

ADDENDUM REPORT

REPORTS THROUGH THE ACTING GENERAL MANAGER

REPORTS FROM THE DIRECTOR TECHNOLOGY AND CORPORATE SERVICES

a46 [TCS-CM] Code of Conduct and Conduct Review Committee/Sole Reviewer Policy

ORIGIN:

Corporate Governance

SUMMARY OF REPORT:

As a result of a number of Conduct Review Complaint investigations and more recently a recommendation from a Conduct Review Committee Panel it has been deemed prudent to review the operations of the Conduct Review Committee and Sole Reviewer and provide clarity to the investigations procedure in both the Code of Conduct and the Conduct Review Committee/Sole Reviewer Policy.

These updates concern the aspects of confidentiality, the role of the support person and the general interaction and functioning of any investigations.

RECOMMENDATION:

That the:

- 1. Updates to the Code of Conduct as reported are adopted.**
- 2. Revised Conduct Review Committee/Sole Reviewer Policy Version 1.1 is adopted.**

ADDENDUM REPORT

REPORT:

Council's Code of Conduct Section 14.10 Amendment of the Operating Guidelines states:

"The conduct review committee/reviewer guidelines may be added to and any additional requirements may be further amended or repealed by resolution of council."

As a result of a number of Conduct Review Complaint investigations and more recently a recommendation from a Conduct Review Committee Panel it has been deemed prudent to review the operations of the Conduct Review Committee and Sole Reviewer and provide clarity to the investigations procedure in the Code of Conduct and the Conduct Review Committee/Sole Reviewer Policy.

These updates concern the aspects of confidentiality, the role of the support person and the general interaction and functioning of any investigations.

It is proposed to:

1. Add to Section 14.6 of the Code of Conduct at the conclusion of the last paragraph the words:

"As per Part 2 – Conduct Review Committee/Sole Reviewer Investigations Procedure contained within the Conduct Review Committee/Sole Reviewer Policy."

2. Amend Section 14.8 of the Code of Conduct – Complaint handling procedures – in reference to a support person by deleting the last paragraph and replacing with:

"In circumstances where the person the subject of the complaint meets with the conduct review committee/sole reviewer, they may be accompanied by a support person who is not to speak either independently or on the persons' behalf, nor are they to direct or prevent the interviewee from speaking. If these rules are not complied with the support person may be asked to leave the interview."

The Conduct Review Committee/Sole Reviewer Policy has been reviewed to cater for the investigation procedures with the inclusion of Part 2 – Conduct Review Committee/Sole Reviewer Investigations Procedure. In accordance with the NSW Ombudsman guideline, 'Investigating complaints' (2004) maintaining confidentiality, a section has been included on confidentiality, including the completion of a Confidentiality Undertaking (addendum 1 of the Policy). The revised Policy follows and is proposed for adoption by Council.

ADDENDUM REPORT



Policy

Conduct Review Committee/Sole Reviewer
Version 1.1

Adopted by Council at its meeting on xx
Minute No. xx

Division: Technology and Corporate Services
Section: Corporate Compliance
File Reference: N/A
Historical Reference: V1.0 adopted by Council 16 December 2008, Minute No. 76

ADDENDUM REPORT

Conduct Review Committee/Sole Reviewer

Part 1

1. Objectives

The purpose of this Policy is to provide:

1. Information to the Councillors and General Manager on the operation of the conduct review committee/sole reviewer; and
2. All parties to a conduct inquiry with a process of investigation in accordance with the rules of procedural fairness.

This Policy is designed in two parts to reflect its two purposes. Part 1 provides guidance and information in relation to the requirements of the Code of Conduct and Part 2 outlines a procedure to follow when conducting an inquiry into a complaint.

The primary role of the conduct review committee/sole reviewer is to establish the facts of allegations that have been referred to it in accordance with the provisions of Council's Code of Conduct. The conduct review committee/sole reviewer will make findings of fact and may make recommendations that Council takes action.

2. Legislative Compliance

Tweed Shire Council must adopt a Code of Conduct that incorporates the provisions of the Model Code of Conduct, pursuant to Section 440 of the Local Government Act 1993.

Council must appoint at least three people who are independent, qualified persons who are high standing in the community to act as conduct reviewers. More than three people can be appointed if Council feels that it is likely that there will be circumstances where one or more conduct reviewers are not available to participate in a matter.

3. Overview

The functions of the conduct review committee/sole reviewer, its composition, operating procedures and the criteria it must take into account in determining whether or not to enquire into an allegation are set out in this Policy.

4. Functions of the Conduct Review Committee/Reviewer

The conduct review committee/sole reviewer will only deal with complaints for alleged breaches of Council's Code of Conduct by councillors referred to it by the General Manager or complaints for alleged breaches of Council's Code of Conduct by the General Manager referred to it by the Mayor.

ADDENDUM REPORT

Complaints regarding pecuniary interest matters shall be reported to the Director General of the Department of Local Government and will not be dealt with by the conduct review committee/sole reviewer.

5. **Composition**

Council will engage at least five qualified persons who are independent, have a high standing in the community and have the expertise to act as conduct reviewers, as provided by clause 12.16 of Council's Code of Conduct.

From this list of five people, the General Manager (or if the facts require, the Mayor), will appoint Reviewers and Committee members when necessary.

The chairperson is to be elected by the members of the conduct review committee.

Conduct reviewers will be appointed to the panel for the term of the Council and will be paid a pre-determined fee for their service, to each appointed committee, which includes out of pocket expenses.

The General Manager, or in the case of complaints about the General Manager, the Mayor, will act in an advisory capacity to the committee when requested.

Sole reviewers and members of the conduct review committee are subject to the provisions of Council's Code of Conduct.

6. **Quorum of the Conduct Review Committee**

A quorum for a meeting of the conduct review committee is the majority of the members of the conduct review committee.

If a quorum is not present at a meeting of the conduct review committee, it must be adjourned to a time and date that is specified.

Business is not to be conducted at any meeting of the conduct review committee unless a quorum is present.

Business may be conducted by video conference or teleconference.

7. **Voting of the Conduct Review Committee**

Each member of the conduct review committee shall be entitled to one vote in respect of any matter. In the event of equality of votes being cast, the chairperson shall have the casting vote.

If the vote on a matter is not unanimous, then this should be noted in any report to Council on its findings.

In relation to any procedural matters relating to the operation of the conduct review committee, the ruling of the chairperson shall be final.

ADDENDUM REPORT

Referral of Complaints to the Conduct Review Committee/Sole Reviewer

By the Mayor

The Mayor is responsible for assessing complaints, made under clause 11.1 of Council's Code of Conduct alleging breaches by the General Manager, in accordance with the assessment criteria provided at Section 13 of the Code of Conduct in order to determine whether to refer the matter to the conduct review committee/reviewer.

By the General Manager

The General Manager is responsible for assessing complaints, made under clause 11.1 of Council's Code of Conduct alleging breaches by councillors, in accordance with the assessment criteria provided at Section 13 of the Code of Conduct in order to determine whether to refer the matter to the conduct review committee/reviewer.

Where the General Manager is the Complainant

Where the General Manager is the complainant, the General Manager must refer the matter to a conduct review committee consisting of at least three members – clause 12.11 (c) and (d) of Council's Code of Conduct.

Where the Mayor is making a Complaint about the General Manager

Where the Mayor is making a complaint against the General Manager, the Mayor must refer the matter to a conduct review committee consisting of at least three members – clause 12.11 (c) and (d) of Council's Code of Conduct.

It is implicit that, for the General Manager or Mayor to make such a complaint, the matter will be significant and/or serious. The conduct review committee is expected to assess the complaint in accordance with the criteria as provided in clauses 13.1 and 13.3 of Council's Code of Conduct.

Operating Procedures

The General Manager or Mayor, in the case of a complaint about the General Manager, will be responsible for convening the initial meeting of the conduct review committee/sole reviewer when there is a complaint to be referred to it.

Where the General Manager, or in the case of complaints about the General Manager, the Mayor, is unable to act as an advisor to the conduct review committee/sole reviewer due to conflicts of interests in relation to a complaint, they are to nominate a senior council officer or councillor (in the case of complaints about the General Manager) to perform this role.

The conduct review committee/sole reviewer will keep proper records of interviews, reasons and deliberations.

Procedural Fairness

In conducting enquiries, the conduct review committee/sole reviewer should follow the rules of procedural fairness and must:

- provide the person the subject of the complaint with a reasonable opportunity to respond to the substance of the allegation;

ADDENDUM REPORT

- provide the person the subject of the complaint with an opportunity to place before the conduct review committee/sole reviewer any information the person considers relevant to the inquiry;
- provide the person the subject of the complaint with an opportunity to address the conduct review committee/sole reviewer in person;
- hear all parties to a matter and consider submissions before deciding the substance of any complaint;
- make reasonable enquiries before making any recommendations;
- act fairly and without prejudice or bias;
- ensure that no person decides a case in which they have a conflict of interest;
- conduct the enquiries without undue delay.

Where the person the subject of the complaint declines or fails to take the opportunity provided to respond to the substance of the allegation against them, the conduct review committee/sole reviewer should proceed to finalise the matter.

Complaint Handling Procedures

The conduct review committee/sole reviewer will ensure that it deals with all complaints in accordance with the provisions of Section 12 of Council's Code of Conduct.

All persons who are the subject of complaints that are referred to the conduct review committee/reviewer will receive written information about the process being undertaken to deal with the matter. Accordingly, Part 2 of this Policy will be provided to both the person whose conduct is the subject of the complaint and also the complainant to advise both parties of the process that the inquiry will follow.

Where the conduct review committee/reviewer determines to make enquiries into the matter, such enquiries should be made without undue delay.

In circumstances where the person the subject of the complaint meets with the conduct review committee/sole reviewer, they may be accompanied by a support person who is not to speak either independently or on the persons' behalf, nor are they to direct or prevent the interviewee from speaking. If these rules are not complied with the support person may be asked to leave the interview.

In the case where the person whose conduct is the subject of the complaint declines or fails to take the opportunity provided to respond to the substance of the allegation/s against him/her, the conduct reviewer/committee should proceed to finalise the matter, pursuant to clause 14.7 of the Code.

Reports from Conduct Review Committee/Sole Reviewer

The conduct review committee/sole reviewer should be mindful that there may be a need to protect the identity of the person making the complaint when preparing the report to council.

The report should be a summary of the inquiries undertaken while providing sufficient information for Council to make a determination as to whether the councillor or the General Manager has breached the Code of Conduct.

ADDENDUM REPORT

The report will generally be dealt with in open session of Council.

The conduct review committee/sole reviewer will have regard to the following prior to making a recommendation to Council:

- the seriousness of the breach;
- whether the breach can be easily remedied or rectified;
- whether the subject has remedied or rectified their conduct;
- whether the subject has expressed contrition;
- whether the breach is technical or trivial only;
- whether the breach represents repeated conduct;
- the age, physical or mental health or special infirmity of the subject;
- the degree of reckless intention or negligence of the subject;
- the extent to which the breach has affected other parties or the council as a whole;
- the harm or potential harm to the reputation of local government and of the council arising from the conduct;
- whether the findings and recommendations can be justified in terms of the public interest and would withstand public scrutiny;
- whether an educative approach would be more appropriate than a punitive approach;
- the relative costs and benefits of taking formal enforcement action as opposed to taking no action or taking informal action;
- whether action or remedy would be in the public interest;
- where to comply with a councillor's obligations under the Council's Code of Conduct would have had the effect of depriving the council of a quorum or otherwise compromise the capacity of council to exercise its functions.

Where the conduct review committee/sole reviewer determines, in its view that the complaint referred to it comprises a breach of Council's Code of Conduct it may, in its report to Council, make recommendations, that the Council take any of the following actions:

- censure the councillor for misbehaviour in accordance with Section 440G of the Local Government Act 1993;
- require the councillor or general manager to apologise to any person adversely affected by the breach;
- counsel the councillor or general manager;
- make public findings of inappropriate conduct;
- prosecute for any breach of the law;
- revise any of councils' policies, procedures and/or the code of conduct.

Amendment of the operating procedures

The conduct review committee/sole reviewer procedures may be added to and any additional requirements may be further amended or repealed by resolution of Council.

ADDENDUM REPORT

Related Documents

This Policy should be read in conjunction with:-

- Local Government Act 1993;
- Local Government (General) Regulation 2005;
- Tweed Shire Council Code of Conduct;
- Protected Disclosure Act 1994;
- Tweed Shire Council Internal Reporting Policy. Tweed Shire Council Complaints Handling Policy.

ADDENDUM REPORT

Part 2

Conduct Review Committee/Sole Reviewer Investigations Procedure

The procedure provided in this Part of the Policy is designed in accordance with clause 12.18 of the Code of Conduct (**Code**) as a guide to Conduct Review Committees/Sole Reviewers. This procedure should be read in conjunction with the procedure set out at clause 14 of the Code and may be adopted by the Committee/Sole Reviewer pursuant to clause 14.6 of the Code, which provides that:

The conduct review committee shall determine the procedures governing the conduct of its meetings provided such procedures are consistent with these operating guidelines. As per Part 2 – Conduct Review Committee/Sole Reviewer Investigations Procedure contained within the Conduct Review Committee/Sole Reviewer Policy.

Further clause 14.8 of the Code provides that:

All persons who are the subject of complaints that are referred to the conduct review committee/sole reviewer will receive written information about the process being undertaken to deal with the matter.

The Committee/Sole Reviewer may provide this procedure to any person whose conduct is subject of a complaint, in accordance with clause 14.8 of the Code.

Use of this procedure will provide Council with consistent and thorough conduct investigations.

Preliminary issues:

1. All Committee members/Sole Reviewers should formally accept the appointment as a Committee member/Reviewer by writing to the General Manager/Mayor who appointed them.
2. All Committee members/Sole Reviewers are to make a statement in writing to the effect that they have no conflict of interests and possibly why they have reached that conclusion. These statements are to be filed and referred to in the Committee's/Sole Reviewer's final report.
3. The Committee/Sole Reviewer must identify whether the complaint may also be a protected disclosure (see paragraphs 17 – 19 for further discussion on protected disclosures).
4. All Committee members should vote for Chair of the Committee, which should also be formally notified to the General Manager/Mayor and duly recorded. Other positions, such as the Secretariat role are to also be established and defined at this stage.
5. The Committee/Sole Reviewer need/s to be aware of how access to further information may be managed. This may require the Chair/Sole Reviewer to make arrangements with the Secretariat.

ADDENDUM REPORT

6. The Committee/Sole Reviewer need/s to consider how to progress the investigation. This may include:
 - 6.1 the names of the individuals to be interviewed and in what order;
 - 6.2 a proposed draft time table for the investigation;
 - 6.3 how the interviews will be recorded and whether a copy of the minutes or a transcript is provided to the interviewee; and
 - 6.4 whether written submissions will be invited by the Committee/Sole Reviewer and when.

Arranging interviews:

7. Arranging interviews is generally the function of the Secretariat. If the Secretariat is a staff member of Council, the Committee/Reviewer will need to provide her/him with a date and time for each interviewee to attend. The invitation to attend an interview should include, but not be limited to:
 - who will be present at the interview;
 - that the person may be accompanied by a support person who is not to speak, either independently or on the person's behalf, nor are they to direct or prevent the interviewee from speaking. If these rules are not complied with the support person may be asked to leave the interview;
 - the location and time of the interview.
8. The interviews should be arranged so as to provide each interviewee ample time to coordinate a support person, if necessary. Support persons may also be the person's legal or union representative.
9. The time it may take to arrange a suitable support person may depend upon the time of year, the remoteness of the residence of the person, the individual's mobility and other health issues, among other considerations.
10. The person whose conduct is the subject of the complaint has the right to be provided the substance of the complaint. Upon the return of a signed confidentiality undertaking (discussed further at paragraphs 11 - 14), the person whose conduct is the subject of the complaint may be supplied the full written complaint.

Confidentiality:

11. In accordance with the NSW Ombudsman guideline, 'Investigating complaints' (2004), maintaining confidentiality:
 - minimises the risk of harm to the parties to a complaint;
 - is the most effective protection available to a whistleblower;
 - reduces the opportunities for evidence to become contaminated;
 - encourages witnesses to be forthcoming in their evidence; and

ADDENDUM REPORT

- protects whistleblowers from the possibility of an action in defamation.
12. Commonly, the person who is the subject of the complaint requests, and is entitled to, a copy of the complaint. The complaint may be provided in full upon receipt of a signed confidentiality undertaking which is to be filed (refer to addendum 1 for example of confidentiality undertaking).
 13. If the person whose conduct is the subject of the complaint fails to provide the Committee/Sole Reviewer with a signed confidentiality undertaking, the substance of the complaint may be extracted from the original and provided to that person.
 14. Each other individual who is present at an interview may be asked to provide a verbal confidentiality undertaking at the beginning of the interview. The minutes would record these verbal undertakings. Support persons should also provide confidentiality undertakings.
 15. In order to facilitate open and candid communication, the Committee members/Sole Reviewer also should offer the interviewee a confidentiality undertaking, with a further statement that if, in due course, the Committee/Sole Reviewer feels that quoting the interviewee in the written report to Council is required, consent from the person to do so will be sought at that time.

Procedural fairness:

16. While procedural fairness comprises three rules, how these rules are interpreted in any investigation would determine whether procedural fairness was afforded to an individual. Denial of procedural fairness in the making of a decision is a ground for judicial review of the decision. The three rules of procedural fairness are:
 - 16.1 the hearing rule, which is the principle that a decision maker must afford a person whose interests will be adversely affected by a decision an opportunity to present his or her case;
 - 16.2 the bias rule, which is the principle that a decision maker must not have an interest in the matter to be decided, or bring to the matter a prejudiced mind; and
 - 16.3 the no-evidence rule, which is the principle that an administrator's decision must be based on logically probative evidence.
17. Any request received from the person whose conduct is subject of a complaint must be considered on its merit in accordance with the rules of procedural fairness. The request and the decision in relation to the request must be recorded, including what factors were taken into consideration when deciding the response to the request.

Support persons

18. Support persons are to be asked to provide the Committee/Sole Reviewer a confidentiality undertaking.

ADDENDUM REPORT

19. It may be useful to advise the interviewees, particularly those interviewees whose support person is legally qualified, that the investigation will be conducted in accordance with the rules of procedural fairness and as such judicial rules and rules of evidence do not apply.
20. If a support person is disruptive or interferes with the investigation process they may be asked to leave.

Protected Disclosures

21. Clauses 11.3 – 11.5 of the Code provide for complaints which are also protected disclosures. A complaint does not need to state that it is also a protected disclosure to be one, therefore identification of a protected disclosure may be difficult.
22. Briefly, a protected disclosure must be:
 - 22.1 made by a public official;
 - 22.2 made voluntarily;
 - 22.3 concern allegations of corrupt conduct, maladministration and/or serious and substantial waste;
 - 22.4 not made for the purpose of avoiding disciplinary action nor about government policy.
23. If a complaint is also a protected disclosure, the complaint must be managed in accordance with the provisions of the *Protected Disclosures Act 1994*. It may be necessary to instruct solicitors to assist the Committee/Reviewer in identifying and managing protected disclosures.

Access to documents

24. Access to Council information by the Committee/Sole Reviewer may be facilitated by the Secretariat. If the Committee/Sole Reviewer requires information that is sensitive or confidential, Council may wish the Committee member/Sole Reviewer to sign a written confidentiality undertaking, if not already done so.
25. If the information that is sought is sensitive or confidential Council may require the return or destruction of the information upon conclusion of the investigation.

Drafting the report

26. The Committee/Sole Reviewer report would generally not require naming witnesses or quoting any individual, as the report must comprise the Committee's/Reviewer's findings, and the reasons for those findings, which can usually be achieved without identifying individuals.
27. The report will contain the Committee/Sole Reviewer's recommendations. Accordingly, the first recommendation should be that the Council adopt the Committee's/Sole Reviewer's findings.

ADDENDUM REPORT

28. A draft report will be provided to the both the complainant and the person whose conduct is the subject of the complaint for final comment prior to providing the finished report to Council¹.

¹ *Valentine v Muswellbrook Shire Council & Ors* [2008] NSWSC 1300.

ADDENDUM REPORT

Addendum 1

Confidentiality Undertaking

Code of Conduct Complaint received [Date]

Respondent: [Name]



I _____ of _____

hereby agree to:

1. hold all information that I encounter or become aware of throughout this investigation as Confidential and will manage it in strict confidence and not disclose, or cause or permit the disclosure of, the confidential information², except to my legal representative, if applicable;
2. keep the confidential information secure and protected from any loss, use, disclosure, modification or access which is inconsistent with this undertaking;
3. promptly notify the Conduct Review Committee Chair or Sole Conduct Reviewer if I suspect, or become aware of, any loss or any unauthorised use, storage, copying or disclosure of the confidential information; and
4. maintain confidentiality over all confidential information unless I have express permission to release the information.

Signature

Date

² Confidential information includes, but is not limited to, the identity of individuals, facts surrounding events and opinions and statements of individuals.



LEGAL/RESOURCE/FINANCIAL IMPLICATIONS:

Nil.

POLICY IMPLICATIONS:

ADDENDUM REPORT

In accordance with the provisions of the Code of Conduct and Conduct Review Committee/Sole Reviewer Policy.

UNDER SEPARATE COVER/FURTHER INFORMATION:

*To view any "**non confidential**" attachments listed below, access the meetings link on Council's website www.tweed.nsw.gov.au (from 8.00pm Wednesday the week before the meeting) or visit Council's offices at Tweed Heads or Murwillumbah (from 8.00am Thursday the week before the meeting) or Council's libraries (from 10.00am Thursday the week of the meeting).*

Nil.
