evidenced by the meeting transcript, the parties discussed the issues, tried to reach a consensus about the behaviour, and pitched resolution options. Cr Mine suggested that both parties *'work on a framework where both sides acknowledge the other's concerns and perspectives, and we commit to improving the understanding, and respecting each other's roles'*.

30. Conversely, from the Chief Executive and Mayor's perspectives, it was important for Cr Milne to acknowledge that his behaviour was wrong, and to apologise for it.

Cr Milne's email to all Councillors

31. On 11 June 2020, Cr Milne wrote a letter to his fellow Councillors and the Chief Executive raising concerns about the waste collection and recycling proposals, as well as the tender and consultation process. He also outlined why he considered it was necessary to consult Waste Management Limited himself.

Deputy Mayor asks for Code of Conduct complaint to be progressed

32. On 12 June 2020, the Deputy Mayor forwarded the complaints to the Chief Executive asking for them to be progressed under the Council's Code of Conduct policy. The Deputy Mayor stated:

Given Cr Milne's recent email to all Councillors, essentially in defence of his conduct, I do not believe it is now possible to informally resolve this matter. I have advised the Mayor of this.

33. At this point, the Mayor's position was that informal resolution process had not been, and was unlikely to be, successful.

Mayor and Chief Executive jointly decide not to dismiss the complaint

34. Under Step 1 of the Code of Conduct policy, the Mayor and the Chief Executive subsequently considered whether to dismiss the complaint on the basis that the complaints did not have a likely prospect of being declared substantial or material.
35. The Chief Executive and Mayor decided that the matter should not be dismissed.¹¹

Independent investigator carries out preliminary assessment

36. On 12 June 2020, the Chief Executive forwarded the complaint to an independent investigator, in accordance with Step 2 of the Code.
37. As part of the independent investigator's preliminary assessment, Cr Milne raised concerns that the complaint was politically motivated, made in bad faith, and should be dismissed. He also noted that the Mayor and Chief Executive had met with Low Cost Bins and Al's Litta Binz, and considered that the Mayor's email of 26 February 2020 in response to the meeting request had effectively encouraged councillors to contact waste industry companies.
38. The independent investigator concluded that the complaints should not be dismissed, and should proceed to full investigation. The investigator did not accept Cr Milne's submission that the complaint was made in bad faith.¹²

¹¹ As part of making this decision, the Chief Executive and Mayor sought internal legal advice.

¹² Paragraph [69] of the Independent Investigator's preliminary assessment report.

39. The investigator also advised that it was not within scope of his preliminary assessment to consider whether the contact between the Mayor and Chief Executive with Low Cost Bins and Al's Litta Binz was appropriate. However, this was a relevant contextual factor to be considered.¹³

Outcome of full investigation

40. On 4 October 2020, the investigator delivered his findings of the full investigation and concluded that Cr Milne had breached clause 5.3 of the Code (relationship with the public) for the first complaint, and clause 8 (conflict of interest) for the second.¹⁴
41. The investigator reiterated his findings that the two complaints were not made in bad faith, and commented extensively on the comparison between Cr Milne's phone call to Waste Management Limited, and the Mayor and Chief Executive's meeting with Al's Litta Binz and Low Cost Bins. The Investigator considered the two situations were materially different and this was not a defence to the complaint.

- a. The investigator stated:

I do not consider the Mayor's encouragement to Councillor Milne is a defence to the complaint.

The particular circumstances which surround Al's Litta Binz and Low Cost Bins are materially different to those which surround Mr Howie of Waste Management.

*The Mayor's encouragement to Councillor Milne was specific to him meeting with Al's Litta Binz and Low Cost Bins – two companies who had approached the Mayor and Councillors seeking a meeting. The email on behalf of the Mayor to Councillor Milne dated 26 February 2020 states that the Mayor "certainly encourages you to meet with **both** organisations separately" (emphasis added). The Mayor's encouragement cannot be reasonably considered a "free for all" for Councillor Milne to approach other waste companies.*

...

The difference between Councillor Milne's call to Mr Howie and the Mayor's meeting with Al's Litta Binz and Low Cost Bins is that there is a risk that Waste Management could be perceived to have obtained an advantage over other waste companies in the tender through information gleaned from the discussion.

¹³ Paragraph [71] of the preliminary assessment report refers.

¹⁴ Cr Milne provided extensive comments to the investigator as part of this process.

This is reflected by Mr Howie's discomfort with the call he had with Councillor Milne, which caused him to make an unsolicited call to the Chief Executive, where he self reported his call with Councillor Milne and said that the timing of the call was inappropriate and noted that Councillor Milne had spoken to other waste companies.¹⁵

Full Council meets to consider Code of Conduct complaint

42. On 9 October 2020, after considering Cr Milne's submissions in defence of his conduct during the Code of Conduct hearing phase, the Council ultimately resolved to accept the independent investigator's findings that the Cr Milne had breached the Code. The Council determined that a number of penalties would be imposed, including seeking a partial reimbursement of costs for the complaint investigation.

Analysis and findings

43. I have outlined the first steps of the Council's Code of Conduct Policy below. I have then gone on to summarise and address Cr Milne's further comments.
44. Clause 12.3 of the Council's Code of Conduct policy states that before making a complaint 'a complainant should first make all reasonable attempts to resolve the matter, if appropriate'. The complaint can be rejected at any stage if it is incomplete.
45. If the complaint is not rejected as incomplete, Step 1 of the policy outlines that the Mayor will attempt to resolve the complaint through informal dispute resolution, within a reasonable time.
46. If the complainant is not satisfied with the proposed resolution or the complaint has not been resolved within a reasonable time, the complainant has the right to forward the complaint to the Chief Executive. The Mayor and Chief Executive, acting jointly, have the power to dismiss a complaint prior to the preliminary assessment stage if they are of the view that the complaint does not have a reasonable prospect of being declared substantial or material.

Were the actions taken by the Council in attempt to resolve the complaints unreasonable?

47. In his further comments, Cr Milne states his concerns that the Council did not take adequate steps to try and resolve the complaint informally. Cr Milne considers that:
 - a. the complaint should have been rejected as incomplete as Cr Milne had not met with the Deputy Mayor directly in the first instance. (Comparatively, Cr Milne states

¹⁵ Paragraphs [181] to [187] of the independent investigator's final report.

that when he subsequently made a Code of Conduct complaint against the Mayor, this was rejected as he had not spoken with the Mayor first.)

- b. Step 1 under the Code requires that an informal resolution attempt by the Mayor occurs *after* the complaint is made. Cr Milne states that any reference to failed attempts at resolving a matter, prior to a complaint being made, cannot be relied upon as satisfying this requirement under Step 1.
- c. the Mayor should have accepted Cr Milne's offer to meet one-on-one. The refusal to do so, and the Mayor's subsequent statement to the Chief Executive that Cr Milne '*refused to meet*', amounted to bad faith.
- d. he had attempted to resolve issues amicably evidenced by his resolution proposal to the Mayor and Chief Executive on 28 May 2020. However, this offer was declined.

Comment

- 48. Firstly, it is clear the overall intention of the Council's Code of Conduct policy is to ensure that, in the first instance, there is an attempt to resolve any grievance or concern before a more resource-intensive preliminary assessment or investigation might be considered.
- 49. When viewing the Council's policy in this wider context, I consider that attempts to resolve a matter prior to it becoming the subject of a formal Code of Conduct complaint can be factored into any consideration under Step 1 (and Clause 12).
- 50. The Council's Code of Conduct policy does not provide prescriptive informal resolution steps. The policy simply requires a complainant to make '*all reasonable attempts to resolve the matter, if appropriate.*' A conversation between aggrieved parties might sometimes be an appropriate first step. But what is reasonable and appropriate will depend on the circumstances - each case must be considered on its own merits.
- 51. I am not currently investigating the handling of Cr Milne's Code of Conduct complaint against the Mayor. However, in this case, in light of the earlier attempts to resolve matters, I do not agree that it would have been necessary or appropriate for the Mayor to have referred the complaint back for discussion between the Deputy Mayor and Cr Milne. The Deputy Mayor had been apprised of the previous unsuccessful resolution attempts prior to her making the complaints. In this respect, I do not consider the complaint was '*incomplete*'.
- 52. In total, there were three unsuccessful attempts to try and resolve matters. This includes the meeting of 21 April 2020, the attempted meeting of 13 May 2020, and the meeting of 28 May 2020 (after the complaint was made).
- 53. While Cr Milne has reiterated his concerns that the Mayor declined to meet one-on-one, I consider the Mayor's decision was understandable in the circumstances and was not unreasonable. The concerns raised involved wider operational matters, including a live RFP that the Chief Executive was responsible for.

54. At the time, Cr Milne did not specify to the Mayor that the 'sensitive information' he wished to share related to the Chief Executive.¹⁶ In any case, the Mayor advised Cr Milne to submit information confidentiality to a restricted email address. I consider this was a reasonably open alternative. Cr Milne ultimately declined meeting on these terms. As such, I do not consider the Mayor's subsequent framing of the matter (as Cr Milne '*refusing to meet*') to be deliberately misleading or made in bad faith.
55. Things came to a head in the meeting on 28 May 2020, after the complaints had been made. From the meeting transcript (which features Cr Milne's resolution proposal), it is clear that matters were discussed openly, and there were genuine efforts from all sides to understand the differing views, and reach consensus on next steps.
56. However, I agree with Mr Woodward's previous comments that, despite multiple attempts to reach resolution, both Cr Milne and the Council's respective positions were entrenched and difficult to reconcile.
57. To this end, for the reasons outlined above, I consider it was reasonably open for the Mayor to reach the view that informal resolution had not been, and was unlikely to be, successful.

Were there unreasonable omissions in the instructions to DLA Piper?

58. In his further comments, Cr Milne reiterates DLA Piper were '*not told that the Mayor had actively encouraged councillor contact with waste companies*' and that the Chief Executive and Mayor met Low Cost Bins and Al's Litta Binz while the tender process was active. Cr Milne considers that this may have changed its advice regarding the appropriateness of Cr Milne's phone call with Waste Management Limited. This is a reference to the Mayor's emails to Councillors and Cr Milne, following the meeting request by Low Cost Bins and Al's Litta Binz.¹⁷
59. As you are aware, the Council's position is that Mayor's email was referencing contact specifically with these two companies, and he was not encouraging unsolicited Councillor contact with any other waste company. This position is supported by the wording of the emails and their context. Further, the Council considers the context and circumstances of the Mayor and Chief Executive's meeting with Low Cost Bins and Al's Litta Binz were distinct to that of Cr Milne's unsolicited phone call to Waste Management Limited. In any case, I note that Cr Milne had multiple opportunities to submit any information he wished to DLA Piper as part of it formulating its advice on his call to Waste Management Limited. This includes any information he considered was personally relevant to his

¹⁶ Cr Milne states in his further comments that the information was about the actions of the Chief Executive in meeting with Mr Cashmore. Cr Milne subsequently raised similar concerns about the Chief Executive in an email to councillors and the Mayor on 7 October 2020. Cr Milne attached the statement made by Mr Cashmore in his email to councillors.

¹⁷ Cr Milne further notes that he was surprised to learn of this omission after DLA had delivered its advice.

motivation for making the call. In this context, I do not consider there were unreasonable omissions in the instructions to DLA Piper on this point.

Was the Mayor and Chief Executive's joint decision not to dismiss the complaint unreasonable?

60. In his further comments, Cr Milne largely reiterates that the Mayor and Chief Executive should have dismissed the complaint and that their decision not to dismiss it was unfair or politically motivated. He says:
- a. the Mayor and Chief Executive had previously met with Low Cost Bins and Al's Litta Binz¹⁸, and the Mayor had effectively encouraged contact with other waste companies. He considers he received differential treatment in regards to his call to Waste Management Limited (where he states tender matters were not discussed) and that this goes to the heart of whether there was a *prima facie* case of a breach of the Code to answer.¹⁹
 - b. Cr Milne considers he received differential treatment in regards to his involvement in Hutt Valley Tennis matters compared to Cr Naomi Shaw. Cr Shaw has an interest with Fraser Park Sportville, and is an appointee to the Fraser Park Sportville Working Group.
 - c. the decision not to dismiss the complaint was politically motivated and made in bad faith. Cr Milne expresses a level of distrust regarding the Chief Executive's actions, and questions the motivations for not dismissing the complaint. He has provided information from a former Councillor in support of this point.

Comment

61. As mentioned above, the test for dismissing a complaint is whether the Mayor and Chief Executive are of the view that the complaint does not have a **reasonable prospect** of being declared substantial or material.²⁰
62. At the time of the joint decision, the complaint alleged serious concerns regarding a potential or perceived interference with a tender process, and a breach of the Council's conflict of interest obligations. Informal resolution had established that Cr Milne's contact with Waste Management Limited and Mr Hodgins had taken place. However,

¹⁸ Cr Milne also refers to Mr Cashmore's statement regarding this meeting, and Mr Cashmore's interactions with the Chief Executive.

¹⁹ Cr Milne has further questioned whether the meeting with Low Cost Bins and Al's Litta Binz instigated by the Mayor amounts to the Mayor breaching the Code by bringing the Council into disrepute. However, any question in this regard is for relevant Councillors to consider in line with its Code of Conduct processes. I am only considering the Mayor's actions in the context of whether the joint decision with the Chief Executive not to dismiss the Code of Conduct complaint made about Cr Milne's actions was unreasonable.

²⁰ Appendix B of the Council's Code of Conduct Policy refers.

there were differing positions regarding the content, context, and appropriateness of the calls.²¹

63. The Council had also received legal advice regarding Cr Milne's phone conversation with Waste Management Limited and his conflict of interest in regards to Hutt Valley Tennis that indicated there were concerns that needed further assessment.
64. In light of the information available at the time, I consider there was a reasonable basis for the Mayor and Chief Executive to consider that the matters raised met the threshold of having a reasonable prospect of being declared substantial or material, and warranted a preliminary assessment to explore the case more fully. This was confirmed by the independent investigator's subsequent preliminary assessment that both complaints were substantial or material and should proceed to a full investigation.
65. Cr Milne has advised the complaint had a political backdrop. This is commonly the case with a Code of Conduct complaint against a local elected representative. Further, I acknowledge that Cr Milne's working relationship with the Chief Executive was under strain. This has also been reflected in the information provided by a former Councillor. However, I consider these circumstances all supported the approach of forwarding the complaints to an independent investigator. This step in the Council's Code of Conduct process, as occurred in Cr Milne's case, effectively deals with any notion of bias, bad faith, or predetermination.²²
66. I do not agree that the Mayor's meeting with Low Cost Bins and Al's Litta Bins (or Mr Cashmore's subsequent statement about these interactions with the Mayor and Chief Executive) provided a basis to dismiss the complaint. This was a separate case with differing circumstances. This meeting was solicited through the Mayor and was openly managed with the involvement of the Chief Executive and council officers.²³
67. Cr Milne has reiterated that the tender, or matters that could compromise the tender, were not discussed during the call. However, at this point in the process, the specific content of the call had not been conclusively established (this would later be examined by the independent investigator).²⁴ In any case, the concerns raised also related to the

²¹ As you are aware, when considering the exercise of the discretion to dismiss a complaint, the Mayor and Chief Executive are not required to conduct a full assessment or investigation to establish, conclusively, the merits of an allegation or whether it should be upheld. This is the role reserved for the independent investigator.

²² For the avoidance of doubt, I am not persuaded that the Chief Executive and Mayor's joint decision not to dismiss the complaint was purely politically motivated and without substance. As outlined above, the allegations raised serious concerns and, on the face of information available at the time, appeared to warrant further consideration.

²³ Further, on receipt of the meeting request from Low Cost Bins and Al's Litta Binz, the Mayor extended an invite for Councillors to meet with the organisations separately, and noted that he had sought input from council officers (the Mayor's email of 26 February 2020 refers).

²⁴ In his further comments, Cr Milne states he told the Mayor and Chief Executive during the informal resolution stage that the tender was not discussed. However, interviews with relevant parties and confirmation of what was said during the call occurred during the investigation, and after informal resolution.

perception of the unsolicited phone call (rather than content), and how contact with an incumbent supplier was managed.

68. While Cr Milne remains of the view that the Mayor had encouraged contact with other waste companies, and that this motivated him to contact Waste Management Limited, he did not raise this matter prior to the joint decision, or during any of the previous informal resolution meetings. I note that this later became a key point in Cr Milne's defence that was considered exhaustively throughout the investigative, and Code of Conduct hearing process.²⁵
69. Cr Milne's further reference to Cr Shaw is not directly relevant to the decision not to dismiss the complaints. It involves another councillor's actions involving separate circumstances. Each case must be considered on its own merits. To the extent that Cr Milne remains concerned about how another councillor manages any conflict of interest, it is open to him to pursue the matter through the appropriate processes, including the Code of Conduct process.
70. Overall, for the reasons above, I do not consider the joint decision to be by the Chief Executive and Mayor not to dismiss the complaint was unreasonable.

Were there unreasonable omissions in the Chief Executive's report to the full Council?

71. In his further comments, Cr Milne repeats that the Chief Executive omitted certain details in her report to the full Council, including:
 - a. a complete account of the informal resolution stage of the complaint, and that he attempted to meet with the Mayor one-on-one;
 - b. references to the Mayor's and Chief Executive's meetings with the Low Cost Bins and Al's Litta Binz, and the Mayor's emails 'encouraging' councillors to contact waste companies (and that these details had been omitted in the instructions to DLA Piper); and
 - c. other matters of defence or context regarding Cr Milne's actions, including the political backdrop to the complaint, references to Cr Milne's governance role and elected duty to question and challenge Council decisions.

²⁵ Cr Milne has further questioned if he, or other councillors, had met with Low Cost Bins and Al's Litta Binz individually, it would have resulted in the same reputational concerns. This matter was considered throughout the Code of Conduct process. As mentioned above, it is clear that the Mayor's meeting – and the invitation extended to Cr Milne and other councillors to meet with these two particular organisations – was managed substantively differently to Cr Milne's unsolicited phone call to an incumbent supplier. I do not consider the Mayor's invitation to councillors on 26 February 2020, in and of itself, provided a conclusive or reasonable basis for dismissing the first ground of complaint made against him under the Code (regarding his separate, subsequent actions).

72. Cr Milne considers that the Chief Executive's omissions in this regard did not meet administrative law standards when it comes to preparing advice for decision-makers, and the omissions were deliberate.

Comment

73. Mr Woodward outlined that it was likely I would accept the Council's position that the Chief Executive performs a largely administrative role under the Code, and that Chief Executive's report is designed to be a covering brief to the investigator's report. In this respect, the brief sets out a high-level background of the process, the Code's policy, and complaints made (in very general terms).
74. Cr Milne states in his further comments that it is not clear that the content of the Chief Executive's report is restricted in this way.
75. However, I remain of the view that the Chief Executive's report is not designed to provide a comprehensive background, and balance between the investigator's findings and matters in support of Cr Milne's defence. To do so would risk the impartial nature of the Chief Executive's role, and effectively replace the investigator's report.
76. Instead, I consider the Chief Executive's role, in drafting the covering report, is to direct Councillors to the Code of Conduct procedure and next steps following the investigator's findings.
77. The investigator's report also considered Cr Milne's submissions regarding the Mayor's email and the meeting with Al's Litta Binz and Low Cost Bins. The investigation report was attached to the Chief Executive's report. I do not consider there was a need for the Chief Executive to reiterate this part of Cr Milne's submissions as they were covered in depth in the investigator's report.
78. Further, the hearing phase is designed to provide the opportunity for a Councillor to present any relevant contextual factors, or matters of defence in response to a Code of Conduct complaint - an opportunity that Cr Milne was afforded where he spoke at length regarding the matters above in paragraph [71]. In reaching its decision on the complaints, the full Council was in no doubt about Cr Milne's position and submissions in relation to these matters.
79. The Chief Executive advised in her report that it was not the role of Councillors to conduct a '*substantive re-investigation*' of the complaints. Cr Milne also suggests in his further comments that this statement should be interpreted as the Chief Executive recommending that the Councillors essentially disregard any matter put forward by Cr Milne during the hearing and simply '*officiate the investigator's findings*'. I do not agree with this interpretation. A plain reading of this statement is that it is not role of Councillors to conduct their own investigation from start to finish as part of the hearing process. Such a statement is consistent with the purpose of, and value in, engaging an independent investigator to examine Code of Conduct complaints.

80. Overall, for the reasons above, I do not consider there were unreasonable omissions in the Chief Executive's report.²⁶

Was it unreasonable or contrary to law for the Chief Executive to advise the full Council that it had the option to seek a reimbursement of costs?

81. Mr Woodward had previously explained that a Council has no power to impose fines on Councillors for breach of its Code of Conduct. This is because of the nature of a fine – a fine is imposed in response to a breach of law and the power to impose a fine must be expressly provided for in legislation.
82. However, there did not appear to be a clear basis to suggest that a Council does not have the legal authority to pass an ordinary resolution, as part of the setting of its Code of Conduct policy, to include a penalty option of requiring one of its members to reimburse costs.²⁷
83. I note that Cr Milne supported introducing this penalty option at the time of resolving to adopt the Code of Conduct policy.
84. In his further comments, Cr Milne has briefly questioned the ability of the Council to set such a penalty option, and referred to the penalty as 'illegal'.
85. I remain of the view that Code of Conduct framework is deliberately non-prescriptive so that elected officials can essentially set their own non-statutory rules.
86. Further, in this case, the Chief Executive's report simply relayed the Code of Conduct penalty options that were set by the full Council. Cr Milne considers the Chief Executive should have overruled the Councillors' adopted policy, and omitted this option. However, it was not the Chief Executive's role to assess the reasonableness of penalty options in this case. Rather, it is for the full Council to consider the penalty options, and decide what penalty is reasonable to impose (in line with its adopted policy).
87. Overall, I am not persuaded by evidence put forward that the inclusion of this penalty option in the Chief Executive's report appeared to be contrary to law, or was unreasonable in the circumstances.

²⁶ I understand that in past correspondence, Cr Milne had also advised that the information identified in paragraph [71] was omitted from the brief to the independent investigator. For completeness, I do not consider the brief to the independent investigator was unreasonable. As outlined in Mr Woodward's letter, the Council has clarified (and to which I agree) that the Code specifically stipulates that the onus is on the complainant and the subject of the complaint to provide all the information and evidence relied on, as part of their initial complaint or defence (Appendix B Step 2 of the Code refers). In referring the complaint to the independent investigator, I do not consider it is the role of the Chief Executive to provide a comprehensive background, or matters of defence in support of Cr Milne's conduct.

²⁷ As previously mentioned, I am not investigating the enforceability of such penalties.

Other matters

88. Mr Woodward had previously explained why it was my likely opinion the Council's interpretation of including the option of imposing multiple penalties in the Chief Executive's report appeared to be consistent with the overall purpose and intent of the Code²⁸, particularly where there were multiple breaches of the Code.
89. Mr Woodward also advised why I was likely to find that the Chief Executive was entitled to rely on sections 48(1)(d) or 7(2)(c)(ii) of LGOIMA when recommending that the public be excluded from the Council's deliberation at the end of the Code of Conduct hearing.
90. Cr Milne has not provided further comments on these two points. Accordingly, for the reasons set out in Mr Woodward's letter, I confirm the Council has not acted unreasonably in these respects.

Peter Boshier
Chief Ombudsman

²⁸ Including Local Government New Zealand's Code of Conduct template.