



DEPARTMENT OF LOCAL GOVERNMENT

CEL 5/6/90

LISMORE CITY COUNCIL RECEIVED	
22 MAY 1990	
FILE NO S/L 4-P, S/G 4-5	
LETTER NO 90-3297	ALLOC GM

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CIRCULAR NO. 90/17

DATE: 11 May, 1990

CONTACT OFFICER:

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REF: F82/2529G

RE: PECUNIARY INTEREST - PROCEDURE FOR DEALING WITH
ALLEGED BREACHES

An increasing number of alleged breaches of the pecuniary interest provisions of the Local Government Act are coming to the Department's attention, and there appears to be considerable confusion among councils as to how such allegations should be handled.

The starting point is that local issues should be, so far as is practicable, resolved administratively, politically and judicially at the local level, by local citizens and ratepayers. In the first instance therefore, the responsibility to take action in relation to alleged breaches of the Act, by members or staff of councils, rests with the council concerned. In this regard, the provisions of section 591(d) of the Act make it clear that the enforcement of the Act is a matter for the community as a whole, including the council concerned, its Clerk, or "any person whomsoever".

The steps that should be followed by councils are as follows:

1. After checking the Primary and Ordinary Returns of the member(s) concerned, the minutes of the relevant meetings, and any other available pertinent information, all complaints should be promptly reviewed by the Clerk and/or Mayor/President/Chairman (as appropriate) to determine whether, in their opinion:
 - (i) the allegation is frivolous, vexatious or not in good faith;
 - (ii) the subject matter of the allegation is trivial;

- (iii) the alleged breach occurred at too remote a time (ie. over 12 months) for prosecution action to be taken (unless the case is considered to be of such gravity as to justify investigation anyway); or
 - (iv) there is insufficient evidence to substantiate the allegation.
2. If the answer to any of the above questions is "YES", the matter should be taken no further, apart from an appropriate report on this assessment being put to the council for consideration in closed Committee, with appropriate advice being sent to the Department.
3. If the answer to all the above questions is "NO", this Department (as well as the Independent Commission Against Corruption as required under section 11 of the Commission's Act) should be notified, and the Mayor/President/Chairman (in his absence the Deputy Mayor/President/Chairman, or where applicable the Clerk) should seek appropriate legal advice. In this regard, they should be given delegated authority to seek such legal advice without reference to the council. Instructions drafted to council Solicitors, should include:
- (i) details of the matter under consideration when the alleged breach occurred;
 - (ii) the nature of the pecuniary interest alleged;
 - (iii) the nature of the pecuniary benefit or loss alleged;
 - (iv) the type of breach alleged, ie, failure to disclose, taking part in discussion or debate, and/or voting (including copies of relevant Minutes);
 - (v) whether any relevant interests were declared in the member's Primary or Ordinary returns;
 - (vi) any written views (or oral views obtained in the presence of a witness) of the member(s) concerned on the allegations; and
 - (vii) a request for an opinion as to whether the available evidence discloses a prima facie case, and the likelihood that prosecution would result in a conviction, including an evaluation of how strong the case is likely to be when presented in court (in circumstances where the alleged breach occurred at too remote a time to take prosecution action (ie., 12 months), an opinion should be sought on whether there was the likelihood that prosecution would have resulted in a conviction, notwithstanding the time limit impediment).

On the receipt of the requested legal opinion, the council should review the available information (in Committee) to decide whether or not to prosecute the alleged offender(s). The factors which should be considered by the council include:

- (i) whether the available evidence discloses a prima facie case; that is to say, on the basis that the available evidence is accepted without a reservation by a magistrate or jury, the magistrate or jury could, acting reasonably, be satisfied of the defendant's guilt beyond reasonable doubt; and
- (ii) whether prosecution would be in the public interest; that is to say, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires that prosecution to be pursued.

In deciding whether the public interest requires a prosecution, a wide variety of factors can properly be taken into account. A dominant consideration is that ordinarily the public interest will not require a prosecution unless it is more likely than not that it will result in a conviction.

Such an assessment requires a dispassionate evaluation of how strong the case is likely to be when presented in court. It must take account of such matters as the availability and credibility of witnesses and their likely impression on a jury, the admissibility of any alleged confession, and the impact of any likely defence on a jury or other arbiter of fact.

This assessment may be a difficult one to make and in some cases it may not be possible to say with any confidence that either a conviction or an acquittal is the more likely result. In cases of doubt, it may still be appropriate to proceed with the prosecution when regard is had to other relevant factors, provided a conviction is reasonably open to the available evidence.

The decision whether or not to prosecute must not be influenced by:

- * the political associations, activities or beliefs of the alleged offender or any other person involved;
- * personal feelings concerning the alleged offender;
- * possible political advantage or disadvantage to any political group or party; or
- * the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

The decision whether or not to prosecute is the most important step in the prosecution process. In every case, great care must be taken in the interests of the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute, or conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the justice system and local government.

In the circumstances where the alleged breach occurred at too remote a time (i.e., over 12 months) for prosecution action to be taken, the council should review the available information to determine what action should be instigated. In making this decision the council should follow the same rationale as for a decision as to whether to prosecute or not (see 4 above).

5. After making its decision, the council should forward to the Department copies of:
 - (i) its resolution as to whether or not to prosecute;
 - (ii) the instructions to its Solicitors; and
 - (iii) the legal advice received from its Solicitors.
6. The information supplied by the council (and any complainants) will be reviewed by the Department to see whether appropriate action has been taken.

The Department recognises that, from time to time in practice, there will be limits to the Department's policy and practice of non-intervention where the council may, for political or other reasons, be unprepared or unable to take appropriate action. The status of local government will be weakened if there are clearly identified and publicised breaches of the law which, for whatever reason, are not remedied. In the absence of prosecutions, the extreme and no longer easily applied sanction of dismissal is the only alternative remedy for council misconduct.

7. (i) In determining whether it will intervene in a particular case, the Department will consider whether:
 - (a) the available evidence discloses a prima facie case;
 - (b) the allegation raises a point of principle, or matters that have implications for local government generally;
 - (c) the public interest involved in the particular circumstances of the case justifies prosecution, including:

- * whether the council proposes to take any non-prosecution action (such as reference to the Independent Commission Against Corruption) in relation to the alleged offence, which is considered appropriate in the circumstances of the particular case;
- * the gravity or, conversely, the triviality of the alleged offence;
- * any mitigating or aggravating circumstances;
- * the expiration of the 12 months period for prosecution;
- * the degree of culpability of the alleged offender in connection with the offence;
- * whether the prosecution would be perceived as counter-productive, for example, by enabling the defendant to be seen as a martyr;
- * the prevalence of such offences and the need for deterrence;
- * whether the consequences of any resulting conviction would be unduly harsh or oppressive;
- * whether the alleged offence is of considerable public concern;
- * the necessity to maintain public confidence in local government;
- * the likely length and expense of a trial; and
- * the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court.

(ii) The decision as to whether to prosecute is for the Minister's final determination.

(iii) The decision made by the Department and/or Minister in each case, will be reported to the council concerned and the alleged offender.

Should any further information or clarification be required, please contact Chris Wheeler, Manager, Special Investigations and Management Audit Branch, on (02) 240 4660.



F.A. Elliott,
Secretary.