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Independent review of Council's management of staff interests

Environment Southland

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Background

1. The Director Policy, Planning and Regulatory Services' (the Director's) spouse is an environmental engineer. Through a consulting business, Envira Consulting Ltd (Envira), she has occasionally contracted into Environment Southland's (ES's) consents and compliance teams, primarily because of her expertise in matters involving contaminated sites and air quality.
2. Envira is a company owned jointly by the Director and his spouse. His spouse is the sole director. Appendix 2 contains a schedule of payments ES has made to Envira since its establishment.
3. The Consents and Compliance managers have the discretion to engage Envira directly under their delegated authority. These managers report directly to the Director. He is their line manager.
4. Prior to establishing Envira, the Director's spouse worked on ES consent contracts as an employee of Lowe Environmental Impacts Ltd (Lowe).
5. Recently, the elected members have received complaints about apparent conflicts of interest in these arrangements – especially in relation to the engagement of Envira.

Engagement of independent advisor

6. I was asked as ES's independent advisor to its Audit and Risk Committee (OPAC) to undertake a short review of the results of staff compilation of information on managing the matter. The terms of reference are in Appendix 1.
7. I sought the peer support of Robert Buchanan, an independent Wellington-based public law specialist, given the sensitivity of the matter and necessary urgency with which the work was undertaken.
8. This report is for the Chief Executive (CE) and Chair of OPAC.

Review methodology

Managing interests and conflicts of interest

9. Public sector management recognises the near-inevitability of interests conflicting in NZ public sector organisations, especially in smaller, regional communities. It is how the interests – especially when they conflict – are managed that is important.
10. This holds for elected members and staff.

11. There is an expectation of public sector entities adhering to a high standard in the management of interests that conflict with official or work-related roles and duties – identifying and declaring relevant interests, assessing the risk that an interest will conflict, developing open and transparent interest plans to manage those conflicts, where necessary, and monitoring adherence to the plan. While it is for the individual to identify and declare relevant interests, and ES to determine whether a declared interest amounts to a conflict, responsibility to ensure a transparent and ethical approach lies with both parties.
12. Conflicting interests take different forms, most commonly those arising from financial interests or relationships with people one knows. Publicly expressed sentiments about a possible conflict of interest situation must always be taken seriously. But the question of whether a declared interest conflicts with another role or duty (or is “perceived” to do so) must always be considered objectively, with reference to what a well-informed, reasonable “bystander” would think of the situation.
13. Financial interests carry particular risks and are subject to legal requirements.¹ In this case, the Director appears to have both a financial interest in Envira and the work of his spouse; and a relationship-based interest in respect of his spouse. In either case, this could create a perception (objectively speaking) of favouritism – either when engaging her or Envira, or when considering the results of her work for ES.

Approach

14. ES staff has received three LGOIMA requests relating to the already-public knowledge of the Director’s interests in relation to his spouse.
15. This review was conducted towards the end of the collation of the information² and was documentary based, supplemented by interviews with the Manager Consents, the Director Corporate Services, and the Chief Executive³.
16. While progress in collation of the information was monitored, the bulk of the review was required to be undertaken over a two day period – 01 and 02 October 2018.

¹ Councillors’ financial interests are regulated by the Local Authorities (Members’ Interests) Act 1968. For those involved in statutory decision-making, an undeclared financial interest could provide grounds for judicial review applying the common law rule against bias. Except in a case where a financial interest is small or inconsequential, a financial conflict of interest often requires the individual concerned to withdraw entirely from the activity concerned. The Act also generally deems a financial interest held by an individual’s spouse or close family member to be held by the individual him/herself.

² Primarily contract payments to Lowe when she was one of their employees and subsequently to Envira.

³ The Director was overseas at the time of the review, although I had heard his perspective while attending the OPAC, in my advisory role, just prior to this review.

Context for review

17. Management commenced work on a Conflicts of Interest policy, dealing with staff interests, in February 2018. At its 05 September 2018, OPAC provided comment of an advanced version of this draft policy. Taking into account OPAC comments and the early findings from this review, the Executive Management Team has adopted and is promulgating the policy. OPAC will receive an updated Policy for noting when it next convenes.
18. The rationale for the Policy is that the practice in declaring and managing conflicts of interest was not documented in one place. Management recognised this needed to be rectified with a coherent and complete approach; and that the Policy needed to reflect current good practice – especially that produced by the OAG⁴.
19. Management also undertook an initial analysis of the events concerning the engagement of Envira. In regard to the ES system for managing staff interests, management assessed there was:
 - Limited written guidance or procedures – the system is characterised as informal.
 - There is a reliance on the integrity and ethics, plus common sense, of all staff to declare potentially conflicting interests and for ES to manage those interests when they conflicted with official roles or duties, without necessarily recording the approach.

Outline of events

2013 engagement of the Director

20. The Director was employed by the CE during 2013. At this point, the Director appropriately raised the potential that his spouse, then an employee of Lowe, may be involved in Lowe's provision of contract services to ES's consenting team.
21. It was agreed that the Director's interest be noted and that he should not be involved in any engagement of Lowe.
22. This agreement was not recorded.

Lowe contracts

23. Lowe were, and still are, engaged to provide services to ES. However, it was while the Director's spouse, working as a Lowe employee, was involved in the firm's provision of consultancy services to a commercial client that the first recorded declaration of interest occurred. This happened by email between the Director and the CE on 19.10.14. This email

⁴ See *Managing conflicts of interest: Guidance for public entities* (2007).

noted the potential that ES might prosecute Lowe's commercial client and that he would stand aside and allow a fellow, experienced Director oversee any action by ES.

24. The Consents Manager noted that during this period when the Director's spouse was used by Lowe in their contracting support to ES, the nature of the Director's interest was well known within the regulatory teams and was respected and managed.

Establishment of Envira

25. Envira was incorporated on 18 March 2016. Since its creation the Director has been an equal shareholder of the company.
26. Again, it is understood the changed nature of the Director's interests was discussed with the CE, and agreement reached that he would not be involved in any decisions to engage, or not engage, Envira.

Procurement of Envira services

27. Envira has contracted to ES under a series of standard short form agreements (SFAs). Three have been arranged since 2016:
- 05 April 2016 – a SFA signed with the Consents team. The ES signatory was the then Consents Manager.
 - 06 September 2017 – a SFA signed by the Manager Compliance.
 - 24 May 2018 – a SFA signed by the Acting Manager Consents. This was part of a process to build a panel of consent contractors which followed an EOI process.
28. Appendix 2 shows the payments made to Envira under these procurement arrangements. The profile of engagement of Envira has been changing. The majority of payments are for completing consent related work initiated while the Director's spouse was employed by Lowe. Since January 2018 the total cost of general consent and compliance work undertaken by Envira amounts to \$5,232.60 (exclusive of GST). This represents 2.3% of the total consenting and compliance spend on consultants to date in 2018 (\$224,527 (exclusive of GST)).
29. Envira had no decision-making rights or responsibilities. Generally the work completed was undertaken as part of an ES team contributing towards the process of consent applications, and in Envira's case, was focused in particular on the specialist areas of air quality and contaminated land.

Objective 1 - analysis and findings on absence of bias and whether ES followed its processes

The practice of managing the Director's interests

30. This review into the management of the Director's interests in relation to the engagement of his spouse, confirmed ES's own assessment of the informality of how those interests were managed. In regards the Director's interests in Lowe and Envira contracts, there is no:
- Written record of the declarations of those interests or the subsequent agreements between the CE and the Director, apart from the Director's emailed advice on 19.10.14 concerning the potential prosecution of a Lowe client for which the Director's spouse was providing services.
 - Formal interest declarations at key points of a procurement process, or interest risk assessments or treatment plans.
31. The lack of a written approach, or documented evidence of the management of the Director's interests, means the primary evidence for this review is reported discussions and actions representing the practice undertaken.
32. The payment records in respect of the contracts – whether the Lowe or Envira payments - show that separation was maintained where otherwise the Director's sign-off would be required – for example where payments exceeded the Consent or Compliance Managers' financial delegations. In addition, it is noted:
- Four initial Envira contract payments (which did not require Director-level delegated authority) were countersigned by another Director after initially being authorised by the Director
 - Another Envira payment that exceeded a Consent Manager's delegation was authorised by another Director.
33. Discussion with the current Consents Manager confirmed that in practice the Director was excluded from any actions in relation to the engagement, monitoring and payment of Envira. The Consents Manager further confirmed that he had never felt any pressure from the Director on the use, or otherwise, of Envira's services.

Gaps in practice

34. Management have recognised the gaps in the formality of their approach to identifying and managing staff interests and are taking the first steps to develop practice through implementing its recently adopted Conflict of Interest policy.

Findings

35. The absence of formally recorded actions means the review cannot conclusively conclude that interests were appropriately declared and managed. However, there is nothing in the actions represented to me in the course of this work which suggests anything other than that the Director, consistent with his agreement with the CE, has taken no part in the engagement or use of Lowe or Envira for services to the ES Consents and Compliance team.

Objective 2 – analysis and findings on “no go” areas

Practice elsewhere

36. Necessarily high-level research involving the practices of other public entities, and review of OAG publications, generally shows that most staff interests are manageable, provided they are appropriately declared and that acceptable management plans are in place. Adopting this approach does require formal systems to ensure that a staff member understands the need to, and takes responsibility for, identifying and declaring a potentially conflicting interest; and that management will assess the potential conflict, the risks associated with the interest, and the need for an appropriate conflict management plan.
37. Examples from other entities show the importance of the professionalism of staff in “owning” the responsibility to declare the interest and use of judgement by management in considering what needs to be done in the circumstances.
38. While most approaches appear “enabling” if suitable interest management practices are in place, there are still examples where interests have been deemed entirely incompatible with the staff member’s role or duties or where the nature of an interest may be so pervasive that the staff member is unable to appropriately undertake their relevant duties for the public entity

Challenges for ES – the perception risk

39. The primary challenge for ES, assuming it upgrades its management systems, is addressing the uncertainty about whether a conflict of interest exists and/or can be managed in accordance with good practice, and at the same time dealing with the public concerns associated with the Director’s financial interest in Envira and his relationship with his spouse.
40. It is noted from a public perspective that:
 - The directorate oversees the process of “setting the rules” for consents.
 - The Consent and Compliance teams within the directorate are “gatekeepers” and “enforcers” of those rules, which includes the ability to prosecute.
41. The perception among some members of the public, as expressed in the media, is that the Director’s official role and his interests in Envira are incompatible. An objective assessment of the situation, and the adoption of a formal approach to conflict of interest management with independent oversight, will not necessarily remove this perception. However, experience shows that it may do much to alleviate public concern.

42. Hence the ongoing approach of ES to the Director's interest is a matter of judgment which will require consideration (and recording) of the judgment reached by ES in relation to the Director, in conjunction with him.

43. ES's new Conflict of Interest policy appropriately anticipates this situation in its introduction:

"Any local authority employee should carefully consider the effect of choosing to pursue a private financial interest, where that interest creates a conflict with their ability to perform their job. This requires judgment and thinking through possible scenarios, including whether the conflict might affect other areas of responsibility in the future. Their manager – and, for the Chief Executive, the Chair – should also think through the implications and be comfortable with their plan to manage those implications. This is particularly so for a Chief Executive because of the statutory responsibilities to advise Councillors and lead staff."

Findings

44. The Director has a financial interest in Envira, both as a shareholder and because his spouse is the director of the company and involved in providing remunerated services to ES. His relationship with his spouse could also lead to situations where his impartiality in performing his official roles could be in question.

45. However, Envira's work for ES is:

- Not pervasive
- Represents a small support portion of the total consents and compliance work function; and
- There is no evidence that the Director is involved in any way in decisions to engage Envira or in the monitoring of its work. Those responsibilities have been delegated to others, and final responsibility for consent and compliance decisions and actions is retained by ES.

46. This might suggest that, when assessed objectively, the interests are not incompatible with the Director's responsibilities. However, the lack of formality in the interests management arrangements may reinforce the public's perception of incompatibility, despite those steps being taken. ES does therefore need to review its approach in line with its adopted policy, and record its response to the Director's interests.

47. The question of compatibility, in an objective sense, and how to address the more subjective public perceptions is a matter of judgment for the CE, in consultation with OPAC.

Recommendations

48. My recommended next steps in relation to the Director's interests are:

- 1) The Director's orally declared interests are updated in writing, and reassessed in line with the Conflict of Interest policy

- 2) The CE, in consultation with OPAC, work with the Director to confirm whether those interests are compatible with his role and can be adequately managed in a way that meets public sector good practice standards and addresses any ongoing public perceptions.

Objective 3 – comments on the recently adopted Conflict of Interest policy

Observations

49. ES has recognised the need to upgrade its approach to staff interests. This is appropriate and encouraging. The recent adoption of a Conflict of Interest policy is an important development.
50. The policy has referenced other local authority practice, plus considered the practice outlined in various publications from the OAG. It is fit for purpose.

Findings

51. ES is proactively upgrading its approach to management, through an internal change project to upgrade its processes and practices. The Conflict of Interest policy comes under that umbrella. Development of the systems to support this Conflict of Interest policy is the next step.

Recommendations

52. My recommended next steps in relation to the implementation of the policy are:
 - 1) A policy implementation plan be developed, which will focus on staff familiarisation with the policy.
 - 2) Systems and procedures for identifying interests, undertaking clearance of those interests (including risk and management plans) and effectively monitoring the management of the interests are developed (where necessary) and aligned to support the policy.
 - 3) Reporting on the management of interests as envisaged by the new Conflict of Interest policy be actioned.

Concluding comments and next steps

53. It is acknowledged that the Director did declare his interests in his spouse's potential engagement on ES-related work when he commenced employment and also updated the CE of changes in those interests, especially when his spouse created Envira. The actions of ES has been to consider, allow for, and manage those interests in an open and transparent manner within the Council.
54. Despite these steps, a public perception risk remains. That perception has not been helped by the informality of ES's approach to date. Council needs to upgrade its response to assess this risk. It has taken a positive step in adopting a fit-for-purpose Conflict of Interest policy.
55. Aligned with the findings of this review, my recommendations represent the next steps in relation to the Director's interests and development of ES's practice to in respect of staff interests. My recommendations are:
 - 1) The Director's orally declared interests are updated in writing, and reassessed in line with the Conflict of Interest policy
 - 2) The CE, in consultation with OPAC, work with the Director to confirm whether those interests are compatible with his role and can be adequately managed in a way that meets public sector good practice standards and addresses any ongoing public perceptions.
 - 3) A policy implementation plan be developed, which will focus on staff familiarisation with the policy.
 - 4) Systems and procedures for identifying interests, undertaking clearance of those interests (including risk and management plans) and effectively monitoring the management of the interests are developed (where necessary) and aligned to support the policy.
 - 5) Reporting on the management of interests as envisaged by the new Conflict of Interest policy be actioned.

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Appendix 1 – Terms of Reference

Independent Review - Conflict of Interest Issues/Processes

Objectives

1. To provide an independent review of the engagement of Envira to ensure the process was devoid of bias and as per the agreed process:
 - essentially a due diligence
 - taking into account guidance from the Staff Handbook and the process agreed with the Chief Executive on the initial engagement of Sarah Smith when she was working as a consultant employed by another company and carried over when she formed her own company (with Vin Smith as a shareholder)
2. To review the need for “no go” areas – i.e. where conflicts are not acceptable noting the need to take into account perception in managing conflicts and the importance of maintaining the community’s trust and confidence.
3. To recommend any consequential changes to the recently adopted Policy.

Scope

The scope of this review should focus on Envira, with the Policy consideration extending to all staff interests where there is a potential for a conflict.

Approach

The proposed approach will build on the existing programme of work being undertaken by Council staff. This includes:

- identifying all business transactions with Envira and other transactions over the last four years;
- assess whether the practice followed when engaging Envira was consistent with the guidance from the Staff Handbook and practice agreed to between the Chief Executive and Vin Smith when Sarah Smith worked as a consultant and carried over when she formed her own company with Vin Smith as a shareholder;
- assess whether there is any suggestion of preference or bias in the engagement of Envira;
- review practice in the management of staff interests.

The independent reviewer will work closely with Council staff when undertaking this work.

Reporting

The independent reviewer will report the outcome of this review directly to the Chief Executive and the Chair of the Organisational Performance & Audit Committee.

Timing

The review and report will be completed in time for the release of the LGOIMA information requested, of 5 October 2018.

Appendix 2 – Payments to Envira Consulting Ltd

Envira Consulting						
Division	Invoice#	Client	Date	Amount	Exclusive	Payment Sign Off
Consents	2		18/04/2016	733.13	637.50	Directors (x2)
Consents	3		18/04/2016	537.63	467.50	Directors (x2)
Consents	9		18/05/2016	782.00	680.00	Directors (x2)
Consents	10		18/05/2016	342.13	297.50	Directors (x2)
Consents	11		18/05/2016	742.90	646.00	Consent Manager
Consents	16		17/06/2016	342.13	297.50	Consent Manager
Consents	15		17/06/2016	293.25	255.00	Consent Manager
Consents	14		17/06/2016	2,952.05	2,567.00	Consent Manager
Consents	17		24/06/2016	15,274.76	13,282.40	Science Director
Total 2016 Financial Year				21,999.98	19,130.42	
Consents	18		15/07/2016	5,669.50	4,930.00	Consent Manager
Consents	19		15/07/2016	5,327.38	4,632.50	Consent Manager
Consents	21		19/08/2016	2,590.38	2,252.50	Consent Manager
Consents	22		19/08/2016	2,541.50	2,210.00	Consent Manager
Consents	23		24/08/2016	5,278.50	4,590.00	Consent Manager
Consents	26		16/09/2016	4,349.88	3,782.50	Consent Manager
Consents	25		16/09/2016	997.05	867.00	Consent Manager
Consents	24		16/09/2016	997.05	867.00	Consent Manager
Consents	34		16/01/2016	195.50	170.00	Consent Manager
Consents	36		14/12/2016	635.38	552.50	Consent Manager
Consents	35		14/12/2016	1,612.88	1,402.50	Consent Manager
Consents	37		3/02/2017	1,612.88	1,402.50	Consent Manager
Consents	40		28/02/2017	3,333.28	2,898.50	Consent Manager
Consents	44		6/04/2017	879.75	765.00	Consent Manager
Consents	45		6/04/2017	293.25	255.00	Consent Manager
Comms	53		30/06/2017	195.50	170.00	Communication Manager
Total 2017 Financial Year				36,509.66	31,747.53	
Compliance	64		2/10/2017	4,594.25	3,995.00	Compliance Team Leader
Compliance	71		31/10/2017	3,184.70	2,769.30	Compliance Manager
Compliance	76		29/11/2017	2,916.86	2,536.40	Compliance Manager
Consents	102		29/06/2018	1,479.94	1,286.90	Consent Manager
Total 2018 Financial Year				12,175.75	10,587.61	
Consents	104		30/07/2018	1,790.78	1,557.20	Consent Manager
Consents	107		30/08/2018	2,746.78	2,388.50	Consent Manager
Total Current Financial Year				4,537.56	3,945.70	
Total all transactions				75,222.95	65,411.26	