

12 July 2019

Dear 

Response - Official Information Request

I refer to your request for information received on 5 July 2019. Your request has been considered under the Local Government Official Information and Meetings Act 1987 (LGOIMA) and I provide the following information.

A copy of the report on the mayor's advocate review by Council.

Attached is a copy of the report on the Mayor's Advocate review undertaken by Council.

You will note that there are two redactions within the report. This information has been withheld to protect the privacy of natural persons, including that of deceased natural persons. You are entitled to seek a review by the Office of the Ombudsman.

Considerations

This report was tabled at a Council In-committee meeting on 13 December 2017. It was not resolved by Council to bring the report out of in-committee at this meeting, nor has it been resolved at subsequent meetings.

Standing Orders states:

17.5 Release of information from public excluded session

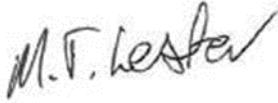
A local authority may provide for the release to the public of information which has been considered during the public excluded part of a meeting.

Each public excluded meeting must consider and agree by resolution, what, if any, information will be released to the public. In addition the chief executive may release information which has been considered at a meeting from which the public has been excluded where it is determined the grounds to withhold the information no longer exist. The chief executive will inform the subsequent meeting of the nature of the information released.

It is considered that with the recent social media attention and publicity regarding the advocate role, that it is in the interest of the public that the report be released.

If you have any queries regarding this information please make contact with the writer.

Yours sincerely



Mark Lester
Group Manager Corporate Services



rbrobertson

Review of the Role of the Mayor's Advocate

Horowhenua District Council



13 December 2017

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Introduction

1. This review has been commissioned by the Finance, Audit and Risk Committee of the Horowhenua District Council (Council), after considering a direction from the majority of Councillors arising from the Ordinary Council meeting on 11 October 2017. Our¹ Terms of Reference follow in Attachment 1.
2. The Mayor of the Council has sought support for his role. Earlier in 2017 he appointed an advisor whom he identified as his 'Advocate'. The person appointed as Advocate was not an employee of Council. Nor was her position funded by the Council. The role had no formal status within Council administration – not being an employee, nor having any lines of accountability. This situation created confusion among staff and elected members, and tension between the Mayor and the Chief Executive.

Objectives and outcomes

3. The review's objectives are to develop and support the relationship, appropriate to the size and scale of the Council, between the Mayor, elected members, Chief Executive Officer (Chief Executive), and his staff with the intent of promoting good governance and management; and for the future to define and minimise the Council-wide risks as evident in the current situation.
4. Under the Terms of Reference, the outcomes of the review were:
 - (a) Establishing what legal and practical support can or should be available to a mayor under New Zealand's local government framework, within the legal and governance structures of local authorities and relevant to the size and scale of Horowhenua District Council.
 - (b) Establishing what authority an advocate could have to act on behalf of the Mayor in his or her official capacity, the accountabilities required of the Advocate and to whom, the role of the Advocate in relation to the Council's Chief Executive Officer and staff (including the ability of the Advocate to work with and request action of staff), the nature of, and constraints on, an advocate's delegated authority and management of personal interests and the role of being Advocate.
 - (c) Establishing the conditions on which an advocate could have the ability to access, use, and disclose Council information generally, and confidential information specifically, both within and outside the Council when representing the Mayor; including the authority to make public statements and publicly commit Council.

¹ The review was completed by a team of three led by the principal reviewer, Bruce Robertson of RBRobertson Ltd.

- (d) Providing a basis for the Horowhenua District Council to determine, and give the necessary instructions to the Chief Executive on the nature of the support (if any) the Council could provide to the Mayor of Horowhenua District Council, including the appropriate role, status, and terms of engagement of an advocate.
5. After our review began, the Mayor indicated that the role of the Advocate had ceased. That removed the need for us to consider the requirements of the role looking forward. Instead, we have focused on what types of similar support – described in this report as communications advice or support – could be made available to the Mayor in discharging his statutory role as the leader of Council.

Our process

6. To deliver on the outcomes sought through this review, we have reviewed relevant Council documentation and correspondence, and interviewed some elected members and staff. A list of people interviewed follows in Attachment 2. We also made general inquiries with a number of elected members and staff of other councils on common practices related to governance, mayoral support, and accountability arrangement for the staff who support elected members.
7. The Mayor declined to meet with us for the review. We had hoped to be able to explore with the Mayor his expectations as to the types and levels of support that could be made available for his role, how they could be established and implemented in a manner that fitted within the local government model, and achieved the necessary transparency and accountability for the personnel involved. We have instead drawn on information supplied by the Chief Executive about the support services that were made available to the Mayor following his election in October 2016, including one role that was publicly advertised by Council.
8. The person appointed as the Advocate also declined to meet with us. In understanding how she and the Mayor defined and approached the role, we have drawn on information contained in the correspondence supplied to us. This included an explanation supplied by the Advocate in a letter to the Office of the Ombudsmen dated 14 November 2017. The Mayor expressly referred us to that correspondence.

Structure of the report

9. Following this introduction, we provide our overview of the situation resulting from our review, followed by our recommendations. Those sections are followed by a full analysis of the issues to support our conclusions. The attachments include our Terms of Reference, and, in attachment 2, a list of people we spoke to within Council and the range of people we spoke to outside Council plus commentary on the constraints on this review.

Disclaimer

10. This report has been provided to the Council, through the Finance, Audit and Risk Committee. No reliance should be placed on the findings of the report by any third parties. The review did not involve any investigation designed to find fault or liability for any acts or omissions by any entity or individual, and no such inferences should be drawn from the report or relied on by anyone. This is also not an assurance report, and no assurance should be taken from its findings.

Overview

11. Our review was prompted by the Mayor's engagement of an advocate to support him in the performance of his mayoral responsibilities. However, as it developed the review raised questions about what level of support a council should provide for the role of the Mayor; and how the support should be structured and managed within the governance system. The establishment of the Advocate's role, and how it was put into effect, also raised specific questions about how elected representatives, including a mayor, interact with the management of a council, including for the purpose of obtaining the information they need for the effective performance of their roles.

The Council's governance systems and practices

12. In our assessment, the Council has in place all the governance arrangements and systems that would be expected of a local authority of its size. Relevant to our Terms of Reference, the *Elected Members' Handbook* stresses the responsibilities of Councillors for governance; the importance of Councillors acting only by majority decisions made at Council meetings; the role of the Chief Executive in advising the Mayor and Councillors and as the employer of Council staff; the importance of a relationship of mutual trust and respect between Councillors and the Chief Executive and staff; and the need for Councillors to declare conflicts of interest. Those statements are supported by the *Code of Conduct* for elected members; the 2016 *Protocol for engagement between elected members and staff* ("the engagement protocol"); and guidance (supported by the *Standing Orders*) on the handling of confidential Council information and on conflicts of interest and bias.
13. From what we were told, the Council under the previous Mayor operated in an environment where there was a degree of integration between the Mayor, Councillors, the Chief Executive, and staff. The Mayor's support requirements for his role were met by the Chief Executive, through the Chief Executive's statutory role as the adviser of the elected members, and by the resources available through the Council administration and staff. There was no separate Mayor's office.
14. The Council's engagement protocol sets clear boundaries between elected members and staff, by discouraging contact. It provides that elected members seeking information on day to day operational matters should use the Customer Request Management System (CRMS);

and that, “wherever possible”, elected members should seek information or make comment on a specific matter via the Chief Executive. Yet we were told of practices that developed during the terms of the previous Mayor, and were accepted by the Chief Executive, which encouraged limited contact directly with senior managers. This was facilitated by (at times) physical access to the administrative offices and the use of email.

15. Such arrangements and practices can work well in a context of mutual trust. Through our inquiries with other councils, such levels of contact are not unusual – although everyone we spoke to stressed this was because of the trust that had been established between governance and management.

What we found at the Council

16. It is clear that the election of the Council’s new Mayor in 2016 ushered in a period of significant transition for the Council as an institution, and for the relationships between the elected members and the administration headed by the Chief Executive. The Mayor has said publicly that he was elected to bring about change in the Council and its administration. That is an acceptable outcome of the democratic process, and is not necessarily unusual in New Zealand local government. But the environment we observed at the Council is marked by a sharp lack of trust between the Mayor and the Chief Executive, and between the Mayor and most other Councillors.
17. There seem to have been several contributing factors. The trust between the Mayor and the Chief Executive, and between the Mayor and other Councillors, was damaged by the Mayor’s public statements about the Chief Executive soon after his election. The Mayor’s relationship with the Chief Executive appears to have steadily eroded since then. The Mayor was initially not trusting of the support resources that were to be made available to him through the Council administration, and asked for his own resources to assist him in his role. When those resources, still provided through the Council administration, did not (for various reasons) provide the support he needed, he engaged his own support in the form of the Advocate.
18. The trust between the Mayor and other Council staff has been eroded by a series of direct interactions which were not consistent with the engagement protocol. While perhaps consistent with the earlier practices as they had developed, they became damaging because of their content and tone.
19. The Councillors we spoke to also told us that trust between them and the Mayor eroded with his actions, soon after his election, to “go public” on his views about the safety of Council’s head office in Levin, without first discussing with them his intended public statement.

The role of the Advocate

20. The fundamental problem is that the role of the Advocate was never defined, at least for those who were expected to interact with her.

21. In particular, it was never clear whether the Advocate was a political adviser to the Mayor, a communications adviser, or a spokesperson. The only definitions we saw of the role were given by the Advocate herself, in her communication to the Office of the Ombudsmen that the Mayor invited us to use as a point of reference and in her letter to the Chief Executive of 31 August 2017. They drew on her previous experience as an advocate in other contexts, including as an advocate for children, a rest home resident and hospital patients. The difficulty in those definitions is that they were derived from other contexts which do not sit with the model of democratically elected local government. An advocate in those contexts is entrusted by someone else to speak on their behalf, for a particular end and using the advocate's own words. That is different from the role of a communications adviser, whose role is to assist a mayor to exercise his or her leadership role as an elected officer, using words which are (or become) those of the mayor.
22. The distinction was clearly evident in some of the communications we saw that had been written by the Advocate, in that capacity. Put plainly, it was difficult to see who was speaking – the Mayor, or the Advocate. Statements appearing to be made on behalf of the Mayor were interspersed with, and at times inseparable from, statements of a personal nature by the Advocate concerning what were clearly her own issues and opinions. There was no acknowledgment of these separate interests, as is required of elected members under the conflict of interest requirements (as set out in the *Elected Members' Handbook*). As Council staff put it, they were often unsure whether they were dealing with the Advocate in person (as a ratepayer) or the Mayor when dealing with communications of that nature.
23. This lack of clarity in the Advocate's role also caused uncertainties about the use of confidential information. Confidentiality is an essential element of governing and managing any organisation, and trust is an inherent factor in enabling confidential information to be created and then used as intended. The *Elected Members' Handbook* describes "confidential information" in these terms:

Confidential information is the term usually used to describe information that is meant for the eyes of elected members and officers only, but is not necessarily in the form of an official Council, committee or subcommittee report where there has been a formal resolution made to treat the report as 'public excluded'.

The information could be shared and discussed in any number of different forums at the Council – from formal Council meetings, to meetings between officers and elected members, to email and so on. In all cases, it is possible that some or all of the information shared and discussed could be confidential. The venue or the medium that the information has been shared or discussed in does not impose any limits on this.
24. The *Guide to members' standards* (prepared by Brookfields Lawyers in 2016) sets out clearly the obligations of elected members in respect of confidentiality. Members are bound by the *Standing Orders* not to disclose "public excluded" information to anyone other than members or officers. A person who acts as an informal political adviser to a mayor or an elected member is not an officer. However, someone engaged by the council administration to provide support to a mayor would be. The fact that the Advocate was not engaged through the Council administration meant that she could not be given confidential

information. But the nature of some of the communications that occurred, and the lack of clarity about the role, made it difficult for staff to be certain about what information they could, or should, tell her. Similar uncertainties arose for elected members, in their interactions with the Mayor of the type referred to in the definition set out above.

25. This contributed to a loss of the trust that is implicit in the definition set out above.

Support for mayors

26. Some mayors do seek their own resources in performing their leadership roles. Our understanding of good practice is that this will usually involve executive support and, in some cases, separate communications resources. But our inquiries with other councils suggest that separate communications resources come with a high degree of challenge and risk. Separate communications support can be useful, but clarity of mandate is essential, so that the words crafted by the adviser can plainly be seen to be those of the mayor, and that the mayor and the council can be seen to “speak with one voice”. As one seasoned operator put it, trust is the key factor in these dynamics. Another stressed how important it is for any separate communications support to be bound by the same conventions that apply to everyone else, including political neutrality, standards of conduct, and respect for confidential information.
27. These comments are reinforced by the point made by the Mayor of one small council when responding to Local Government New Zealand’s survey about the role of mayors in 2015, published in *Local Leadership: The Role of Mayors and the Impact of the LGA2002 Amendment Act 2012* (at page 14):

I don’t support mayors having their own “departments”. The smooth running of a council depends on a good relationship between the Mayor and Councillors and the Chief Executive which in turn provides access to Council staff and information. We are all part of the same team and to have two teams has the potential to be divisive.

Conclusions and recommendations

28. We summarise our conclusions from the review as follows
 - a) The Mayor had a valid request for support in his role as the incoming Mayor. However, the solution he eventually developed in the form of the Advocate, after two attempts at Council-assisted support, was problematic. The role lacked any formal basis, and its nature, responsibilities and constraints were unclear (at least to others). Because it sat outside the Council administration and the governance model, it created uncertainty and risk, including in respect of whether confidential information could properly be given to and used by the Advocate.
 - b) The manner of the role’s implementation was also problematic. The Advocate engaged in direct communication with officers, contrary to the expectations of the Council’s engagement protocol. Some of the communications appeared to mix official with personal matters, which undermined the objectives of the conflicts of interest system.

This made it difficult for staff sometimes to understand who was “speaking”, or on whose behalf. The tone of the communications became confrontational, and not what would be expected of internal communications. A history of previous interactions between officers and the Advocate in her personal capacity did not help matters. But neither did some of the responses by management.

- c) These factors associated with the role of the Advocate – problematic design and problematic implementation – contributed to a further breakdown of the trust. This happened at two levels in the Council. There was a worsening of the distrust already existing between the Mayor and the Chief Executive. And, as elected members became aware of the impact of the Advocate’s role, this also affected trust and hindered their aspirations for political engagement with the Mayor.
29. At a deeper level, two key themes have emerged.
 30. First, we think the review has exposed a deficiency in how elected members interact with, and obtain information from, the Council administration. The Council’s engagement protocol makes clear the need for members, consistent with the model of corporate governance for local authorities, to interact with staff through the Chief Executive wherever possible. All members should have the same rights of access to Council information. But over time practices have developed that are inconsistent with the protocol, for example enabling committee chairs to interact directly with Council officers and other elected members to raise questions with officers in advance of Council meetings. While the purposes of these interactions may be legitimate, in the current climate they have resulted in uncertainty, including for staff in dealing with the Advocate’s communications.
 31. We also noted the Mayor’s increasing use of the Local Government Official Information and Meetings Act 1987 (“LGOIMA”) to seek access to Council information. The LGOIMA is designed to make information publicly available. Information needed by an elected member for internal use should be sought using the engagement protocol. Using the LGOIMA as an alternative to the protocol is symptomatic of a significant breakdown of Council’s systems in this area. It also shows a lack of consensus about what types of information an elected member (and the Mayor in particular) is entitled to seek internally, compounded again by the lack of trust between those involved.
 32. The second theme is about the resourcing of the Mayor’s leadership role. Practice elsewhere for small councils suggests that any such support should be modest, and could include access to part-time executive assistance and communications advice. But the use of separate communications advisers carries risks, as explained above. These risks need to be fully understood and managed, so that a mayor and the council itself can be seen to be “speaking with one voice” and that (as the *Elected Members’ Handbook* stresses) the support does not transgress into “assistance to elected members on personal or political issues”.
 33. Systems are also needed to ensure that the support staff are accountable to the chief executive for their work, but that the mayor is able to direct their activities in consultation with the chief executive and contribute to the chief executive’s management of their performance.

34. Given what we have observed, the Mayor's indication that the role of the Advocate has now ended, and that he will from now on rely on resources supplied by the Council administration, provides an opportunity. If those resources are to include communications advice or other forms of executive assistance, we urge that clarity is essential in terms of role, responsibility (including in respect of matters such as access to confidential information and interactions with other staff) and accountability. That will set the foundation for the necessary level of trust, consistent with the *Elected Members' Handbook*.
35. While this is positive, it does not automatically heal the rift of a lack of trust. This remains the most significant challenge and risk to Council functioning effectively.

Recommendations

36. Our recommendations are designed to promote forward-looking solutions for the Council that will be acceptable to all involved. To address the two underlying themes just discussed:
 - a) The Council's practices in respect of elected members' interaction with staff, and the exchange of information between them, need to be aligned with existing policy and good practice.
 - b) There should be a consensus about the level of support to be made available for the Mayor in his leadership role. While the provision of support is a matter for the Chief Executive, in consultation with the Mayor, in the current climate we would suggest that the elected members also discuss and give their blessing to the arrangements that are put in place. In particular, the elected members should be entitled to assurance that any communications assistance will be provided only to support the Mayor's leadership role, and should not undermine the communications work being done within the Council administration.
37. We recommend that:
 - a) The Council review the Council's engagement protocol and its current implementation, to ensure that the practices align with good practice and can be appropriately observed and enforced, if necessary. An objective of the review should be to ensure that the practice of elected members using the LGOIMA for internal purposes is discouraged and preferably eliminated.
 - b) The Chief Executive, in discussion with the Mayor, review the level and nature of support needed for the Mayor to discharge his leadership role under the Local Government Act. This should include consideration of the types of support required, and the level of resource and time input (expressed in FTEs) needed. The elected members should review and agree to the outcome, through the Finance, Audit and Risk Committee.
 - c) For the purpose of the review of the Mayor's support requirements, expert advice should be taken on how the challenges associated with separate support can be managed. In particular, advice should be taken on how to achieve clarity of roles, and ensure that the Mayor is always "the person speaking", and that Council is always seen to be "speaking with one voice".

- d) That the Finance, Audit and Risk Committee oversee and monitor the implementation of the above recommendations.

Analysis

38. This part of the report contains our detailed analysis which informs the findings and recommendations stated above.

Support provided for the Mayor before the appointment of the Advocate

39. The Mayor was elected to that office in October 2016. As we understand it, from early in his term he sought support to assist him to carry out his role. The Chief Executive and some elected members were aware that the Mayor, immediately after his election, was receiving private administrative and secretarial assistance as he prepared for his new role. That assistance was never formalised in any arrangement with the Council. (The person who provided that assistance later became the Advocate.)
40. After the Mayor's inauguration, a temporary Executive Assistant was engaged for a short period. At the Mayor's request, a support role was advertised in November 2016. The role was for an 'Executive Assistant to provide exceptional and professional executive administrative support services to the Mayor'. The Council sought a person who was 'motivated and experienced to deliver high level managerial support, exceptional administrative services and demonstrate high levels of efficiency relating to information management and special events coordination,' and experienced in minute taking.
41. Applications were received, and shortlisted, and psychometric testing completed on the shortlisted candidates. Before an appointment could be made, the process was cancelled after the Mayor decided that the support should be that of an assistant, not an executive assistant.
42. Before Christmas 2016, the Mayor identified a person to take up the role as his assistant. The assistant was engaged as a contractor to Council, with the support of the Chief Executive. The purpose of his role was to provide assistance for the Mayor, including arranging meetings and engaging with elected members. The engagement was documented using a services agreement, and was subject to a written confidentiality agreement. As a contractor engaged by the Council under the authority of the Chief Executive, the assistant was accountable to the Chief Executive but, in practice, took his instructions from the Mayor directly. The assistant resigned from the position in February 2017, after reporting to the Chief Executive that he had done all that he could in the role.
43. Following this resignation, a person was contracted in the position of Executive Assistant to the Mayor on a temporary basis from March to July 2017. After that, a permanent Executive Assistant was employed.

The intent of the role of advocate

44. After the two short-lived appointments to the Council-funded roles, the Mayor informed the Chief Executive and elected members in May 2017 that the person who had previously provided him with secretarial support in the pre-inauguration period was now his 'advocate'. As noted above, the role was not a Council-funded position, had no terms of reference as far as we are aware, and had no formal status or internal lines of accountability within the Council administration.
45. We were provided with correspondence that gives some indication of the intent of the Mayor and the Advocate herself, as to the purpose of the role.
 - a) In an email dated 10 May 2017, in response to an email from the Advocate the previous day the Mayor informed the Chief Executive that he had authorised the person concerned to act as his advocate, that he had authorised her to write all emails that she had sent to that point, and that he expected the Chief Executive to 'take notice' of the contents of the previous email written the previous day.
 - b) In an email dated 16 May 2017, the Advocate advised the Group Manager Corporate Services (GMCS) that the Mayor had authorised her to respond to the GMCS's email to the Mayor from the previous day.
 - c) In a letter to the Chief Executive, dated 31 August 2017, the Advocate advised, among other points, that she was 'neither paid by you or Council.'
 - d) In her letter to the Office of the Ombudsman (referred to in the Introduction), the Advocate:
 - described her previous experience as a writer and as an advocate for children, a rest home resident and two hospital patients
 - noted that the Concise Oxford Dictionary definition of an "advocate" is "to plead for, to speak on behalf of, to recommend publicly, to defend"; and that in this instance, and at the Mayor's request, she had "advocated on behalf of" him
 - stated that she considered her unpaid advocacy role for the Mayor to be "casual and temporary with occasional guidance to the Mayor on writing and some other issues, and that the role was pending a suitable EA [being] employed by [the Chief Executive] for the Mayor's mayoral office"
 - stated that she was not engaged as an advisor to the Mayor; she had been asked to be his advocate, to speak on his behalf, and to publicly defend him.
46. It seems from this correspondence that the Mayor intended for the Advocate to interact with Council staff and the public on his behalf; that he had authorised in advance the substance of that engagement; that the role was unpaid; and that it was an on-going arrangement. This meant there was no formal relationship with, or accountability to, the Council organisation.

What happened in practice

47. The Chief Executive and Council staff told us that they recognised the need for the Mayor to have support in his role, whether in the form of administrative support or the more operational type of support provided by the assistant between December 2016 and February 2017. Those roles were established under the authority of the Chief Executive, consistent with the model of local government. We heard that the manner in which the assistant's engagement became known to them surprised some elected members, and the later disclosure of a family connection with the person who became the Advocate also came as a surprise, but there was general support for the work he performed and his professionalism in doing so.
48. In contrast, we observed through our discussions and review of documentation that the establishment and implementation of the Advocate role lacked transparency and led to confusion and tension between the Mayor and elected members, and between the Mayor and the Chief Executive and other staff.
49. The staff confusion arose from a lack of clarity as to the mandate and purpose of the role. The Advocate had a history of communications with the Council, including interactions with staff, in a personal capacity in respect of issues in her home community. Some of her communications to the Chief Executive and other staff were sent with a byline of "Advocate for Mayor Michael Feyen" (for example, an email sent on 9 May 2017 at 11:22:01 am to the Chief Executive). Others were clearly written by the Advocate, but sent by the Mayor in the name of the Mayor himself. Yet others were sent under her own name, but apparently using the authority of the Advocate (for example, an email dated 11 May 2017 sent at 8:29:38 am to the Chief Executive).
50. Many of the communications we saw contained what appeared to be a mix of information being sought, and opinions stated, on behalf of the Mayor and information and opinions that were clearly those of the Advocate personally. An example was the email dated 11 May 2017 just referred to, which addressed matters concerning the Chief Executive's employment (which could only have been the concern of the Mayor) but also personal matters concerning her and her husband's interactions personally with him. An 8-page letter sent to the Chief Executive on 31 August 2017 similarly canvassed matters in relation to his employment, but these were intermingled throughout with matters that were clearly personal to her and matters of her own opinion. There was no attempt in such communications to separate the different interests involved.
51. We also found the tone of that letter disturbing, and not what would be expected of an internal communication. But the letter also defended the Advocate's role, with the statement that she was not the Mayor's "Advisor" or a "Consultant", and did not need the Chief Executive's approval for her actions. This, to us, typified the lack of transparency about, and accountability for, the role. From our reading of this correspondence it was unclear to us whether the Mayor was aware of, or had endorsed, the Advocate's statements, or what if any oversight the Mayor was exercising over her actions.

52. When approached by the Advocate in these ways, staff were unsure about the nature of the opinions being expressed, the basis of the requests being made for information, and whether or how they should reply. Under the Council's processes for raising ratepayer concerns, members of the public do not communicate directly with staff about issues of personal concern. Instead, their communications are channeled through the CRMS and allocated to responsible staff for reply. Under the Council's engagement protocol, elected members seeking information on day to day operational matters, whether on behalf of constituents or otherwise, should also use the CRMS rather than interacting directly with staff. On specific matters, the protocol says that "wherever possible" elected members should seek information or make comment on a specific matter via the Chief Executive.
53. Although the protocol is clear in its discouragement of direct contact between elected members and staff (other than the Chief Executive), we were told of practices that had developed during the terms of the previous Mayor, and were consented to by the Chief Executive, which did allow limited contact directly with senior managers, for example to answer members' queries about Council papers in advance of a meeting. This practice was facilitated by (at times) physical access to the administrative offices and the use of email. It worked acceptably, making Council meetings more effective.
54. This practice, and the history of interactions between Council staff and the Advocate in her capacity as an individual ratepayer, is perhaps one cause of the confusion that arose for staff about whether the Advocate was appropriately communicating with them directly, and how to respond to her approaches. But the situation was clearly exacerbated by a lack of clarity in many instances about whether the Advocate was speaking on behalf of the Mayor or with his authority, or on her own behalf.
55. An example concerned the Advocate's longstanding personal interest in her community's water supply. While performing her role on behalf of the Mayor, the Advocate also continued to raise concerns about this matter, apparently in her personal capacity but using her connections with the Mayor and another elected member to gain prominence. We saw correspondence in November 2017 concerning this issue, which referred to an earlier complaint by her and was forwarded by the elected member directly to Council staff for response. While the matter was responded to effectively, staff found the situation difficult because of the lack of clarity about her role.
56. As these types of interactions continued, tension increased and the tone of the communications both from and (in some instances) to the Advocate became increasingly confrontational. The staff "pushed back" to the Advocate, and to the Mayor, both through the Chief Executive and in some cases directly. We were also told that staff felt stressed and harassed by some of the communications. This culminated in an email copied to the Chief Executive on 5 October 2017 in which the Advocate, writing in the name of the Mayor, questioned the qualifications of a staff member. The Mayor subsequently said that the email had been sent to the Chief Executive in error (it was apparently a draft prepared by the Advocate for the Mayor to consider and approve). But, at the same time, the Mayor said that the question was "a matter of public interest". We were told that this exchange prompted a council-level discussion because of concerns about governance interference in management matters and resulted eventually in this review being commissioned.

57. The focus of our review was on internal communications within the Council as an organisation. There is also some risk that the internal lack of clarity on the Advocate's role could have also been manifested externally. For example, we were given a copy of an email dated 5 May 2017 which the Advocate wrote to a Crown agency with advice about its contact and work with Council. Her email was clearly written by the Advocate and signed as "Advocate for Mayor Michael Feyen".

Support for mayors

Legal requirements and good practice

58. The local government model in New Zealand follows the standard model of corporate governance used for other types of entities, including companies and non-profit entities.
59. A good system of corporate governance ensures that an entity has well-defined roles, effective separation between roles, and shared understandings about responsibility and accountability. The key point of separation is between governance (not to be confused with the system of corporate governance itself) and management (performed by the entity's staff, headed by a chief executive).
60. This can be readily seen in the Local Government Act. Section 41 of the Act requires that every local authority has a governing body. The governing body (which is usually known as the Council) consists of the elected members and the elected mayor. Section 42 of the Act also requires there to be a chief executive, who is appointed by, and responsible to, the local authority.
61. The Act spells out clearly the respective roles of each. The governing body is responsible and democratically accountable (to electors and the community) for the decision-making of the local authority. The chief executive is responsible to the local authority for (among other things) implementing the local authority's decisions, supporting the governing body with advice, ensuring the effective and efficient management of the authority's activities, and employing and leading the local authority's staff.
62. It is important to state these fundamental principles because they are the source of the convention, found in corporate practice as well as in local government, that contact between individual members of the governing body and the chief executive, or members of management, is undertaken within the overall corporate governance framework and using communication processes that are transparent and well understood. In the corporate sector this is usually set out in a charter or other document applying to members of the governing body, including how dialogue occurs and the limitations of any information exchange or decision-making. In local government, including the Council, it is set out in the *Elected Members' Handbook* and other documentation, including the Governance Statement.
63. The Council has in place all the governance arrangements and systems that would be expected of a local authority of its size. Relevant to our Terms of Reference, the *Elected Members' Handbook* stresses the responsibilities of Councillors for governance; the importance of Councillors acting only by majority decisions made at Council meetings; the

role of the Chief Executive in advising the Mayor and Councillors and as the employer of Council staff; the importance of a relationship of mutual trust and respect between Councillors and the Chief Executive and staff; and the need for Councillors to declare conflicts of interest. Those statements are supported by the *Code of Conduct* for elected members; the 2016 *Protocol for engagement between elected members and staff* (“the engagement protocol”); and guidance (supported by the *Standing Orders*) on the handling of confidential Council information and on conflicts of interest and bias.

64. Corporate governance principles and practices also define the role of the chair of a governing body. The role is one of leadership, promoting an effective governance culture within the organisation and providing effective representation outside it. However, the chair’s leadership role must be exercised within, and subject to, the principle that all members of the governing body are collectively responsible for board decisions and must act in accordance with decisions once made. This is sometimes expressed using the phrase ‘first among equals’.
65. The Local Government Act again reflects this aspect of corporate governance. The position of mayor is equivalent to that of the chair of a board of directors of a company or the governing body of a non-profit entity under corporate governance practice.
66. In its original form, the Act said very little about the role of the Mayor. However, the Act was amended in 2012 to clarify the role of the Mayor in terms of leadership.
67. The reforms originated in the legislation establishing the Auckland Council in 2009 (the Local Government (Auckland Council) Act). This recognised that the role of the Mayor of the Auckland Council and conferred some specific responsibilities and powers. The role was to articulate and promote a vision for Auckland, and to provide leadership for the purpose of achieving objectives that would contribute to that vision (section 9(1)). The Mayor was also given a number of specific statutory powers. These were to establish processes and mechanisms for the Council to engage with the people of Auckland, to appoint the Deputy Mayor, to establish committees of the Council and appoint the chairperson of each committee, and to establish and maintain an appropriately staffed office of the Mayor (section 9(3)).
68. In 2012 the Local Government Act was amended to confer similar responsibilities and powers on all mayors of local authorities. However, section 41A (1) limits the role of the Mayor to that of providing leadership to the other elected members of the authority and the people in the local authority’s district. And section 41A (3) limits the powers of the Mayor to appointing the deputy mayor, establishing committees, and appointing the chairperson of each committee.
69. Unlike for Auckland Council, the 2012 reform gives no power to a mayor to establish an Office of the Mayor. It is also worth noting that, even in Auckland, that power is subject to the constraint that the Mayor must exercise the power in consultation with, and act through, the Chief Executive. This recognises the basic principle of the separation between governance and management, and the role of the Chief Executive to employ staff. A mayor has no power to do so him or herself.

70. The absence from the Local Government Act of a mayoral power to establish an Office of the Mayor does not preclude the local authority doing so, under the authority of the chief executive but in consultation with the mayor, in accordance with the division of responsibilities referred to earlier.
71. Some mayors do seek their own resources in performing their leadership roles. Our understanding of good practice is that this will usually involve executive support and, in some cases, separate communications resources. But our inquiries with other councils suggest that separate communications resources come with a high degree of challenge and risk. Separate communications support can be useful, but clarity of mandate is essential, so that the Mayor and the Council can be seen to speak with one voice. As one seasoned operator put it, trust is the key factor. Another stressed how important it is for any separate communications support to be bound by the same conventions that apply to everyone else, including political neutrality, standards of conduct, and respect for confidential information.
72. These comments are reinforced by the point made by the Mayor of one small council when responding to Local Government New Zealand's survey about the role of mayors in 2015, published in *Local Leadership: The Role of Mayors and the Impact of the LGA2002 Amendment Act 2012* (at page 14):

I don't support mayors having their own "departments". The smooth running of a council depends on a good relationship between the Mayor and Councillors and the Chief Executive which in turn provides access to Council staff and information. We are all part of the same team and to have two teams has the potential to be divisive.

Our inquiries about practices elsewhere

73. We made general inquiries about practices elsewhere in the local government sector. Those we spoke to agreed that mayors require support. At minimum, a mayor needs a good executive assistant. They may also need support around communications, in the form of media training, speechwriting, a spokesperson for times when the mayor is not available.
74. Most mayors do get administrative support from their councils, and most of the time it works well. Auckland, Wellington and Christchurch have larger teams supporting the Mayor.
75. For larger councils, an Office of the Mayor, with a team of people supporting the Mayor on administrative matters, event coordination, and media management can be appropriate.
76. Sometimes a mayor might need an advisor or representative to go to a meeting on his or her behalf, authorised to speak for him or her if unable to attend, but that would be with very specific authorisation.
77. It is important that staff are employed by Council with clear roles, responsibilities and lines of accountability. That said, those we spoke to noted that it can be difficult for staff to have a dual accountability to the Mayor and the Chief Executive. They commented that building relationships and trust are critical. Ensuring staff are part of the same team can work well, even when some work for the Mayor and some work for the Chief Executive.

78. Working to the “no surprises” rule is also very important, although it was acknowledged that this tends to apply more to chief executives than to mayors.
79. Mayors may also make use of their personal networks to discuss issues and sound out solutions. But those people are not employed by council. Because they are not officers, they cannot receive confidential information or act on behalf of the mayor or the Council. Interviewees told us that external advice of this type is important, whether as political mentoring or as general sounding boards. However, within the governance framework of a council, the chief executive is the council’s chief advisor, supported by officers with specific roles and on occasions using independent advice, or a second opinion, obtained under the authority of the chief executive.
80. Our inquiries have indicated that the role of an ‘advocate’ appears to have no precedent in local government. Those we spoke to expressed concern about the implications of the role, including that it appears to go beyond the role of a communications adviser. Everyone considered that the term was unusual, and could be construed negatively. The feeling was that mayors must speak for themselves. It is not unusual for mayors to have support in relation to communication, or to authorise someone to attend a meeting on their behalf, but the connotation of a communications director, or representative, is that of a spokesperson using the mayor’s own words – rather than someone who speaks on the mayor’s behalf using the advocate’s own words, pleads for the mayor, or acts as a defender, as implied by the term ‘advocate’.
81. Specific comments from people within the sector whom we contacted include:
 - a) A mayor is elected at large. Other councillors and the chief executive need to recognise the strength of that mandate and support the mayor.
 - b) Any role supporting the mayor must be beneficial to both the mayor and the organisation.
 - c) A person advising the mayor, who is not employed by council, would be better called an ‘adviser’.
 - d) Working collaboratively is a key part of managing dual accountability.

Observations on the elements of our brief

82. In this section we respond to each of the matters addressed in our Terms of Reference, with the benefit of the preceding discussion.

Authority to act on behalf of the Mayor

83. The powers of a mayor are set out in section 41 of the Local Government Act 2002, and are limited to appointing the deputy mayor, and establishing committees and appointing their chairs. These powers may not be delegated.
84. There is nothing to prevent a mayor from authorising someone to act on their behalf, however:
- a) a mayor may not delegate any of their powers to anyone
 - b) if the person were employed by the local authority, they would be accountable as an employee to the chief executive
 - c) a mayor could be seen as abrogating their duty to provide leadership to the people in his district if he allows someone to speak publicly on his behalf
 - d) the use of the term 'advocate' could reinforce this impression: people in the district may question why a mayor would require someone to speak or plead on his behalf, or to defend him
 - e) even if a mayor did not specifically abrogate their leadership responsibilities, any such impression could be a risk.
85. The mayor's ability to authorise a person to act on their behalf is constrained by the scope of the mayor's role; while mayors provide leadership, they do not direct the Council organisation. It follows that a mayor cannot authorise anyone else to do so.

The role of an "advocate" in relation to the Chief Executive and staff

86. Section 39(e) of the Local Government Act requires that a local authority should ensure that the relationship between elected members and management of the local authority is effective and understood. The Council has a code of conduct, which sets out requirements for relationships with staff. This is given effect through the engagement protocol.
87. As noted earlier, the protocol specifies that members engage with the organisation through the CRMS for information on day-to-day operational issues, and through the Chief Executive for other matters wherever possible.

Delegated authority

88. Section 42 of the Local Government Act requires the local authority to appoint a chief executive, and stipulates that the chief executive employs the staff of the local authority. A person, other than an elected member (including the mayor), can therefore only act on behalf of the local authority if they are authorised through the chief executive. As noted above, a mayor does not have any authority to authorise a person to act on behalf of the Council organisation.
89. An important aspect of delegation of authority is the need for mechanisms to hold the person to account for exercising that authority. These will usually be set out in an employment agreement or contract for service, and associated directions from management (such as a delegations manual).

Management of personal interests

90. The requirement that state servants must be apolitical when carrying out their duties, functions and powers is an established constitutional convention in New Zealand. This applies by analogy to employees of local authorities.
91. A person who is not an employee of, or contractor to, the council does not have this obligation. A person engaged by a mayor could naturally be expected to support and promote the mayor's political views. Where such a person promotes their own views or interests, which are distinct from, or differ from the mayor's views or interests, the primary risk is to the mayor's credibility in providing leadership for members and the community. The *Elected Members' Handbook* makes it clear that a communications adviser will not provide assistance to elected members on personal or political issues.

Conditions for an advocate accessing, using and disclosing confidential information

92. Confidentiality is an essential element of governing and managing any organisation. The *Elected Members' Handbook* describes "confidential information" in these terms:

Confidential information is the term usually used to describe information that it meant for the eyes of elected members and officers only, but is not necessarily in the form of an official Council, committee or subcommittee report where there has been a formal resolution made to treat the report as 'public excluded'.

The information could be shared and discussed in any number of different forums at the Council – from formal Council meetings, to meetings between officers and elected members, to email and so on. In all cases, it is possible that some or all of the information shared and discussed could be confidential. The venue or the medium that the information has been shared or discussed in does not impose any limits on this.

93. The *Guide to Members' Standards* (prepared by Brookfields Lawyers in 2016) sets out clearly the obligations of elected members in respect of confidentiality. Members are bound by the *Standing Orders* not to disclose "public excluded" information to anyone other than members or officers. A person who acts as an informal political adviser to a mayor or an elected member is not an officer. However, someone engaged by the council administration to provide support to the mayor could be.
94. A person employed by the council as an officer would have a contract that sets the parameters for managing access to information. However, if a mayor provided a non-council employee access to confidential or personal information contrary to policy this would be considered a serious breach of the confidentiality requirement, irrespective of how that information was used, or whether it was disclosed to additional parties. The inappropriate use and disclosure of such information raises significant risk for a council, and can result in significant media interest and legal action.

Summary of risks

95. Acknowledging that the advocate role has ceased, and that the risks noted in the Terms of Reference may have been mitigated, it may be useful to consider them when establishing any support for the Mayor going forward.
96. The term 'advocate' implies that the Mayor may have been unwilling or unable to speak for himself and that he may have needed someone to defend him, whether to other members, the council organisation (including the Chief Executive), or the community. Irrespective of the title given to the role, there is a risk that a mayor in these circumstances is perceived as abrogating his or her democratically elected role to an unelected and unaccountable third party. Despite the Mayor's intention in creating the role (which we have not had an opportunity to discuss with him), this opens a mayor up to the risk of challenge – either internally or externally, especially if people rely on the statements of the advocate. To manage this risk, any future arrangements need to be organised within the governance framework under the Local Government Act, consistent with good corporate governance practice as we have described it.
97. Further, if the engaged person attempts or is perceived to "advocate" on behalf of the mayor, that raises questions about the information the person needs to carry out the role, and, as we have noted the risks around an unentitled and unaccountable person receiving confidential information. This again could open a mayor up to challenge.
98. The lack of clarity in the role the Mayor established has resulted in considerable uncertainty within Council. This remains an extant risk between the Mayor and his Councillors, and between the Mayor and the Chief Executive (and staff). Unless this is resolved, the prospect for repaired relationships and a new political consensus is limited. This will mean the often public and reputational risk for all individuals and the council as a whole remains.

Attachment 1 – Terms of Reference

Terms of Reference

Review of the Role of the Mayor's Advocate

Introduction

1. This document sets out the Terms of Reference for a review of the of the role of the Mayor's Advocate. The review has been commissioned by the Horowhenua District Council's Finance, Audit and Risk Committee after considering a direction from the majority of Councillors arising from its Ordinary Council meeting on 11 October 2017.

Background

2. The Mayor of Horowhenua District Council has sought support for his role. Earlier in 2017 he appointed an advisor which he identified as his "Advocate". The person appointed as Advocate is not an employee of Council nor is her position funded by the Council. The role has no formal status within council administration – not being an employee, nor having any lines of accountability.
3. On 10 May 2017 the Mayor informed the Chief Executive Officer that "I have authorised [REDACTED] to be my Advocate." Further, in outlining that he authorised her to communicate with the Chief Executive Officer, he said "I expect you to take notice of this immediately" implying also that the Chief Executive Officer should cooperate with any instruction from her.
4. The Chief Executive Officer's response on the same day was to state "I [do not] recognise her as having any formal association with Horowhenua District Council over and above any other customer, resident and/or ratepayer".
5. The role has not been defined further and, while the role of Advocate has been retained by the Mayor, it has remained contentious and disputed. It is reasonable to characterise the relationship with council staff as tense and holding some animosity.
6. At its ordinary meeting on 11 October 2017 Council discussed an email purportedly written by the Mayor, but allegedly prepared and sent by his Advocate on 05 October 2017. The intent of the discussion of Council was that the matter be reviewed.
7. While this matter remains contentious, as it has for much of 2017, until an agreed understanding of the status and role of the Advocate is reached, good governance and management practice and discipline at the Horowhenua District Council is impaired.
8. Importantly there are a set of risks that Council as a whole faces – internal email evidence reflects there is a growing divide over the role of the Advocate, and her actions, which is increasingly public, bringing reputational risk to the Council. There is employment risk as relationships break down. Further there is legal risk associated with the uncertainty surrounding the Advocate's role and her capacity to act on behalf of the Mayor. This affects

the Mayor's fellow Councillors, the Chief Executive Officer and his staff and external Council stakeholders. The extent of these risks is yet to be defined.

Scope and objectives

9. The Finance, Audit and Risk Committee's review is intended to establish a principled approach to the support sought by the Mayor through the engagement of the Advocate and the extent of that support's role and capacity to act in Council affairs.
10. The review's objectives are to develop and support the relationship, appropriate to the size and scale of the Council, between the Mayor, his Council, the Chief Executive Officer and his staff with the intent of promoting good governance and management and to define and minimise the Council-wide risks as evident in the current situation should it continue to exist on a status quo basis.
11. The outcomes of the review will be:
 - a. Establishing what legal and practical support can or should be available to a Mayor under New Zealand's local government framework, within the legal and governance structures of local authorities and relevant to the size and scale of Horowhenua District Council.
 - b. Establishing what authority an advocate could have to act on behalf of the Mayor in his or her official capacity, the accountabilities required of the Advocate and to whom, the role of the Advocate in relation to the Council's Chief Executive Officer and staff (including the ability of the Advocate to work with and request action of staff), the nature of, and constraints on, an advocate's delegated authority and management of personal interests and the role of being advocate.
 - c. Establishing the conditions on which an advocate could have the ability to access, use, and disclose council information generally, and confidential information specifically, both within and outside the Council when representing the Mayor; including the authority to make public statements and publicly commit Council.
 - d. Providing a basis for the Horowhenua District Council to determine, and give the necessary instructions to the Chief Executive on, the nature of the support (if any) the Council could provide to the Mayor of Horowhenua District Council, including the appropriate role, status, and terms of engagement of an advocate.
12. In the course of the review, other matters may come to light which the review may consider and report on.

Out of Scope

13. The following issues are out of scope for the review:
 - a. determining whether any matter reviewed and concluded on should give rise to any Code of Conduct or other governance-related or employment-related disciplinary action
 - b. concluding on any existing claims between any of the parties, subject to the review.

Approach

14. The review will have regard to, and where appropriate, draw from previous reviews and advice that have been conducted or given on this matter at Horowhenua District Council.
15. The review will seek the willing cooperation of all parties involved.
16. The work will be undertaken over four phases:
 - a. **Phase 1 – Discovery** - enlist the cooperation of all parties involved, collate and review all relevant information, including past communications between the parties, and establish New Zealand practice for support arrangement for Mayors
 - b. **Phase 2 – Confirmation** – agree that, based on all collated information, the objectives of the review are achievable and confirm with the Finance, Audit and Risk Committee
 - c. **Phase 3 – Development of findings and recommendations** – conclude any further review work required and develop findings and recommendations, observing fairness requirements
 - d. **Phase 4 – Reporting and implementation of findings** – in receiving the report from the reviewers and formally releasing the report, the Finance, Audit and Risk Committee will consider the steps necessary to implement the findings.

Key Dates

17. The indicative dates for each phase are:
 - a. Phase 1 – 21 November
 - b. Phase 2 – 23 November
 - c. Phase 3 – 08 December
 - d. Phase 4 – 13 December
18. The timing is indicative and is dependent on a number of matters contingent on such factors as the availability of staff and Councillors.

Project Governance

19. The review will be overseen by, and report to, the Chair of the Finance, Audit and Risk Committee.
20. The Chair will be responsible for all external and media communication on the conduct and results of the review.

Philip Jones

Independent Chair
Finance, Audit and Risk Committee
Horowhenua District Council

01 November 2017

Attachment 2 – Constraints

There were a number of constraints around this review – either through accepting what constituted adequate information or externally imposed on us.

What information did we have?

The primary information we had was access to a number of emails held by the Council. We reviewed these emails to understand the nature of communication between the Mayor, his Advocate, and senior management.

We considered specifically the emails causing the notice of motion of Councillor Piri-Hira Tukapua that ultimately led to this review. The key email is from the Advocate to the Mayor and copied to the Chief Executive on 5 October 2017.

An important email written by the Advocate to the Office of the Ombudsmen in light of the commissioning of the review was referred to us by the Mayor (email to the chair of the Finance, Audit and Risk Committee, 17 November 2017). The Advocate's email (14 November 2017) defined the intended role of the Advocate. The Mayor told us that he endorsed this as a clear definition of the role.

We also considered a number of Council documents, listed primarily in the body of this report.

Who did we meet in the course of the review?

We invited those directly involved in the series of emails and events that led up to the review:

Senior Management

Chief Executive Officer, David Clapperton
Senior Managers, Gallo Saidy and Mark Lester

Elected Members

Mayor, Michael Feyen
Deputy Mayor, Wayne Bishop
Councillors, Piri-Hira Tukapua and Ross Campbell

The Advocate

[REDACTED]

Other

We invited a selection of mayors, senior management and communication advisors to discuss how mayoral support arrangements operate in their councils.

We also made contact with several relevant government departments, agencies and entities based in Wellington and which have on-going involvement in matters at the Council.

Who could we have approached but didn't?

We considered broadening our interviews to all councillors and a wider selection of staff. While this may have given us a richer view of the issues around the Council table, it would not,

in our view, have directly affected our findings and conclusions. Similarly, there was no overt reason to extend our interviewing to other staff.

We did not make contact with any past elected members or staff.

Were we constrained?

We received full and open cooperation from the people who agreed to meet with us.

However, and importantly, the Mayor, the Advocate and Councillor Campbell elected not to meet with us. The Mayor also was not prepared to provide feedback in the agreed time on the draft of this report. The only information we have received from them for the purpose of this review is the copy of the Advocate's 14 November 2017 email to the Office of the Ombudsmen, referred to above and discussed in the report.

What is the impact of not being able to meet all parties?

The impact is varied. We were not able to meet with all of the external contacts we identified to discuss broader sector support arrangements. In our judgement, this has not affected our ability to conclude what represents good practice. All those we did interview were in broad agreement over the key components of good practice.

However, we have had to conclude on the events around the emails and the Advocate's role without the cooperation of either the Mayor or the Advocate. This has been compensated for, in part, by the Mayor referring us to the information in the 14 November email to the Office of the Ombudsmen.

We do remain aware that we have not been able to hear "their side of the story". Consequently, we have taken care to not overreach in our findings, conclusions or recommendations. There are some matters which we have not been able to conclude on which may have been valuable. We have not included these matters in this report. In regard to the matters in this report, there is also a low risk we may have amended some of our findings had we been granted interviews.

Our focus has been on the Terms of Reference, and we have worked within the constraints. The report contains an important disclaimer about the limitations of the review, who it was undertaken for, and the importance of not placing reliance on its findings beyond what is appropriate. Our focus has been on steps to go forward and deal with the undeniable breakdown in trust at governance and management level.