

Updated 29 May 2023

15. The council and the law

The council obtains legal representation and advice which is subject to litigation and legal professional privilege.

15.1 Legal advice and representation

15.1.1 General

- a. The council [1] obtains legal advice and representation from:
 - its in-house Legal Services department, Ngā Ratonga Ture, managed by the General Counsel
 - external lawyers instructed by the General Counsel or their staff
 - employment relations lawyers in the People and Culture department.
- b. All requests for legal advice or representation (not concerning employment relations matters) must be referred to the council's Legal Services department.

15.1.2 Advice and representation from the council's Legal Services department

- a. Advice and representation obtained from in-house lawyers is professional, independent and objective.
- b. In-house lawyers, including those in Legal Services and the General Counsel, are bound by the rules of professional conduct for lawyers when providing legal advice or representing the council [1]. These professional obligations require in-house lawyers to (among other things):
 - Exercise independent professional judgement on the council's behalf, and give objective advice to the council based on the lawyer's understanding of the law [2] and
 - Within the bounds of the law and their professional obligations, protect and promote the interests of the council to the exclusion of the interests of others [3].

15.1.3 Advice and representation from external legal providers

- a. The General Counsel (acting under the chief executive's delegation) or their Legal Services staff may procure external legal advice or representation for the council.
- b. In deciding whether to procure external advice or representation, the General Counsel and Legal Services staff take the following factors into account:
 - the nature and/or complexity of the matter
 - the available capacity and expertise within Legal Services and elsewhere, including and the availability of counsel
 - the financial and strategic risks and implications for the council
 - issues of independence or conflict of interest (actual or perceived).
- c. The decision whether to obtain external legal advice or representation will be made in consultation with the relevant council business unit or department.
- d. Where external lawyers are instructed on a council legal matter, the General Counsel and Legal Services staff retain oversight and will direct the manner in which the legal services are provided.

15.2 Legal advice and legal professional privilege

15.2.1 Legal professional privilege

- a. Legal professional privilege is a term that applies to the protection of confidential communications between lawyer and client. If legal advice is protected by legal professional privilege, it will not be required to be produced for inspection during discovery in legal proceedings and will likely be protected from disclosure under the Local Government Official Information and Meetings Act 1987 and the Privacy Act 2020 [1].
- b. There are two types of legal professional privilege:
 - **Solicitor/client privilege** - protects communications between client and lawyer where the communication is intended to be confidential, and the communication is made for the purpose of obtaining legal advice.
 - **Litigation privilege** protects communications and information made or received for the dominant purpose of preparing or conducting court proceedings, where proceedings are either underway or reasonably apprehended.
- c. In this context, council is the client. Council communications (including emails) seeking or providing legal advice are legally privileged, including those between the Legal Services department and external lawyers. Exchanges between council

witnesses and lawyers to prepare evidence are also legally privileged.

- d. It is very important that legal professional privilege is maintained. Legal Services staff can advise how to ensure legal professional privilege is not inadvertently waived.
- e. Staff and elected members should not disclose privileged material outside of the council without first seeking advice from Legal Services.

15.2.2 Presentation of legal advice

- a. A document is not automatically privileged because a lawyer prepared it or it is labelled 'legally privileged'. Often only parts of a document will be privileged (e.g. those parts seeking or recording legal advice, as opposed to providing policy advice).
- b. To ensure legal advice is properly protected by legal professional privilege:
 - Legal advice should, where practical, be separated from policy advice, even if both kinds of advice are contained in the same document
 - Legal advice should be marked 'confidential and legally privileged'.

15.3 Litigation involving the council

15.3.1 General

- a. The General Counsel (acting under the chief executive's delegation) and their staff in the Legal Services department manage litigation involving the council (initiated by council or against council).
- b. Litigation involves a range of decisions that are often irreversible and have significant consequences for the council.
- c. Legal Services works with the relevant council staff, department or business unit involved in the proceedings. Staff members are expected to cooperate with the General Counsel and their team to determine whether it is appropriate for them to give evidence or assist in the proceedings.

15.3.2 Approach to litigation

- a. The council is committed to acting as a model litigant. This means more than acting honestly and complying with the law and court rules. The council also undertakes to act with propriety, fairly and in accordance with the highest professional and ethical standards.
- b. The council is also committed to managing litigation by or against it as

effectively and efficiently as practicable, taking into account the legal, financial and reputational risks. In particular the Council will:

- take and defend legal action in accordance with the statutory functions and purpose, the principles of local government, and its strategic and operational objectives
- Only initiate litigation, including appeals, where there is a reasonable prospect of success and/or if the litigation is justified in the public interest
- deal with litigation promptly and efficiently, without causing unnecessary delay or expense
- when responding to litigation, consider the appropriate level of involvement it should have in each case, taking in to account the issues at stake and how important they are to the strategic objectives to the council, the participation of other parties and requirements or expectations of the court
- seek to resolve claims as early as appropriate and consider and initiate (where appropriate) alternative means of resolution to avoid litigation
- apply a fair and objective approach to handling litigation
- not contest matters which it accepts as correct or make unmeritorious arguments for tactical reasons
- act decisively and properly to protect and advance its interests as a local authority.

15.3.3 Council instigated legal proceedings, including prosecutions

- a. The council's commitment to acting as a model litigant is especially important when instigating legal proceedings.
- b. The council's most common legal proceedings are prosecutions and enforcement actions for non-compliance with regulatory requirements, e.g. a breach of a bylaw, resource or building consent.
- c. In considering whether to bring an enforcement action or to prosecute, the council adopts an escalated approach, i.e. an enforcement officer will assess the nature of the non-compliance and, in particular, whether it was intentional.
- d. In deciding whether to prosecute and throughout the prosecution, the council complies with the Solicitor-General's Prosecution Guidelines which aim to ensure all

prosecution processes are open and fair, and reflect the public interest [1].

- e. Elected members should not get involved in decisions on individual prosecutions and enforcement actions. This does not prevent elected members from engaging in the council's overall policy on prosecutions.
- f. Generally, the council will prosecute cases of intentional non-compliance or recidivist or serious non-compliance (where there is serious impact or harm caused). Where the non-compliance is non-intentional, the council may impose low level sanctions and require the non-compliance to be remedied instead of prosecuting.
- g. The council's prosecuting lawyers have particular professional obligations [2] (in addition to their general professional obligations), including presenting the prosecution case fully and fairly and with professional detachment.

15.3.4 Judicial review of the council's decisions

- a. The High Court can undertake a judicial review to determine if a council decision is lawful.
- b. A court can review most formal council decisions (including those by elected members and council staff) and the process by which they were reached. Ordinarily, a power that is the subject of review proceedings will be one that has been given to the decision-maker by statute.
- c. Usually a person or group adversely affected by the decision brings a judicial review.
- d. The basic questions for judicial review are:
 - Has the decision-maker acted within the scope of the power or discretion conferred?
 - Has the decision-maker acted fairly?
 - Has the decision-maker acted reasonably? Normally this question is confined to asking whether the decision-maker has acted in a way that no reasonable decision-maker could have acted.
- e. The most likely grounds for a review of a council decision are that, in making the decision in question, the council decision-maker:
 - Failed to follow the process specified in legislation for making the decision.
 - Did not act fairly because they failed to consult with persons or groups affected by or interested in the particular decision. In particular, if the council did not follow the consultation requirements outlined in the Local Government Act 2002.
 - Defeated a legitimate expectation of a person with an interest in the decision (e.g. a promise to do something in a particular way).

- Did not act fairly because they failed to give effect to the principle of natural justice.
 - Made up their mind before hearing or considering all relevant matters (i.e. predetermined the decision).
 - Took into account irrelevant considerations, failed to take account of relevant considerations, made a mistake about the facts relevant to the decision, or made the decision for the wrong purpose.
 - Could appear to an observer to have been influenced by a personal relationship, duty or consideration (i.e. the decision-maker had a conflict of interest or was biased).
 - Made the decision after an invalid or unauthorised delegation.
 - Acted for an improper purpose (not the purpose for which the power or discretion was conferred).
 - Acted outside the scope of the power or discretion or misinterpreted the applicable law.
 - Made a mistake about facts that were important to the decision.
 - Did not actually make the decision, but instead rubber-stamped the decision of an adviser.
- f. If a claim for judicial review is successful, it is up to the Court to decide what, if any, remedy it will grant. Most often, the Court will set aside the decision, and direct the decision-maker to remake it. The Court may direct how this should be done, but will not direct the outcome of the decision. The Court might also make declarations about the way the decision was made (e.g., that something that should have been done was not done, or that some matter that was taken into account by the decision-maker was not relevant). In some cases, the Court may also award monetary relief, such as compensation for a breach of a fundamental right, or restitution where fees have been unlawfully charged.
- g. As part of the council's model litigant commitment, the council will normally take a generous rather than technical approach to the disclosure of documents in judicial review proceedings. It is also expected to be candid in explaining its decision-making process to the court.
- h. Staff and elected members should be aware that information they prepare for internal purposes, including emails, may be released to opposing parties in litigation.

15.3.5 Proceedings that name staff or elected members as defendants

- a. In legal proceedings involving the council, the appropriate party is Auckland Council

rather than a specific decision-maker or part of council. The “party” is the person or organisation which brings the action or defends the action.

- b. Elected members or council staff may occasionally be named as defendants in court proceedings in relation to the exercise of powers in their council role. In these situations, the council should be substituted as the correct party. If this does not occur, the practice is for the council to indemnify elected members or council staff and to conduct the proceedings on their behalf.
- c. In some cases, an elected member or staff member may be sued for acts in their official capacity but which have a more personal aspect. For example, an elected member may be sued in defamation because of the contents of a particular speech or public statement. Alternatively, proceedings may be instituted alleging that a council decision-maker has acted dishonestly or in bad faith.
 - The extent to which the decision-maker will be personally liable in these cases will depend on the law and facts of the particular matter.
 - By their very nature, cases brought against a decision-maker personally raise issues about whether he/she has acted within the scope of his/her legal authority. The council may not indemnify the decision-maker if they have acted greatly beyond the scope of their authority.
- d. There is no absolute legal right to indemnity just because a person is acting as a council decision-maker.
- e. When a decision-maker is personally sued or threatened with legal action and is unsure whether they should be indemnified, they should seek the Chief Executive’s agreement (in consultation with the General Counsel) in advance to meet their legal expenses.
- f. The General Counsel (acting under delegation from the Chief Executive) may in some situations retain private counsel for a decision-maker.

15.3.6 Court documents

- a. Legal documents that must be served on the council may be served by leaving them at the council’s principal public office (135 Albert Street, Auckland) or given personally to the mayor or chief executive [1].
- b. Once a document has been filed in the court, it is under the custody of the court, and access to such documents is controlled by the court [2]. Therefore, court documents (whether the council’s or another party’s) must not be disseminated beyond what is necessary for the council’s involvement in the proceedings. Such dissemination may well be a contempt of court.

15.3.7 Insured claims against council

- a. In some cases the council may be insured for the costs of proceedings or the

quantum of any damages awarded against it.

- b. Staff should promptly notify the General Counsel (or their team) of proceedings in which they have become involved, or threats of claims, or circumstances which may give rise to a claim, to ensure any council-held insurance policy is not compromised. Admissions of wrongdoing, apologies and settlements of an insured claim, without consultation of the insurer, may invalidate the council's insurance over that claim.
- c. If the claim is insured, council's insurance and legal teams will manage the claim, in conjunction with the insurer and broker.

15.3.8 Commenting on council legal proceedings

- a. It is inappropriate for staff or elected members to publicly comment on the substance of a matter involving the council when it is before the court. In some circumstances, such a comment may be a contempt of court.
- b. Elected members and council staff should be careful not to act in a way that jeopardises the council's position in a legal proceeding.
- c. Elected members and council staff must not express views that are likely to be publicised if these views could be regarded as reflecting adversely on the impartiality or ability of a judge. It is improper for a person holding public office to make such comments publicly.
- d. Elected members must make clear that any public comments on judicial decisions (once the litigation is complete) are their own views and not the council's.

15.4 Footnotes

15.1.1 General

[1] Lawyers in the council's Legal Services department also provide legal advice to some CCOs.

15.1.2 Advice and representation from the council's Legal Services department

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[2] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rule 5.3.

[3] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rule 6.

15.2.1 Legal professional privilege

[1] Local Government Official Information and Meetings Act 1987, s 7(2)(g); Privacy Act 2020, s 53(d).

15.3.3 Council instigated legal proceedings, including prosecutions

[1] Crown Law Solicitor-General's Prosecution Guidelines (1 July 2013) at 1.1.

[2] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rule 13.12.

15.3.5 Court documents

[1] Local Government Act 2002 s 250.

[2] See Senior Courts (Access to Court Documents) Rules 2017

Key Documents

Local Government Official Information and Meetings Act 1987

Privacy Act 2020

Local Government Act 2002

Senior Courts (Access to Court Documents) Rules 2017

Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008

Crown Law Solicitor-General's Prosecution Guidelines