

STATEMENT ON INVESTIGATION

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Outcome of Ombudsman investigation into alleged misconduct by a council employee

The Ombudsman investigated, upon referral by the Independent Commissioner Against Corruption, whether a council employee committed misconduct by

- accessing and utilising a contractor's information gained through his position with the council for a private purpose
- improperly relying on his employment with the council to offer employment to a rival contractor's employee
- failing to act in a way that generates community trust and confidence in the council.

The Ombudsman also investigated, upon his own initiative, whether the council's decision to allow the employee to engage in secondary employment while employed by the council was wrong.

The employee is a director and shareholder of a company that recruits compliance and enforcement staff for local government authorities. It was alleged that a rival recruitment company lost contracts to the employee's company, and that the employee accessed commercially sensitive information about the rival company through his employment with the council. It was also alleged that the employee improperly relied on his employment with the council to access the rival company's staff.

While the employee acknowledged that they had access to some information pertaining to the rival company, there was no evidence that the employee used that information for a private purpose. Nor was there sufficient evidence to suggest that the employee used access to the rival company's staff for a private purpose.

The employee complied with their obligation under section 120(2) of the Local Government Act to declare their interest in their company to the council's Chief Executive Officer. There was no suggestion that the employee failed to comply with the conditions of the council's approval to engage in secondary employment. The Ombudsman considered that while it could be argued that the employee ought to have abstained from undertaking work with their company given the difficulty of managing the public's perception of his conflict of interest, the employee was entitled to rely on the council's consent to undertake secondary employment. The Ombudsman was not persuaded, therefore, that the employee's actions in undertaking work with their own company could constitute a failure to act in a way that generates community trust and confidence.

The council had placed conditions on the consent for secondary employment, including a condition that the employee not use intellectual knowledge gained at the council to further the interests of their secondary employment. The Ombudsman considered, however, that the conditions did not sufficiently address all potential issues that could arise from the

employee's conflict of duty. The Ombudsman's view was that it is difficult to reconcile concerns about the fact that the employee has competing and conflicting duties to both the council and their own company. As long as the employee remains employed by the council and has access to a competitor's information, there will continue to be a perception that the employee could misuse that information, contrary to their duty to the council, in order to promote the interests of their company in accordance with their duties as director.

The Ombudsman did not consider that those concerns could be avoided or resolved by the council's condition, given that such a condition cannot be monitored or enforced with certainty. The Ombudsman considered that the employee could be influenced in ways not apparent even to themselves. The Ombudsman also considered that accessing the rival company's information was necessary and unavoidable for the employee in performing their role at the council and accordingly limiting access to that information was not a possible solution.

Given the close connection between the employee's primary and secondary employment, the Ombudsman could not envisage any additional measures that the council could have taken to better manage the employee's conflict. The Ombudsman also considered, however, that as there is such a close connection between the employee's primary and secondary employment, and significant potential for misuse of council information arising from their conflict of duty, the council ought to have known it could not adequately address such concerns by placing conditions on the employment. It was the Ombudsman's view, therefore, that the council should not have granted approval for the employee to undertake secondary employment with their company. On that basis the council's actions were wrong for the purposes of section 25(1)(g) of the Ombudsman Act.

The Ombudsman commended the council for considering a new draft protocol for secondary employment and commented that if that protocol had been in place when the employee commenced their employment with the council, that secondary employment would not have been approved at all (on the basis that the protocol provides that consent must not be granted where there is an actual, potential or perceived conflict of interest).

The Ombudsman recommended under section 25(2) of the Ombudsman Act that the council:

1. revoke the Chief Executive Officer's consent for the employee to undertake secondary employment
2. implement a protocol for managing secondary employment which specifically address actual, potential or perceived conflicts of interest.