

Who's
putting local
issues on
the national
agenda?

**We are.
LGNZ.**

LGNZ Code of Conduct template

Guidelines

October 2016

Preface

Our effectiveness as members of public bodies charged with providing leadership to our regions, cities and districts is strongly related to the quality of our community mandate and how we are perceived by our communities. This is the case whether that mandate comes from the number of people who voted at the previous election or the level of trust the public has in our performance. Both are closely related.

This is one of the reasons that Councils in New Zealand, like public bodies throughout much of the world, are required to adopt a Code of Conduct. Codes of Conduct are designed to build the respect and trust which creates our mandate to lead. There is nothing like dysfunction at the governance level to “turn off” citizens, feed negative journalism and undermine the morale and the good will of staff, let alone elected members themselves.

This new Code of Conduct template has been designed to incorporate recent legislative change, new approaches to good governance and provide better advice for councils having to deal with alleged breaches. Just as importantly its focus has been widened from controlling poor behaviour to promoting an inclusive and positive governance culture, thereby removing some of the factors that can result in behavioral issues.

Getting our governance cultures right is important and makes good economic sense. Councils that are trusted and respected are more likely to be able to enlist the support of their communities and other agencies in the goal of improving outcomes and meeting their strategic goals.

I hope you will find the Code helpful in strengthening your governance culture, building the mandate of your local authority and developing a great team.

Lawrence Yule
President
LGNZ

Contents

Preface	2
Contents	3
Introduction	4
Why a Code of Conduct?	4
Content	5
Considerations when designing a Code	5
The Media	7
Register of Interests.....	7
Promoting a supportive governance culture	8
Creating an inclusive council.....	8
Breaches of the Code	9
Who can make a complaint?.....	9
Decision-making options.....	9
Investigating complaints	10
Creating a panel of investigators	10
The role of investigators	10
Determining materiality.....	10
Process upon receiving a complaint	11
Process for non-material breaches	11
Process for managing material breaches.....	12
Hearing by Council or Committee.....	12
Possible penalties and actions in response to a material breach.....	13
Process to be followed in the case of statutory breaches.....	13
Possible penalties for statutory breaches.....	14
References	14
Appendix 1: Examples	15
Example One	15
Example Two	15
Example Three	16
Appendix 2: Complaints Procedure – Flow Diagram	17
Appendix 3 Self Assessment Template	18
Appendix 4: Register of interests template	20

Introduction

The LGNZ Code of Conduct template 2016 replaces the template published as part of the suite of KnowHow products following the passage of the LGA 2002. The LGA 2002 made the adoption of a Code of Conduct (the Code) mandatory. The new template includes a range of new features and draws on good practice introduced by councils over the past decade, particularly Gore District Council and Northland Regional Council. New features are:

- refinement of the principles including a new principle that highlights the importance of elected members “pulling their weight”;
- simplification of the roles and responsibilities section;
- encouragement for members to participate in activities to build and maintain collaborative and cooperative cultures within the council;
- a new process for investigating and assessing complaints, including a ‘materiality’ test;
- additional guidance on penalties or sanctions;
- clarification that complaints can only be made by members and chief executives; and
- a more empowering and less prescriptive approach.

Why a Code of Conduct?

Codes of conduct are common features in local government systems in many parts of the world and in New Zealand the Code complements specific statutes, such as the Local Government and Meetings Act 1987, which are designed to ensure openness and transparency. Codes are an important part of the framework for building citizen confidence in our governmental processes. The template has four objectives:

- to enhance the effectiveness of the local authority and the provision of good local government of the community, city, district or region;
- to promote effective decision-making and community engagement;
- to enhance the credibility and accountability of the local authority to its communities; and
- to develop a culture of mutual trust, respect and tolerance between the members of the local authority and between the members and management.

The four objectives highlight the importance of achieving ‘good local government’, effective and inclusive decision-making, strengthened community credibility, and a culture of trust and mutual respect within the local authority.

They also contribute to making councils a more rewarding and satisfying place for elected members.

Content

Codes of conduct vary from place to place, and especially between jurisdictions, but there are certain critical elements a good Code should contain. In addition to the minimum requirements set out in the LGA 2002 (see cl.15 Schedule 7, LGA 2002) an effective Code of Conduct should include:

- guidance for managing relationships and ensuring constructive behaviour, including processes for ensuring these are adhered to. This will ideally cover relationships with other members, staff, the media and relationships with the public;
- a statement of the different roles and responsibilities of governance and management. The Code should complement and reinforce the rules and statutory provisions set out in a council's standing orders;
- provisions dealing with confidentiality of information received during the course of a members' duties as well as situations when members are required to disclose information to the local authority and each other;
- provisions dealing with conflicts of interest;
- provisions dealing with ethical conduct, such as the way in which expenses may be claimed and soliciting or accepting gifts, rewards, or benefits;
- an explanation of the importance of adhering to the Code of Conduct and details of the procedures for investigating and resolving alleged breaches;
- provisions designed to encourage courteous and constructive behaviours and so reduce the risk of poor behaviour and alleged breaches;
- details of penalties or sanctions, such as what they are, when they might be applied, and the processes for their application (where these processes are within the control of council); and
- provisions for the review of a code of conduct (both in terms of the statutory requirements and any processes the local authority has put in place).

All efforts have been made to ensure that these matters have been incorporated in the LGNZ Code of Conduct template.

Considerations when designing a Code

Codes of conduct are part of the "house rules" that govern relationships and behaviour and complement other corporate documents, such as Standing Orders and the council's Governance Statement. While some high level principles may be desirable in order to "set the scene", a document that talks in vague generalities will be difficult both to adhere to, and to enforce.

Codes of conduct are not a means of preventing elected members from expressing their views

Codes of conduct should promote effective working relationships within a local authority and between the local authority and its community. Among other things, a Code should promote free and frank debate which should in turn result in good decision making. Codes of conduct should not be used in such a way as to stifle robust debate.

Provided that an elected member does not attempt to present a personal view as anything other than their own view (and does not contravene other parts of the Code) they should be able to do so. Codes of Conduct are ideally designed to provide rules of conduct that promote debate and make it clear that personal views, and the rights of *all* members to express personal views, are to be respected.

What a Code of Conduct does is set boundaries on standards of behaviour in expressing and promoting those views, and means of resolving situations when elected members breach those standards.

Elected members should “own” the Code

Nothing is more likely to promote non-compliance with a Code than elected members being invited to “rubber stamp” a Code that others have prepared.

It may be useful for elected members to “workshop” the Code template as soon as practicable after each triennial election, for example, at the council’s induction workshop. Given that the Code deals with the relationship between elected members, the chief executive, and staff, it may be desirable to have the workshop facilitated by an independent person.¹

Processes need to be put in place for investigating and resolving breaches of the code

Applying a penalty or sanction under the Code should ideally be the last, rather than the first response – most situations can be resolved without the need for sanctions. Often something as simple as an apology will resolve the issue. The original code of conduct template created difficulties for some councils as it provided little guidance on how to distinguish between minor and material breaches. This template has been specifically designed to enable non-material breaches to be dealt with outside the formal process of a full investigation by the council or committee.

Most of all, the principles of natural justice must apply to the investigation, assessment and resolution of complaints made under the Code.

Codes of conduct cannot stand alone

Codes of conduct work best when they are supported by other mechanisms.

¹ Equip, LGNZ’s business arm, may be able to help with such sessions or advise on suitable facilitators.

The most obvious supporting mechanism is training. A good Code will remind members of their obligations under the LGA 2002, the Members' Interests Act and the Local Government Official Information and Meetings Act 1987 etc. However, a Code that replicated all of the relevant provisions would probably be of a size where no one person (either member or staff) could remember it all. All elected members should receive training in their obligations under these Acts at the beginning of each triennium. Other provisions of the Code should be covered during such training.

Codes of conduct should also be linked to other procedural documents adopted by councils, such as Standing Orders. Standing Orders provide rules that set out processes and standards of conduct for meetings while the Code governs day-to-day and less formal relationships.

The media

When designing the Code it is important to recognise the legitimacy of political debate and open discussion and ensure that provisions do not become an instrument to diminish this. It is important to note that the Declaration of Office, sworn by members, states:

*"I will faithfully and impartially, and according to the best of my skill and judgment, execute and perform, in the **best interests** of [name of region, district, locality, community]"*

Under the declaration members must act in what they believe is the best interests of the community, district or region. It is up to individual members, in consultation with residents and on the basis of advice and research, to determine what 'best interest' for their regions or district means.

The Code must respect the spirit and intent of the New Zealand Bill of Rights Act and ability of members to express dissent. However, in doing so members must act in accordance with the standards set out in the Code. Consequently the new template has not made any substantive changes to the 'dealing with the media' provisions from those set out in the original template.

Register of Interests

The Code requires that members maintain a register of interests. A template register is set out in **Appendix 4** of this guide. The register is limited to disclosures affecting members and their spouses or partners. It is important that members update their details when circumstances change. We recommend that staff regularly remind members to check that the register is up to date and relevant.

Promoting a supportive governance culture

One important difference between the new and old templates is the addition of commitments designed to promote a supportive and inclusive governing environment and strengthen relationships at the governance level.

These provisions are intended to diminish the risk of conflict between members and between members and the public, and thereby avoid the likelihood of breaches. The new Code encourages members to review their collective performance and governance style in order to assess the degree to which their culture is both inclusive and supportive.

The reference to “equitable contribution” in the Values section has been added to encourage members to take all reasonable steps to fulfill the duties and responsibilities of office, such as attending meetings and workshops, undertaking relevant reading, preparing for meetings and taking part in relevant training workshops or seminars.

The intention is to provide councils with leverage to encourage members to do ‘their fair share’ of the tasks necessary to provide effective governance and representation and take part in exercises designed to improve relationships and teamwork.

Creating an inclusive council

The new and proactive focus on building a positive culture is the subject of section 11, “Creating a supportive and inclusive environment”. The key parts of this section are designed to encourage members to:

- take part in council induction workshops;
- contribute to activities designed to seek agreement on vision, goals, objectives and operating values;
- participate in processes for assessing the governing body’s performance (see **Appendix 3** for a self assessment survey form for consideration); and
- undertake, where necessary, training to improve their knowledge of how the council works and being an effective elected member.

The provisions require that members should take “all reasonable steps” to fulfill their responsibilities as elected members. As a result of these commitments the possibility exists that a complaint could be laid against a member for having consistently refused to participate in council organised activities designed to build a better culture.

Breaches of the Code

One of the ongoing problems with many of the Codes in use is the way they deal with the process of making, investigating and ruling on complaints. In its report on Codes of Conduct (OAG 2006) the Office of the Auditor General noted that many councils lacked a process for distinguishing between trivial and serious breaches of the Code and consequently spent considerable energy and resources hearing complaints on what are in effect matters of no concern. Many other issues have also arisen, such as:

- failure to adequately guard against the risk of members with an interest in a complaint taking part in the decision on whether or not to uphold a complaint;
- examples of members of the public making complaints about the behaviour of individual members for reasons that appear to be more concerned with settling 'political' differences; and
- lack of preparedness. Many councils discover, when faced with a code of conduct complaint, that they have failed to establish in advance the processes for handling the complaint, thus exacerbating the original issue.

This section of the guide discusses the process set out in the new template for investigating, assessing and making decisions about complaints.

Who can make a complaint?

The Code is designed to be a self regulatory instrument and as a result complaints can only be made by members themselves and the chief executive. All complaints must be made in writing to the chief executive who is obliged to forward them to an independent investigator for a preliminary assessment.

Decision-making options

Where a complaint is found to be material the investigator will provide a report to the council setting out the reasons why the allegation has been upheld and is material. The council needs to have a process in place for discussing and making a decision on the investigator's recommendations. In some cases the governing body, or some of its members, may be interested parties in the complaint and should therefore not take part in discussions on the matter nor determine penalties.

To avoid such situations, the council might consider establishing a Code of Conduct Committee. The purpose of the committee would be to consider any reports from an independent investigator and determine appropriate responses. An appropriate Code of Conduct Committee might consist of three members – a member of the governing body and two community representatives chosen for their knowledge and experience, either by invitation or as a result of a call for expressions of interest.

The council will need to decide whether the Code of Conduct Committee should have delegated decision making powers or recommendatory powers.

Investigating complaints

One of the issues with the original template was the lack of detail about the process for investigating complaints and determining their materiality. Another issue involved the need to ensure processes are free of bias, especially when all councillors might be seen to be interested parties.

In order to address these concerns the new Code requires that all complaints are forwarded to an independent investigator for a preliminary assessment and that the council abide by the investigator's assessment whether or not an alleged breach is material or not.

In some cases an investigator may choose to make non-binding recommendations, for example, where a pattern of non-material complaints has emerged that highlight a need for changes in council processes, or an investment in capacity building.

Creating a panel of investigators

At the beginning of each triennium the chief executive will prepare a panel of investigators in consultation with the mayor, chairperson or council. Investigators may be drawn from inside or outside the district or region. In putting together the list the chief executive may call for nominations, invite members of the public with appropriate skills (for example retired judges who may live within the district) to be investigators or contract with an external, such as EquiP, to provide the service.

Councils may wish to develop a joint list of investigators.

The role of investigators

The process set out in the Code gives an investigator responsibility to determine, without challenge, whether a complaint is material or not. The rationale for giving the investigator this degree of authority is to ensure the process is free of any suggestion of bias. It is also intended to reduce the cost of the complaints process, by reducing the time spent by members and officials. It also ensures that the Code process itself is less likely to be brought into disrepute.

In adopting the Code members of the governing body agree to abide by an investigator's preliminary assessment. Under the process set out in the Code members are informed of the result of a preliminary assessment and only if the finding is material will members have any involvement (and then only if there is no conflict of interest).

Determining materiality

The complaints procedure is underpinned by the principle that councils (or committees) should only be involved in ruling on possible breaches of the Code when they are material. Consequently a level of clarity is required about how materiality should be determined. In the case of non-statutory breaches the Code states that a breach is material if:

“...it would, if proven, bring the council into disrepute or reflect adversely on the local authority if not addressed.”

The notion of disrepute involves the local authority’s reputation and the risk that specific behaviours will, in the mind of the public, undermine that reputation. Only if there is a real risk that reputation will be undermined should a breach be determined as material (see **Appendix 1** for examples).

Other factors that might be considered when determining the level of materiality include whether complaints are intended to:

1. intimidate or harass another member or employee;
2. damage another member’s reputation;
3. obtain a political advantage;
4. influence the council in the exercise of its functions or to prevent or disrupt the exercise of those functions;
5. avoid disciplinary action under this Code; or
6. prevent or disrupt the effective administration of this code.

Other factors include whether complaints are vexatious and have not been made in good faith. The investigator may take what ever actions they need in order to determine the materiality of a complaint, although investigations will need to be within whatever budgetary constraints have been set in their contract for service or approved by the chief executive.

Process upon receiving a complaint

Having received a complaint in writing the chief executive will:

- notify the complainant and the respondent(s) that the complaint has been received and the name of the selected investigator (including information on the process that will be followed); and
- provide ongoing updates to members on progress with the resolution of complaints received. This could be through a chairperson or chief executive’s report.

Process for non-material breaches

In the case of complaints that are non-material an investigator can, if required, discuss the matter with the complainant and the respondent and may:

- dismiss the complaint with no further action taken;
- uphold the complaint but rule that as it is minor and non-material no action is required; or
- uphold the complaint, noting its minor and non-material nature, and make a non-binding recommendation to the council, such as, that the respondent consider attending a relevant course or that a policy or practice is reviewed.

The investigator will present their findings to the chief executive who will inform the complainant and the respondent at the earliest opportunity.

Process for managing material breaches

Where an investigator finds that a breach is material the following steps will apply:

- The investigator will inform the chief executive, who will in turn inform both the complainant and the respondent, that the breach has been determined as material and outline the process to be followed.
- The investigator will undertake an investigation appropriate to the scale of the breach, which may include interviews with other affected parties, and prepare a report for the chief executive which will set out the rationale for their findings and may include recommendations for resolving the breach and/or appropriate penalties.
- On receipt of a report the chief executive will send a copy of the investigator's findings to the complainant and the respondent(s) inviting them to reply in writing as to whether or not they agree to the findings and whether they wish to make a written submission for consideration by the council or committee.
- The chief executive will then prepare a paper, including the investigator's report and any submissions from affected parties, for a forthcoming meeting of the council, or committee with delegated responsibility, to consider complaints and determine penalties.

Hearing by council or committee

On receipt of the chief executive's report the council or committee will:

- In considering a report from the chief executive, the council or committee may, if necessary, ask the investigator to provide a briefing on his or her findings and invite the complainant and/or respondent to speak to any submissions that might have been made.
- On consideration of the evidence, the council or committee will decide whether a material breach of the Code has occurred and what, if any, penalty or action should occur in response to the breach.
- The council will inform the respondent and complainant of its decision in writing.

No member of the council with an interest in the complaint may take part in the hearing or decision-making process, unless invited by the council or committee to speak to their submission.

Note: No appeal right is included in the Code as all members are able to make use of the processes set out in standing orders for revoking council decisions. In addition, a council decision can be subject to a judicial review and a committee decision can be subject to an Ombudsman's review.

Possible penalties and actions in response to a material breach

The Code reflects an agreement between elected members about the behaviours they expect from each other and themselves. It is therefore heavily reliant on individual good will and the ability of the council, as a collective body, to exert moral suasion to either prevent breaches of the Code or promote a positive and constructive culture. However, where there has been a material breach of the Code a local authority might consider the following penalties and actions where a material breach has been confirmed:

- a letter of censure to the member;
- a request (made either privately or publicly) for an apology;
- a vote of no confidence in the member;
- removal of certain council-funded privileges (such as cell phones, or attendance at conferences);
- restricted entry to council offices, such as no access to staff areas (should no restrictions apply);
- limitation on any dealings with council staff so that they are confined to the chief executive only;
- suspension (rather than removal) from committees or other bodies; or
- an invitation for the member to consider resigning from the council.

A council or committee may decide that a penalty will not be imposed where a respondent agrees to one or more of the following:

- attend a relevant training course; and/or
- work with a mentor for a period of time; and/or
- participate in voluntary mediation (if the complaint involves a conflict between two members);and/or
- tender an apology.

Decisions to apply a non-statutory penalty for material breaches should be made in meetings open to the public unless some aspect of the matter necessitates treating the matter “in committee”.

Process to be followed in the case of statutory breaches

Where an investigator finds, in response to a complaint, that a member has breached provisions set in statute, such as a breach of the Members’ Interests Act 1968, the Local Government Official Information and Meetings Act 1987 or the LGA 2002, they will immediately provide their findings to the chief executive who will inform the relevant agency, as well as the complainant and the respondent.

Possible penalties for statutory breaches

Although the local authority and its community will play a role in monitoring compliance with these provisions, outside agencies also have a role in monitoring in compliance and more particularly in dealing with breaches of law. Penalties that may apply, depending on the type of breach, are:

- criminal prosecution, conviction, and the resulting consequences (for breaches of the Crimes Act, the Secret Commissions Act or the Securities Act); or
- prosecution by the Audit Office² under the Member's Interests Act which on conviction leads to the member's ouster from office (where a member votes or discusses a matter in which they are deemed to have an interest); or
- inviting the Auditor-General to prepare a report on any financial loss or damage suffered by a local authority as the result of a breach (which could potentially lead to the member having to personally make good the loss or damage); or
- sanctions made under the Privacy Act.

References

OAG (2006) *Local Authority Codes of Conduct* available from <http://www.oag.govt.nz/2006/conduct/docs/conduct.pdf>

² The Audit Office is an avenue for making complaints about breaches of the Members' Interests Act, but also functions as an advisor where there is doubt as to whether a particular course of action constitutes a breach, and can in certain circumstances give approval for members who might have an interest to participate in discussions and/or vote on a particular matter.

Appendix 1: Examples

Example One

Councillor Smith was elected on a platform of stopping the sale of council housing. The council has made a decision to sell the council housing. Cr Smith makes media comments against the decision after it is made. Those same statements suggested that council staff advising on the sale “must have owned shares” in the company that proposed to buy the houses.

Cr Smith’s actions in releasing a media statement criticizing a decision after it has been made would probably not in and of themselves constitute a breach of a reasonable code of conduct. Cr Smith has a right to express a viewpoint and, provided that he makes it clear he is expressing a personal view, then issuing a critical press statement is an action he is entitled to take. If his statements failed to make it clear that he was expressing a personal or minority view then it may be a non-material breach of the Code, probably one where censure would be the appropriate response.

However, this media statement has made an allegation that staff advice was based on improper motives and/or corruption. This is a breach of most codes of conduct. It is most likely to be a material breach given the potential impact on the Council’s reputation and the reputation of staff.

Also, there is no qualified privilege attaching to public statements about employees which are false and damaging. In other words elected members may be sued for defamatory statements made about employees.

Example Two

Cr Jones is on the Council’s Works and Services Committee. The Committee is currently considering tenders for the construction of a new wastewater treatment plant and has received four tenders in commercial confidence. The Committee has recommended to Council that they award the contract to the lowest tenderer. Cr Jones is concerned the lowest tender proposes to treat sewage to a lesser standard than others. She leaks all four tenders to the local media. A subsequent investigation by the Council conclusively traces the leak back to her.

In leaking the tender information to the media Cr Jones will have breached most codes of conduct. This breach has potentially serious consequences for the Council as a whole. It not only undermines elected members trust of each other, it also undermines the confidence of suppliers in the Council, which may lead to them not dealing with council in future, or even complaints under the Privacy Act.

In circumstances such as these where an elected member fails to respect a commercial confidence censure and removal from the Committee is an obvious first step. The Council may be liable for prosecution under the Privacy Act and even to civil litigation.

In the event that the council suffers financial loss the Council may elect to ask the Auditor-General to prepare a report on the loss (or the Audit Office may do so on their own initiative), which may result in Cr Jones having to make good the loss from her own pocket.

Example Three

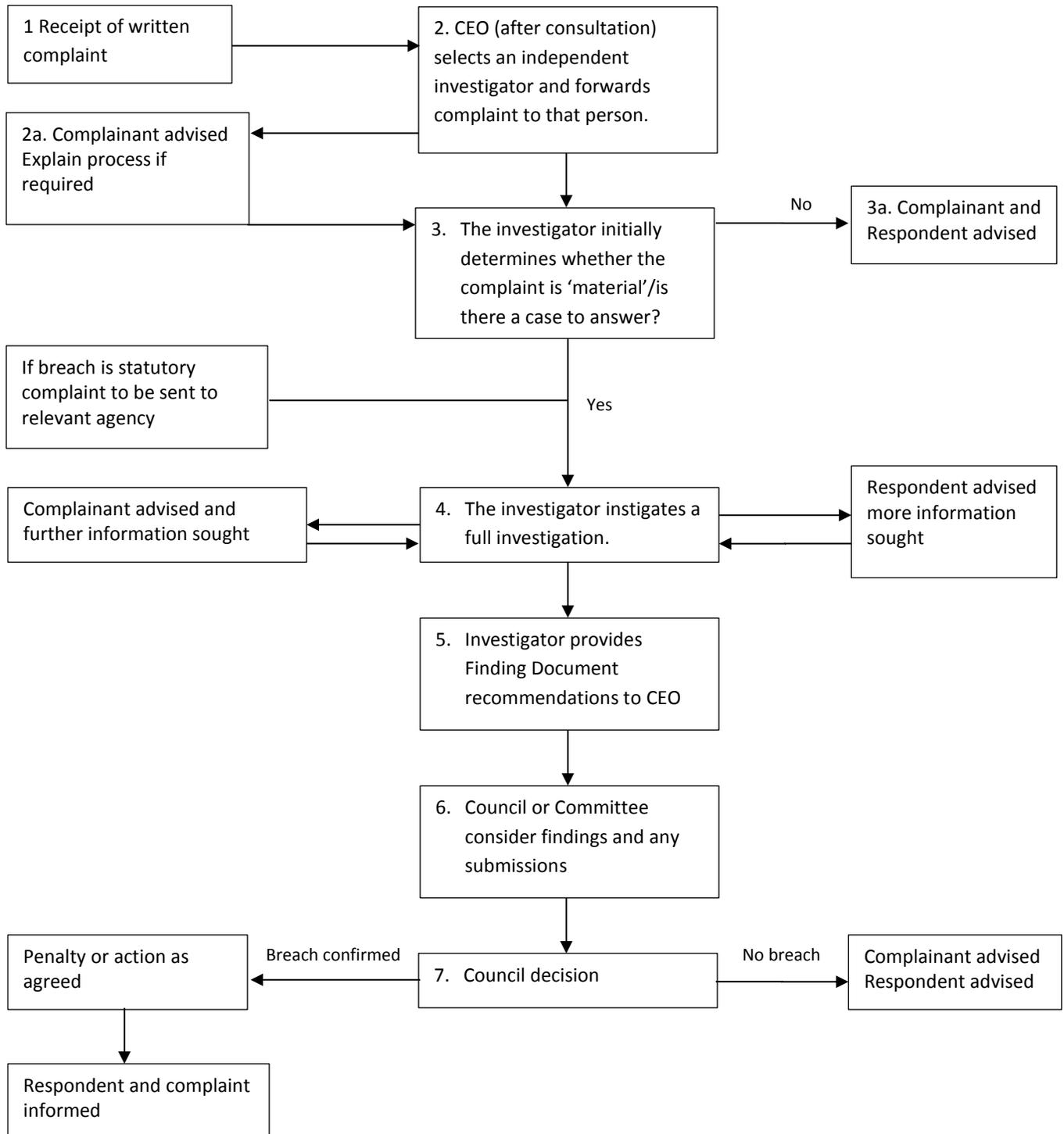
Eastland Regional Council is conducting a performance review of the Chief Executive. It has established a CEO Performance Management Committee to conduct the review. In the course of that review the Committee meets informally with the Chief Executive to review which performance targets were met and which were not. The meeting notes that the CEO has been unable to meet two of his twenty performance targets that were set and resolves to formally report this to the full Council for its consideration. At the conclusion of that meeting Councillor Black leaves to find a local reporter waiting outside and makes the comment that "Jack White won't be getting a pay increase this year because he didn't meet all his targets".

This action will probably constitute a breach of most codes of conduct in that it:

- breached a confidence;
- presumed to speak on behalf of council;
- purported to commit council to a course of action before the council and made a decision (or even met to consider the matter); and
- failed to treat a staff member with respect and/or courtesy.

In addition to the provisions of the Code Cr Black's actions will severely undermine the relationship between the Chief Executive and the Council, which may well constitute grounds for litigation against the Council both in terms of employment and privacy law.

Appendix 2: Complaints Procedure – Flow Diagram



Appendix 3 - Self Assessment Template

Please rate how you view the performance of elected members collectively (acting as the council) in the following areas:

A rating of 1 indicates an excellent level of performance – through to a rating of 4 indicating that the collective performance of elected members could improve significantly.

1. We act together as a team to deliver value to the people of our district/region.

1 2 3 4 **(please circle)**

2. We are effective in being part of a coordinated approach to promote the district/regions.

1 2 3 4 **(please circle)**

3. We have effective working relationships with key stakeholder groups.

1 2 3 4 **(please circle)**

4. We have an effective working relationship with Council staff through members interactions with the Chief Executive.

1 2 3 4 **(please circle)**

5. We engage effectively with the community on issues of importance to them.

1 2 3 4 **(please circle)**

6. We are well prepared and well equipped to make informed decisions in our capacity as elected representatives.

1 2 3 4 **(please circle)**

Appendix 4: Register of interests template

Member name:		
Spouse/partner name:		
Declared employment or business interest	Spouse/partner declared employment or business interest	Council appointment
Address of any land in which a beneficial interest is held within the Council boundaries (member and her/his partner)		
Address of any land owned by the Council rented to the member or spouse, or to a firm or organisation in which the member or spouse is a director or trustee		