

Investigation into Complaint by Councillor Condie about Mayor Foster

Investigation Report

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Contents

THE COMPLAINT	3
PRELIMINARY ASSESSMENT	4
WITNESS STATEMENTS	7
Responses to Draft Report.....	8
THE ISSUES	8
Was it appropriate for Mayor Foster to rely on or refer to the File note of his discussion with [REDACTED], in the context of the vote on Shelly Bay on 11 November 2020?	9
<i>The File note</i>	9
<i>The High Court Decision</i>	10
<i>Fairness to [REDACTED]</i>	12
<i>Risk of Judicial Review</i>	13
<i>Conclusion</i>	14
Was it appropriate for Mayor Foster to show the File note of his discussion with [REDACTED] to some, but not all, Councillors?	15
<i>Conclusion</i>	17
Do the leadership responsibilities that the Mayor has given rise to any greater obligations in this context?	17
<i>Conclusion</i>	18
Code of Conduct for Elected Members	18
Summary of Key Findings	20
RECOMMENDATIONS	22
CONCLUSION	24
APPENDIX 1	25
Terms of Reference	25
APPENDIX 2	26
Excerpts from Written Statement prepared by Councillor Condie – 30 November 2020.....	26
Excerpts from Interview with Councillor Condie – 4 December 2020	27
Excerpts from Interview with Councillor Laurie Foon – 11 December 2020	33
Excerpts of Interview with Councillor Diane Calvert – 11 December 2020	33
Excerpts from Interview with Mayor Foster– 17 March 2021.....	35
Excerpts from Response of Councillor Condie to Mayor Foster’s Interview – 31 March 2021	49
Excerpts from Mayor Foster’s response to Councillor Condie’s comments of 31 March 2021 – 14 April 2021 ..	54
APPENDIX 3 – COUNCILLOR CONDIE’S RESPONSE TO DRAFT REPORT – 21 APRIL 2021	56
APPENDIX 4 – MAYOR FOSTER’S RESPONSE TO DRAFT REPORT- 23 APRIL 2021	57

The Complaint

1. On 11 November 2020 Councillor Jenny Condie submitted a complaint about Mayor Andy Foster to the Chief Executive of Wellington City Council.
2. The complaint related to the alleged conduct of Mayor Foster in the lead up to the vote on the key commercial terms for the sale and lease of Council land at Shelly Bay. In summary Councillor Condie alleged:
 - 1.1. Mayor Foster asked to meet with her as he said he had something to show her.
 - 1.2. At the meeting Mayor Foster said he wanted to show her notes that he made during a conversation with ██████████ regarding the width of the road going to Shelly Bay.
 - 1.3. Mayor Foster told her that the information he was going to show her “would change [her] mind about Shelly Bay”.
 - 1.4. Mayor Foster made it clear that he did not have permission to share this information and asked her to read some notes, which she did.
 - 1.5. “Nothing in the notes gave [her] cause for concern about the actions or integrity of any Council officer”.
 - 1.6. She asked Mayor Foster whether he would be making the notes publicly available to all other Councillors, and he indicated that he would not do so.
 - 1.7. She told the Mayor she disagreed with this given the “over-riding public interest in all Councillors making decisions based on the same information”.
 - 1.8. She understood Mayor Foster had “previously hinted on numerous occasions that he has important information which was not previously disclosed and that other Councillors have advised him to disclose any information to the Ombudsman for independent oversight and assessment”. She believes that he was likely referring to the information she was shown.
 - 1.9. The notes contained potentially defamatory allegations about the behaviour of a former Council employee. These allegations are similar to matters that were considered and dismissed by the High Court in 2018.
 - 1.10. She believes that it was “extremely unwise for the Mayor to attempt to unfairly besmirch the professional integrity and probity of a former Council officer”.

- 1.11. She believes that she was not the only Councillor Mayor Foster showed the information to.
- 1.12. She considers his actions to have been improper and seeks an investigation.
3. Councillor Condie did not identify any particular parts of the Code of Conduct that she considered the Mayor's conduct to be in breach of. Nor did she specify what aspects of the Mayor's conduct she considered to be improper, except to the generalised extent set out above.
4. Mayor Foster objected to the investigation on the basis that Councillor Condie had not sufficiently identified her concerns, stating that the investigation cannot properly "be aimed at identifying a concern to answer on the complainant's behalf – which approach would be inconsistent with the purpose of an independent investigation".
5. I have considered this objection, but do not accept it. It is not unusual for complainants to set out the factual basis for their concerns, rather than framing these as allegations or as alleged breaches of the Code of Conduct. The complainant in this case is not a lawyer, and I would not necessarily expect her to identify what part or parts of the Code of Conduct she claims have been breached. She has complained about aspects of the Mayor's conduct, and this has triggered an investigation. I am comfortable that it falls within the scope of my Terms of Reference, and the appropriate role of an Investigator, to consider whether the conduct alleged in the complaint, if substantiated, amounts to a breach of the Code of Conduct, and if so, how.

Preliminary Assessment

6. The Local Government New Zealand ("LGNZ") Guidelines provide that the first step for an Investigator is to make a preliminary assessment of whether the complaint is "material" and whether there is a case to answer. In making this assessment the Investigator is to consider whether:
 - 1.13. The complaint is trivial or frivolous and should be dismissed:
 - 1.14. The complaint is outside the scope of the Code of Conduct and should be re-directed to another agency or institutional process;
 - 1.15. The complaint is minor or non-material;
 - 1.16. The complaint is material and a full assessment is required.
7. Mayor Foster claims that complaint is frivolous and should be dismissed, again relying on the fact that Councillor Condie has not articulated what potential breach of the Code of Conduct may have occurred. He also points to statements made by Councillor Condie in her interview

with me indicating that she did not know to what extent the Mayor's conduct was wrong, but she wanted someone to look at it and determine how serious it was.

8. In response to the criticism that she does not appear to “understand [her] own complaint” and “in her recollections she seems unclear”, Councillor Condie says “I made considerable efforts in all my statements to you to very clearly indicate where my recollections were specific and where I had less confidence in my memories, to give Mayor Foster the best chance to state his case”.
9. Mayor Foster also says that Councillor Condie's own conduct is a “blatant abuse of process” and therefore the complaint should be dismissed on this basis. In particular the Mayor objects to the fact that Councillor Condie “chose to raise her complaint in a public Council meeting, attended by media, with what appears was an intention to generate as much adverse publicity and embarrassment for [him] as possible”.
10. For the reasons set out below, I do not consider the complaint to be trivial or frivolous. Nor do I consider the matter complained of, if substantiated, to be minor or non-material. Accordingly I have proceeded with a full investigation of the matter.
11. In his response to the draft Report Mayor Foster expressed concern that I had moved to a full investigation of the matter prior to him being advised of my decision as to “materiality”. He also says that had it been communicated to him that I had moved beyond making a preliminary assessment “he may have taken the opportunity to focus on further issues in his interview – instead, his ... focus, was on the issue of materiality”.
12. In support of this submission Mayor Foster says that Part 12 of the Terms of Reference for this investigation required that he be informed as to my decision on “materiality” before a full investigation proceeded.
13. The Terms of Reference (**Appendix 1**) do not in fact require this additional step to be taken. It appears that Mayor Foster may have been relying on an earlier draft of the Terms of Reference in advancing this position.
14. Nonetheless, even if this was his expectation, I do not believe there has been any disadvantage.
15. I note in this respect that I wrote to Mayor Foster through his representatives on 4 February 2021 in response to their dated 28 January 2021 in which it was asserted that it was improper for there to be a formal investigation into the complaint.
16. In respect of this point, I responded:

“While Councillor Condie has not specified which parts of the Code of Conduct she alleges may have been breached, my letter to you of 10 December 2020 sets out which parts of the Code of Conduct I consider could potentially be relevant to the allegations. Whilst no decisions have been made or final views formed, it is my initial view that the allegations on their face, if substantiated, could potentially be capable of

amounting to a breach of the Code of Conduct, in particular the parts that have been identified.

Accordingly, the Chief Executive has instructed that I should continue my investigation into these issues”.

17. Whilst this response does not expressly refer to the complaint being “material”, however it does in effect put the Mayor on notice that I consider that the matters raised are material in that they are potentially capable of amounting to a breach of the Code of Conduct. The letter also clearly states that I will be proceeding with an investigation into these issues.
18. It is not clear what further issues the Mayor may have wished to address, but I note that he was given the opportunity to raise any further issues in his response to the draft Report. Further, I am satisfied that the interview that I undertook with the Mayor canvassed all of the substantive matters upon which I have made findings in this Report.
19. I also undertook interviews with all those who I considered could assist with my enquiry, and gave both the Complainant and Respondent several opportunities to provide me with their account of events and response to the evidence and submissions provided.
20. Nonetheless, it is open to Council to determine that further enquiries or investigation should be undertaken if it considers that Mayor Foster has not had a full and fair opportunity to respond to the allegations.
21. With regard to the claims that Councillor Condie’s own actions were an abuse of process, I consider this to be outside of the scope of my investigation, and informed the Mayor of this when the matter was first raised by him. To the extent that Mayor Foster wishes to make a separate complaint against Councillor Condie in relation to his concerns, he is free to do so, but they do not form part of this investigation. I did indicate that I would consider any issues of credibility arising out of Councillor Condie’s conduct insofar as this is relevant to the complaint she has made.
22. Given that the Mayor’s claims about Councillor Condie’s conduct have been raised and are recorded in this Report, I record briefly her response. She says that while some Councillors expressed the view that a Code of Conduct complaint was unnecessary, many others supported the action. She rejects the claims that her actions were politically motivated and says she has repeatedly refused media interviews on the matter. Where she has made public comment she says she has been reserved and has noted that the outcome of the investigation could clear the Mayor.
23. In response to these comments Mayor Foster said that whilst Councillor Condie may have recently refrained from making further public comment on the matter, the mode of the complaint and initial public comment (including on Twitter), has already done the damage and clearly suggested a political motive. As indicated above, it is not within the scope of my Terms of Reference to consider the claim that Councillor Condie’s actions were an abuse of process, and nor do I intend to comment on whether there was any political motivation for her laying a

complaint. Ultimately, this is not relevant to my assessment of the claims made against Mayor Foster, except to the extent that it may impact on whether her complaint was based on genuinely held views. In this regard, I note that I found Councillor Condie to be open and honest in her interview and communications with me, and that overall her views were expressed in a moderate and measured manner. I also believe that she had genuinely held concerns regarding how she perceived the Mayor had conducted himself.

Witness Statements

24. I received information from the following sources as part of my investigation:
 - 24.1. Written Statement prepared by Councillor Condie – 30 November 2020.
 - 24.2. Interview with Councillor Condie – 4 December 2020.
 - 24.3. Interview with Councillor Laurie Foon – 11 December 2020.
 - 24.4. Interview with Councillor Diane Calvert – 11 December 2020.
 - 24.5. Interview with Mayor Foster – 17 March 2021.
 - 24.6. Written response from Councillor Condie to Mayor Foster’s interview – 31 March 2021.
 - 24.7. Written response from Mayor Foster to Councillor Condie’s comments of 31 March 2021 – 14 April 2021.
25. Prior to interviewing Mayor Foster, I provided him with the material that I had received from Councillor Condie and copies of all of the interview transcripts.
26. I also engaged in correspondence with Mayor Foster, through his representative, in between December – March, about matters relating to the investigation. I have not attached that correspondence to this Report, nor did I disclose it to Councillor Condie as the matters raised largely related to the process of the investigation and concern that the allegations had not been adequately articulated and that there was insufficient justification for pursuing an investigation. The correspondence did not materially add to the substance of the Mayor’s explanation, and I responded to it at the time.
27. I note that I considered whether it was necessary to interview other Councillors who may or may not have been shown a copy of the File note, but decided not to. Ultimately it does not matter which Councillors in particular were shown the File note – it is common ground that it was shown to some but not others.

28. I also note that I have not addressed the various discussions and interactions that occurred after the meeting between Councillor Condie and Mayor Foster on 11 November 2020, or the public meeting that afternoon, as there is no suggestion that Mayor Foster acted improperly in respect of any such matters.
29. There was little material difference in the accounts given to me by the witnesses as to what occurred – it is largely as summarised by Councillor Condie in her complaint (refer paragraph 2 above). For this reason I do not intend to set out a summary of the facts in this section, but instead refer to the accounts and explanations of the witnesses in the body of the Report below, insofar as they relate to the key issues. However for convenience, I have set out the key excerpts from the witnesses statements in **Appendix 2** to this Report.

Responses to Draft Report

30. I provided a copy of my draft report to both Councillor Condie and Mayor Foster on 15 April 2021 and sought their responses by 23 April 2021.
31. Councillor Condie responded on 21 April 2021 indicating that she had “no further comment to make” (**Appendix 3**).
32. Mayor Foster responded through his representatives on 23 April 2021 raising a number of points (**Appendix 4**). The matters raised are addressed as appropriate within the body of this Report.

The Issues

33. As noted above, the accounts given by Councillor Condie and Mayor Foster of what occurred at their meeting on 11 November 2020 are broadly consistent. Further the statements of Councillors Calvert and Foon generally support what the complainant and respondent have told me. Therefore the issues for determination in this investigation relate to the appropriateness of the Mayor’s actions within the particular context, as opposed to factual disputes as to what was said and done.
34. Whilst Councillor Condie provided a lot of background, the key issues as they relate to the Mayor’s conduct may be summarised as:
 - 34.1. Was it appropriate for Mayor Foster to rely on or refer to the file note of his discussion with ██████████, in the context of the vote on Shelly Bay on 11 November 2020?
 - 34.2. Was it appropriate for Mayor Foster to show the File note of his discussion with ██████████ to some, but not all, Councillors?
 - 34.3. Do the leadership responsibilities that the Mayor has given rise to any greater obligations in this context?

35. In his response to the draft Report Mayor Foster said that “this is the first time “the issues” have been clearly articulated throughout the process”. He also says that “Not one of the three issues you identify actually refers to whether or not the alleged conduct breached the Code”.
36. The three questions set out above are a summary of the key issues arising out of the complaint as they relate to the Mayor’s conduct. Whilst these specific questions or issues were not framed in precisely in this way, they were certainly put to the Mayor encapsulated in my questions to him during his interview. In fact it will be clear from the excerpts from the transcript of the interview (**Appendix 2**) that each of these issues was canvassed extensively. I therefore do not consider that there has been any disadvantage or breach of natural justice in the issues not being formulated or expressed in this way earlier.
37. With regard to whether the conduct considered in respect of each issue could constitute a breach of the Code of the Conduct, paragraphs **101 - 109** of this Report summarise my key findings and then relate these to the relevant parts of the Code of Conduct.

[Was it appropriate for Mayor Foster to rely on or refer to the File note of his discussion with \[REDACTED\], in the context of the vote on Shelly Bay on 11 November 2020?](#)

The File note

38. The file note in question was created on or about 24 April 2019 following a telephone call between Mayor Foster and [REDACTED]. [REDACTED] was employed by the Council as Transport and Infrastructure Manager, but had left by the time of the call. The Mayor said that he called [REDACTED] because “there had been an extended period of officer advice on matters around the resource consent for Shelly Bay and that advice abruptly changed and I looked at it and thought I wanted to understand why”.
39. I raised with the Mayor whether it was appropriate that he contact a Council employee directly to have this discussion, as opposed to going through the Chief Executive. His response was “well at this stage of course he was a former employee”.
40. The form of and content of the File note is more or less as described by Councillor Condie – it runs to one and a quarter pages and comprises a series of direct quotes purportedly from [REDACTED]. There are a number of references to [REDACTED] and other team members being placed under “great pressure” and statements including that “[REDACTED] was putting pressure on me”. [REDACTED] was the [REDACTED] at the time. These comments appear to be in response to a direct question from the Mayor, “did you get put under pressure?”. There is also reference to [REDACTED] “having an agenda”.

The High Court Decision

41. It is necessary to consider briefly the decision of the High Court in *Enterprise Miramar Peninsula Incorporated v Wellington City Council and The Wellington Company Limited* [2018] NZHC 614, insofar as it traverses matters which were also the subject of the File note.
42. The factual background to the case is not relevant, but it did address the allegation that Council managers, including ██████████, placed Council employees under pressure in terms of their decision making relating to Shelly Bay roading issues. At paragraphs 120 – 124 of the decision Justice Churchman considered claims that the Council’s Chief Traffic Advisor, ██████████, had “softened his view on roading requirements following intervention from members of the commercial team...”, and in particular that the Council’s former CEO and ██████████ had been involved in “some sort of inappropriate pressure brought to bear on ██████████ which resulted in him “softening” his position”.
43. Having considered affidavit evidence provided by ██████████, the former CEO and ██████████, Justice Churchman concluded that “there is no basis for a suggestion that ██████████ was prevailed upon to alter his original opinion by other WCC officers as alleged by the applicant”.
44. When I put to Mayor Foster the concern expressed by Councillor Condie that the File note included statements to the effect that ██████████ had pressured Council employees to change their advice on the Shelly Bay roading matter, and that this was unfair (and potentially defamatory) because the High Court had “cleared” him, the Mayor’s response included:
 - 1.17. He had simply recorded words that were spoken to him and “I didn’t put anybody’s name in there...”.
 - 1.18. The High Court decision related to whether there was any “improper pressure” placed on anyone, whereas the File note did not refer to “improper pressure” only “pressure”.
 - 1.19. What he took from ██████████ comments was an explanation as to why Council staff changed their advice in the consent process, he did not view the comments as suggesting that ██████████ (or anyone else) had placed improper pressure on any Council employee.
 - 1.20. He would need to re-read the High Court decision to determine whether it had any relevance to this matter.
 - 1.21. The File note is an explanation of a situation, it “was not about ██████████ at all”.
 - 1.22. It was not the purpose of the File note, nor his intention, to reflect ██████████ in a poor light.
 - 1.23. He had not made the File note public, he had simply showed it to a couple of Councillors in confidence.

45. Whilst I accept that the Mayor's intention in showing Councillor Condie (and others) the File note was not to disparage ██████████, or to damage his reputation, I consider that the disclosure was certainly capable of having this effect. In this regard I do not find the Mayor's explanation in relation to this matter to be persuasive. In particular the references to ██████████ and other team members being placed under pressure, in the context of the File note, suggest that the pressure was "improper" or inappropriate.
46. The distinction drawn by the Mayor between the content of the File note and the matters considered by the High Court is, in my opinion, too fine. In reality both the File note and the High Court decision address the issue of whether ██████████ and other Council managers placed Council staff under pressure – the implication in both instances was that the pressure was inappropriate or improper.
47. Further, given that the Mayor had significant notice of our interview and had access to Councillor Condie's written statement and interview notes which reference the High Court decision in a number of places, it is surprising that he was not aware of the relevance of the High Court decision to the matters being complained of. If he did not have a clear recall of this, he certainly had the opportunity to inform himself before our interview. Further, given that it appears he directly asked ██████████ about being put under pressure, and his interest in the roading matter at the time of showing Councillor Condie the File note, it seems unlikely that he would not also have considered the context of the High Court decision insofar as it related to the same matter.
48. I note that I offered the Mayor the opportunity to further consider the relevance (or otherwise) of the High Court decision and to come back to me after our interview. No additional comments were provided on this matter.
49. I am also uncomfortable with the distinction drawn by the Mayor between recording what someone else has told him, and then passing that information on. It is true that the File note appears to record ██████████ observations, not the Mayor's, but in disclosing the File note to third parties (in confidence or otherwise), the recipients would reasonably assume that the Mayor endorsed the contents of it or at least considered it worthy of consideration.
50. I note that Mayor Foster has pointed to Councillor Condie's acknowledgement (he says "for the first time") in her written response of 31 March 2021 that the File note did not contain his statements or opinions. I do not view this as inconsistent with her earlier statements – she had previously described the File note as "2-3 pages of quoted statements" which were "verbatim notes" taken from a conversation between the Mayor and ██████████.
51. The Mayor has also highlighted that Councillor's Condie's description of the File note was not wholly accurate, for example she said it had no heading or date. I do not find this surprising given that Councillor Condie was shown the File note for a couple of minutes only. Having viewed the File note myself, I consider that the content of it is in fact broadly consistent with her description.

52. In my view, given that the findings of the High Court case would have or should have been known to the Mayor, he had a responsibility to take care to ensure that the content of any information that he passed on to other Councillors was accurate and/or did not unfairly disparage any person. Whilst questions of accuracy are often a matter of interpretation, in this instance, the contents of the File note included claims that had been directly considered by the High Court and dismissed as inaccurate.
53. The Mayor also said that the fact that Councillor Condie found the File note to be “inconsequential” or of “no great consequence” was relevant as it meant that she was not in fact influenced by it. Councillor Condie correctly pointed out that she had not used the words “inconsequential” or “of no great consequence”, but had referred to the File note as not “particularly persuasive”. However she also said, and I agree, that this is not the point. Mayor Foster showed the File note to Councillor Condie in the context of seeking to “lobby” Councillor Condie in relation to the Shelly Bay matter, and in doing so, it is apparent that at least he thought it was relevant and material. In this regard Mayor Foster’s conduct is not excused just because his efforts at persuasion were unsuccessful.
54. With regard to whether Mayor Foster had [REDACTED] permission to show her the File note, I do not understand Councillor Condie to be suggesting otherwise.
55. In his comments on the draft Report Mayor Foster says that “It is not unreasonable or uncommon to hold a different view than one communicated by a Court”. He also notes that the High Court reached its view on the basis of affidavit evidence only, which was summarised in four paragraphs of a large judgment.
56. It was also submitted that “Mayor Foster does not have a view on whether the High Court was correct, or not, and he did not rely specifically on this document in the vote”.
57. I do not accept that this explanation excuses the Mayor’s actions. Firstly even if the Mayor had a different view from the Court, which he says he did not necessarily, the fact that the matter had been considered by the High Court and was the subject of express judicial findings, should have been enough, at the very least, to cast significant doubt over the reliability of the material. In this context it was inappropriate for the Mayor to show the document to other elected members in an apparent endeavour to influence their thinking on the Shelly Bay matter.
58. In relation to the Mayor’s comment that he did not “rely specifically” on the File note in his voting, this is not the point. He used the document to attempt persuade other Councillors in respect of issues relating to Shelly Bay, and given the timing of the incident with Councillor Condie, it can reasonably be inferred that the purpose was to influence her vote later that day.

Fairness to [REDACTED]

59. I note that when I asked the Mayor whether he thought it was fair to [REDACTED] to have disclosed the information in this way, he referred to the fact that [REDACTED] was no longer an employee of Council and had not been at the time of the disclosure.

60. When Councillor Condie asked the Mayor a similar question during her meeting on 11 November 2020, she says “From memory he didn’t really answer that question, what I remember is him telling me that, kind of turning it around and saying whether it was fair to [REDACTED] and the traffic advisors that their side of the story hadn’t been told properly”.
61. As indicated above, I do not believe that the Mayor intended to intentionally disparage [REDACTED] or damage his reputation, however using the File note as he did was certainly capable of having this effect given that it contained information about [REDACTED] that had been discredited. I consider that this was unfair to [REDACTED].
62. I accept Mayor Foster’s explanation that his focus was on understanding the reason for the apparent change in advice being given by officials, not in respect of any individual. However, the fact that Councillor Condie questioned whether it was appropriate to show her the File note, and raised the issue of fairness to [REDACTED] at the time, establishes that the Mayor was in the least put on notice of the issue and should have considered this prior to disclosing the File note. In the circumstances I consider that more care should have been taken.
63. In this context the obligation on an agency that holds personal information to ensure that it is “accurate, up to date, complete, relevant, and not misleading” (Principle 8, Privacy Act) is also relevant. This applies regardless of whether the person concerned is an employee.
64. Mayor Foster’s feedback to the draft Report notes, in relation to this issue, that the Code of Conduct does not “protect” ex – employees. He also says that in practice there was the potential only for “very limited reputational damage” and that this “does not seem to have actually occurred here”.
65. I agree that the Code of Conduct does not extend specifically to treatment of former employees but regardless I consider that the Mayor’s use of the File note in this context was unfair to [REDACTED] and should not have occurred.

Risk of Judicial Review

66. The other issue that has been raised in the context of whether it was appropriate to disclose the File note to other Councillors relates to the risk of judicial review. On this matter Councillor Condie referred to advice that the Councillors had received from the Council’s Chief Legal Advisor given that the matter was a contentious one and there was an inherent risk of judicial review. She said:

“We’ve been given a lot of legal advice about what we were, what we were and were not allowed to be considering in making this decision. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

67. The Mayor said in relation to the advice that had been given “Look we were advised that the

[REDACTED]

68. In response to this, Councillor Condie commented:

“In my view that characterisation borders on misleading. The legal advice we had from our Chief Lawyer

[REDACTED]

[REDACTED]

[REDACTED]

69. On the basis that the Mayor has not refuted Councillor Condie’s more detailed description of the advice given, I am inclined to accept that it is accurate. It also appropriately reflects the legal position in relation to judicial review and the importance of distinguishing between relevant and irrelevant considerations.

70. Given this, the Mayor’s actions in disclosing the File note to some Councillors on the day of, or the day prior to, the vote on the commercial arrangements for Shelly Bay, was unwise. Whether or not the intention was to influence Councillors’ decision making on the vote, it could give rise to a perception that this was the case and put the Council in the position of having to defend claims that irrelevant considerations were taken into account.

71. In respect of this matter, Mayor Foster’s response to the above findings was to say:

“In order for the file note to have created any potential legal risk (which seems inherently unlikely given it was found to be unpersuasive by all who saw it), its existence would need to have been made public. Mayor Foster did not publicise it, and did not himself rely on its content in his vote – and there is no evidence anyone else did either. In fact, any legal risk associated with the document appears to have arisen out of Councillor Condie’s approach to raising her complaint – which itself created immediate media scrutiny”.

72. As I have indicated above, the issue is not whether the File note did in fact influence any Councillor’s decision making, but that it could be perceived to have done so and therefore put Council in a position of having to defend such claims. Further, it is not correct that a legal risk could only arise if the existence of the File note was made public – in the event of litigation the File note could well fall within the scope of any disclosure request. It is also a fact that the matter (if not the File note itself) has now been made public, and regardless of how Councillor Condie chose to pursue her complaint, this would not have occurred if the Mayor had not conducted himself in the manner that he did.

Conclusion

73. In conclusion, I consider that Mayor Foster’s actions in disclosing the File note to Councillor Condie were inappropriate for three reasons:

- 73.1. the File note included content that had been found to be inaccurate in the High Court proceedings;
- 73.2. the inaccurate content related to a former Council employee and had the potential to damage his reputation; and
- 73.3. the disclosure, in the context that it occurred, could have created potential legal risks for the Council.

Was it appropriate for Mayor Foster to show the File note of his discussion with [REDACTED] to some, but not all, Councillors?

74. Based on the information that I received I have established that the Mayor showed the File note to Councillor Diane Calvert on the day before the Shelly Bay vote, and to Councillor Condie on the day of the vote. He also had a discussion with Councillor Laurie Foon on the evening prior to the vote in which he indicated that he had something to show her that may help her with her decision, but she declined this opportunity. I believe, given the timing, and the context of the discussion, that this likely related to the File note.
75. Councillor Condie also suggested that other Councillors, including Nicola Young and Sarah Free, may have been shown the File note. Mayor Foster could not recall whether it was disclosed to Councillor Young and denies disclosing it to Councillor Free. Ultimately it does not matter exactly who was shown a copy, the fact is that some Councillors were shown it, and some were not.
76. Mayor Foster is upfront about this and explains that:

“.. I knew there were some councillors were completely in one camp or another camp. But there were some councillors I thought it might be useful to, it became fairly evident from showing it to a couple of people that people didn’t see it as having any substance at all, so any consequence, therefore, you know, just let it be”.
77. In relation to why the Mayor showed the File note to Councillor Condie, she says that he told her at the time that this was “because he knew I care about good quality advice and transparency”.
78. She said she asked him at the time whether he intended to make the notes public and/or disclose them to all other Councillors. She reports that his response was that he did not have permission (presumably [REDACTED]) to make them public.
79. She also says:

“Personally, I think that Mayor Foster shared the file note with me because he believed the statements it contained; he hoped that those statements would raise concerns in my mind about the quality of the advice provided by staff during the process of the

resource consent and he hoped that those concerns would influence me to vote against the sale and lease of council land later that day.”

“Given the context in which Mayor Foster shared the file note with me, I believe it is reasonable to infer that he agreed with the statements it contained. They may not have been his words, but in sharing them with me he was endorsing them”.

80. I accept Councillor Condie’s characterisation of what occurred and why – it seems clear that the File note was disclosed to her in the context of her being lobbied by the Mayor. However, leaving aside the issues as to the appropriateness of relying on the File note in question, there is nothing necessarily wrong with this.

81. The reality is that lobbying is part and parcel of national and local body politics. As part of this politicians and elected members may disclose certain information to, and seek to lobby some colleagues but not others, depending on their assessment of whether or not they can be persuaded to a particular view.

82. Mayor Foster also said that elected members have conversations amongst themselves many times a day on an individual basis, and it would be completely unrealistic to have every conversation with 15 individuals. He further said:

“if you go down that track the wheels of local government, the wheels of any organisation will stop because you’re basically saying you cannot have a one-on-one conversation with anyone without having a conversation with everybody and that means the world as a whole, and that’s just untenable”.

83. The point was also made that the Mayor shared the information with only a few people and did not provide a copy of the File note to any person in order to keep it confidential and ensure names were not put into the public arena. In this context the issues that this particular Council has had with “maintaining confidentiality” was raised as a factor.

84. Councillor Condie said in response to this:

“I accept that of course elected members must be able to have one on one conversations with each other, and that these conversations often include what the mayor has termed ‘lobbying’. In my view, appropriate “lobbying” is asking people what their views are, what information and reasoning has led them to that view, and then emphasising different information or different reasoning to explain why you hold a different view, in the hopes you might persuade them to change their view.”

85. She also said:

“The substance of my complaint is not that meetings like this take place. Of course these conversations take place and they are an appropriate and necessary part of democratic decision making. The difference between these other conversations and the one I had with Mayor Foster was the characteristics of the information the mayor shared with me”.

86. It seems that Councillor Condie does not have an issue with lobbying as such, or that one on one discussions take place. Her primary concern is the nature of the information she was shown. This is consistent with my own views of the matter, specifically there was no issue with Mayor Foster seeking to persuade some Councillors, but not others, but for the reasons set out above, the disclosure of the File note on this particular occasion was problematic.
87. Mayor Foster has provided feedback that my finding in respect of this issue should influence my finding on Issue One. This submission conflates two different matters. Firstly I have found that it was inappropriate for Mayor Foster to rely on and use the File note in the manner he did because the content was irrelevant, inaccurate and had been discredited (Issue One). Issue Two deals with a separate question, namely, leaving aside the content of the File note, does the Mayor have an obligation to disclose information that is known to him to all Councillors. I have found that he does not, but that does not remove the concerns about the use of the particular File note in question. In my view it should not have been relied on at all, or shown to any other Councillors.

Conclusion

88. The Mayor's actions in disclosing the File note to some, but not all Councillors, was not in itself inappropriate (leaving aside the issues relating to the content of the File note).

Do the leadership responsibilities that the Mayor has given rise to any greater obligations in this context?

89. The Local Government Act provides that it is the role of the Mayor to "provide leadership" (section 41A). For this reason I considered it appropriate to explore whether this responsibility gives rise to any additional or heightened obligations in the context of this issue. In this regard, given the status of the position of Mayor it might be reasonable to assume that other elected members may give greater weight to his statements and views, than to others. Further, it might reasonably be assumed that he has access to information that other elected members may not have access to.
90. Councillor Condie referred to comments that the Mayor had made in workshops about Shelly Bay about having access to information that might influence others' thinking on the matter. She says he made comments along the lines "if you'd seen what I'd seen you would think differently about this". Councillor Condie says that at the time the Mayor was challenged to disclose the information to all Councillors or stop talking about it because they could not rely on it, and he probably should not either. She says that the Mayor declined to disclose the information at the time as he did not have permission to do so.
91. In response the Mayor does not deny making a comment or comments to this effect but says that they did not relate specifically to the File note. He says that "there's a lot of information about the subject material of Shelly Bay which goes back many years and some of that is public material and some of that isn't." He denies ever using the term "secret information" (and this is accepted by Councillor Condie) and said that knowing things that other people do not know

does not make the information secret. The fact is that the Shelly Bay matter has been ongoing across two Council terms and not all Councillors had access to the same information.

92. Councillor Condie says in response to this explanation “if that was the case then I would have expected during the conversation Mayor Foster would bring my attention to information in the public arena which he felt was important but which he was concerned I may not have read.”
93. She also says that if these statements were not in reference to the File note “then was Mayor Foster referring to other significant information that he holds regarding Shelly Bay which he has not shared with other councillors or staff?”.
94. Given the nature of politics, and the freedom that elected members, including the Mayor, must have to represent and advocate in support of particular views, I consider that it is going too far to suggest that the Mayor has greater legal responsibilities than any other Councillor within this context.
95. In this regard the “leadership” required by the Act should not prevent the Mayor from advocating for certain positions, forming alliances or having conversations/disclosing information to some but not all Councillors. Put another way, I do not consider that the Mayor is legally required to provide all of the information he has at his disposal to all other Councillors as a result of his statutory leadership responsibilities.
96. Nonetheless, the status of the position undoubtedly provides the Mayor with access to information that other Councillors may not have, and this gives rise to a duty to use this privilege responsibly. In the context of the complaint made by Councillor Condie, I consider it is likely that the Mayor did make statements to the effect “if you’d seen what I’d seen you would think differently about this”, in reference to the File note and related information. Given that the Mayor was not prepared to share the information he was referring to, this comment was unhelpful and risked creating a perception that he was using his position (rather than information or persuasion) to advance a position.

Conclusion

97. The Mayor has a responsibility to provide leadership under the Local Government Act. However this does not require that he disclose all of the information that he comes into possession of to other Councillors, and nor does it prevent him from advocating for certain positions, or lobbying colleagues, as other Councillors are free to. However care needs to be taken to ensure that the Mayor is not seen to use the fact that he may have privileged access to information as a means of influence in itself, if he is not able to share or disclose that information.

Code of Conduct for Elected Members

98. The Code of Conduct for Elected Members (“Code”) includes the following general principles of good governance:

- 98.1. Honesty and Integrity – Members should not place themselves in situations where their honesty and integrity may be questioned, should not behave improperly and should on all occasions avoid the appearance of such behaviour.
 - 98.2. Openness – Members should be as open as possible about their actions and those of the Council, and should be prepared to justify their actions.
 - 98.3. Respect for others – Elected members should remember the respect and dignity of their office in their dealings with each other, management and the public.
 - 98.4. Duty to uphold the law – Members should uphold the law, and on all occasions, act in accordance with the trust the public places in them.
 - 98.5. Leadership – Members should promote and support these proposals (sic) by example, and should always endeavour to act in the best interests of the community.
99. With regard to Roles and Responsibilities, the Code provides that the Mayor shares the same responsibilities as other members of Council, and also has a number of specific additional responsibilities. None of these additional responsibilities are relevant to the issue complained of, specifically the Mayor is not subject to any particular responsibility in relation to the sharing of information and in respect of decision making.
100. The Code also contains a section regarding “Relationships and Behaviours”. Those parts which are potentially relevant to the complaint are:
- 100.1. Relationships with other Members – Elected members will conduct their dealings with each other in ways that:
 - a. Maintain public confidence in the office to which they have been elected.
 - b. Are open and honest.
 - 100.2. Relationships with Chief Executive and Staff – The effective performance of Council also requires a high level of cooperation and mutual respect between elected members and staff. To ensure that level of cooperation and trust is maintained, elected members will:
 - a. make themselves aware of the obligations that the Council and the Chief Executive have as employers and observe those requirements at all times.
 - b. treat all employees with courtesy and respect (including the avoidance of aggressive, offensive or abusive conduct towards employees).
 - c. avoid publicly criticising any employee in any way, but especially in ways that reflect on the competence and integrity of the employee.

100.3. Confidential Information – In the course of their duties members will receive information that they need to treat as confidential. Confidential information includes information that officers have judged there is good reason to withhold under sections 6 and 7 of the Local Government Official Information and Meetings Act 1987. This will often be information that is either commercially sensitive or is personal to a particular individual or organisation.

Summary of Key Findings

101. The Mayor should have taken more care to ensure that the information he passed on to other Councillors was fair and accurate – the contents of the File note included statements that had been found to be inaccurate by the High Court and therefore should not have been relied on or disclosed in this way.
102. It was not the Mayor’s intention to do so, however disclosing the File note did have the potential to disparage or damage the reputation of a former Council employee.
103. Given that Councillor Condie expressly raised the issue of fairness to the former Council employee and questioned whether it was appropriate for the document to be shown to her in this context, the Mayor was on notice of the sensitivity of the issue and should have considered the implications of relying on this material.
104. Whilst the statements and views contained in the File note were not the Mayor’s, his actions in passing on this information could be viewed as endorsing them.
105. Regardless of whether or not Councillor Condie viewed the File note as persuasive, by taking the trouble to invite her to a meeting to show her the document, the Mayor’s own actions demonstrated that he considered it relevant and material.
106. The subject matter of the File note was not relevant to the decision to be made by elected members on 11 February 2020, and therefore the Mayor’s actions in showing the document to Councillor Condie (and potentially others) at that time could have created legal issues for Council in terms of the perception of consideration of irrelevant information in a judicial review context.
107. Leaving aside the concerns raised regarding the content of the File note itself, as a matter of principle there is no issue with the Mayor speaking to and disclosing information to some Councillors and not others. Lobbying is a normal and accepted part of local body politics.
108. The Mayor is not under any statutory obligation to share information he is privy to with all Councillors. However care needs to be taken to ensure that inappropriate influence is not brought to bear if the context suggests that the Mayor has access to privileged information that cannot be shared.
109. Applying the principles and expectations in the Code to the above findings, I consider:

- 109.1. The Mayor did not act in a dishonest manner or in a manner lacking in integrity. Rather, I consider that in pursuit of a particular agenda, the Mayor failed to give full and adequate consideration to the appropriateness of showing the File note to Councillor Condie.
- 109.2. The principle of “openness” needs to be read in the context of what is accepted and usual practice in a local government or political environment. Whilst I have noted situations in which the Mayor should take care about how he may be perceived to be using his position, I do not consider that his actions amount to a breach of this principle.
- 109.3. The Mayor’s actions were not consistent with the obligation of elected members to deal with each other in ways that “maintain public confidence in the office to which they have been elected”. In particular relying on a File note that contained irrelevant, inaccurate and discredited information to lobby other Councillors on an important Council decision, is likely to undermine public confidence.
- 109.4. In respect of this issue Mayor Foster’s feedback on the draft Report included the statement that the “failure to maintain public confidence in good quality decision making is not a breach of the Code of Conduct”. He also highlighted the distinction between “maintaining public confidence in the office to which they have been elected” (which is the wording in the Code of Conduct), and “maintaining public confidence in decision making”.
- 109.5. In support of this submission the Mayor said that :

“If undermining public confidence in decision making was a breach of the Code of Conduct, then the behaviour at many Council meetings would be in breach of the Code. In particular it appears that public confidence in Council’s decision making in relation to Shelly Bay has been eroded over many years, without any apparent breach of the Code of Conduct”.

- 109.6. I agree that the correct formulation of the question is whether the Mayor’s conduct could undermine “public confidence in the office to which they have been elected”, rather than the short-hand that I used in my draft report (“undermine public confidence in good quality decision making”). I have now amended the Report to use the wording of the Code of Conduct.
- 109.7. However, regardless of how it may be expressed, my finding remains the same. This is because effective council decision-making is one of the core responsibilities of Councillors as part of their representation of the interests of residents and ratepayers. Members of the public are entitled to assume that Councillors will make decisions on the basis of relevant and accurate information, and not in a way that exposes Council to potential legal risk. Obviously where this does not occur, there is the potential for public confidence to be undermined.

- 109.8. I note, further, that the reference in the Code to “the office to which they have been elected”, arguably places a higher duty on the Mayor. In this respect the public may reasonably expect that the person in the office of Mayor would conduct themselves in a more professional way than other Councillors may be expected to.
- 109.9. With regard to the submission that the behaviour at many Council meetings may undermine public confidence, this may well be the case, but this does not excuse the Mayor’s conduct in respect of this matter. Further the suggestion that public confidence in Council decision making relating to Shelly Bay has already been eroded, if anything, should have made the Mayor more cautious as to his actions.
- 109.10. The Mayor’s actions in relying on, and disclosing to others, a File note which was disparaging of a former Council employee, would have amounted to a breach of the Code, but for the fact that the person concerned was no longer an employee at the time. In this regard the Code requires that elected members make themselves aware of the obligations that the Chief Executive and Council have as employers and observe those requirements at all times. The use of the File note by the Mayor in this context was unfair to the former Council employee named in it, and had he remained an employee, could have given rise to a personal grievance claim against his employer.
- 109.11. The requirement to “avoid publicly criticising any employee” has not been breached because the information was not made public, rather it was disclosed in confidence to Councillor Condie (and potentially other Councillors). This part of the Code contemplates public, not internal, disclosure, or at least disclosing information in a manner where it may become public. Further, [REDACTED] was no longer an employee at the time the disclosure occurred.
- 109.12. I do not consider that the requirement to keep information confidential has been breached. The issue was not the limited disclosure of the information, but the nature of it.

Recommendations

110. I have found that the Mayor has breached the Code in one particular respect, relating to the need to maintain public confidence.
111. I consider the breach to be material, but at the lower end of the scale given that I do not believe that the Mayor intended to act improperly, rather he failed to give the issue and potential implications sufficient consideration. However it is up to the elected members to make their own decision as to whether any breach has occurred and the materiality of it. To this extent the findings in this Report and my recommendations below are to guide Council, but are not binding on it.

112. Subject to these comments, my recommendations are:

- 112.1. Those Councillors with an interest in the complaint should be excluded from the hearing and decision making process. Given that it is possible that other Councillors were also shown the File note, and that neither Councillors Foon or Calvert were concerned about the Mayor's engagement with them, I do not consider it necessary to exclude them from this process. Therefore only the Mayor and Councillor Condie should be excluded from decision making.
- 112.2. The Mayor should have the opportunity to address Council in relation to the report and proposed recommendations prior to Council making decisions regarding these matters.
- 112.3. I consider that a letter censuring the Mayor would be appropriate in the circumstances, including a statement of expectations regarding the use of, relevancy, and accuracy of information.
- 112.4. Those Councillors who were shown the File note should be instructed to keep the content of it confidential and not to refer to it in any way going forward. Given that it is not clear which Councillors were shown the File note, this may need to occur on a general basis.
- 112.5. I understand that the former Council employee named in the File note is aware of the disclosure and the fact of this investigation. In the circumstances I consider it appropriate that he be advised that the investigation concluded that it was inappropriate for the Mayor to have relied on the File note and a private apology be extended. He should be reassured however, that there were only a very small group of people who saw the File note and they have been instructed to keep the contents confidential.
- 112.6. The contents of the File note, and the identity of the former employee, should be kept confidential. I note that there is likely to be a request for the release of this Report and the File note under the Local Government Official Information and Meetings Act. To the extent that a decision is made to release any part of this Report, consideration needs to be given to redacting any details leading to the identification of the former Council employee given his legitimate privacy interest and the potential damage to his reputation.
- 112.7. Subject to any obligations under the Local Government Official Information and Meetings Act, Councillors should consider whether this Report and its outcomes should be kept confidential. In making this assessment Councillors should weigh up the principles of openness and accountability, against the risk of undermining public confidence if the Report and its findings are reported selectively or out of context. Consideration should also be given to the privacy interests of all involved, including Councillor Condie and Mayor Foster.

Conclusion

113. In relation to the key issues arising out of the Complaint, my conclusions are summarised as follows:

113.1. Mayor Foster's actions in disclosing the File note to Councillor Condie were inappropriate for three reasons:

- a. the File note included content that had been found to be inaccurate in the High Court proceedings;
- b. the inaccurate content related to a former Council employee and had the potential to damage his reputation; and
- c. the disclosure, in the context that it occurred, could have created potential legal risks for the Council.

113.2. The Mayor's actions in disclosing the File note to some, but not all Councillors, was not in itself inappropriate (leaving aside the issues relating to the content of the File note).

113.3. The Mayor has a responsibility to provide leadership under the Local Government Act. However this does not require that he disclose all of the information that he comes into possession of to other Councillors, and nor does it prevent him from advocating for certain positions, or lobbying colleagues, as other Councillors are free to. However care needs to be taken to ensure that the Mayor is not seen to use the fact that he may have privileged access to information as a means of influence in itself, if he is not able to share or disclose that information.

114. This conduct was capable of undermining public confidence in the office to which the Mayor has been elected and therefore amounts to a breach of the Code of Conduct. I assess that the breach is at the lower end of the spectrum as there was no intention to act improperly, rather the Mayor failed to give the issue and potential implications sufficient consideration.



Susan Hornsby-Geluk

Appendix 1
Terms of Reference

Code of Conduct for Elected Members Inquiry | Terms of Reference

Background

1. On 11 November 2020, Councillor Jenny Condie made a formal complaint in relation to the alleged conduct of Mayor Andy Foster in the lead up to the vote on the key commercial terms for the sale and lease of Council land at Shelly Bay.
2. Under the Code of Conduct for Elected Members, the Chief Executive must consider and deal with the allegation, seeking advice as appropriate. The Chief Executive has appointed Susan Hornsby-Geluk of Dundas Street Employment Lawyers as the external reviewer to undertake an investigation of the complaint.

Purpose

3. The purpose of this inquiry is to consider the complaint made by Councillor Condie (“complainant”), inquire into the alleged behaviour by Mayor Foster (“respondent”), and determine whether a breach of the Code of Conduct for Elected Members (the Code) has occurred.
4. A copy of the complaint is attached.
5. In summary, the complaint relates to the respondent’s alleged conduct in relation to the lead up to the decision on the key commercial terms for the sale and lease of Council land at Shelly Bay.
6. The reviewer will undertake an investigation into the complaint.
7. The reviewer is also asked to make any recommendations as appropriate.

Process

8. Section 3 of the Code sets out the process to be followed by the Chief Executive in relation to an alleged breach by the Mayor of the Code of Conduct. The reviewer shall carry out this review in accordance with this section of the Code. In particular, the reviewer shall ensure that:
 - (a) due process is respected;
 - (b) The respondent (and any other named members) are given the opportunity to consider and respond to any allegations made against them.
9. In addition to Section 3 of the Code, the reviewer shall comply with the steps below.
10. The reviewer will undertake an investigation into the complaint and prepare a report for the Chief Executive regarding that investigation. In preparing that report the reviewer may:
 - (a) consult with the complainant, respondent and affected parties; and /or
 - (b) interview the complainant, respondent and other potentially relevant witnesses / affected parties; and/or

- (c) require the production of relevant documents or information from the complainant, respondent and affected parties (including Wellington City Council); and/or
 - (d) refer to any relevant documentation.
11. Consultations and/or interviews may be digitally recorded and transcribed.
 12. The reviewer may include in the report any recommendations to the Chief Executive in relation to the investigation.
 13. Upon receipt of the report, the Chief Executive may refer the matter to Council for consideration and determination.

Deliverable for reviewer

14. The reviewer is to provide a report setting out the findings and recommendations (if any) to be presented to the Chief Executive.

Attachments:

- (a) Letter of complaint dated 11 November 2020
- (b) Code of Conduct for Elected Members dated October 2015

Appendix 2

Excerpts from Written Statement prepared by Councillor Condie – 30 November 2020

For some months Mayor Foster had been alluding to 'secret' information he had relating to the original decisions around the Shelly Bay. He tended to say things like, 'If you'd seen what I've seen, you would be totally against it.' He had always declined to share this information with anyone.

He wanted to hear from me where I was at with regard to Shelly Bay, and said he had something he wanted to show me. He put several sheets of paper in a blue plastic document folder on the sofa next to him.

Mayor Foster said he had made a call at some point in the past (he wasn't clear about exactly when) to ██████████, who had been a lead transport advisor on advice relating to Shelly Bay Road. He had asked ██████████ whether he would talk to him about what had happened about the change in advice on Shelly Bay Road. He said he had been surprised that ██████████ was willing to talk to him. They seem to have had quite a long conversation about it. He said that during that conversation, he had taken notes. What he wanted to show me was the verbatim notes he had taken of that conversation.

He said he wanted to show them to me because he knew I care about good quality advice and transparency.

I asked him some questions before he showed me the documents. I don't remember in what order I asked the questions, but these are the questions I asked, and Mayor Foster's responses.

Are you going to show the notes to all councillors? He said he did not intend to do so.

Are you going to make the notes public? He said he didn't have ██████████ permission to make them public, and talked about how difficult it is for a staff member to become a whistle blower. He mentioned that some of the staff who had worked for ██████████ still worked for the council.

Do you have permission to show me these documents? He said he didn't have permission to share it publicly. I don't recall him commenting on whether he had permission to show it to any specific individuals.

Do you think it is fair to ██████████ to be showing these notes to people privately in a way that means ██████████ can't give his side of the story? He avoided answering the question, and talked about the fairness of ██████████ view of events being known.

Essentially, we spent about 10 minutes discussing whether Mayor Foster thought it was appropriate to show me the documents.

I believe I said something about it not being unusual for advice to change as part of the policy process. (I am not completely certain that I did.)

I believe I said something about the High Court decision, having read it the night before, and therefore I was certain that it had rejected the allegation the advice was changed improperly. (I am not completely certain that I did mention this.)

I don't remember what, if anything, Mayor Foster said in response if I did say those things.

I said that I would look at the document if he still wanted to show it to me. He then gave it to me.

The document was 2-3 pages of quoted statements. Essentially they were multiple repetitions saying that █████ and his team had come under pressure to change the advice. █████ was mentioned by name at least once. I noticed that there was a lack of detail about the alleged pressure. All the statements were generic - it didn't list any specific meetings, or anything specific they had been told as part of the alleged pressuring. The statement read to me like an emotional, frustrated person venting, rather than evidence compiled by an intending whistleblower.

I handed it back to him. I don't remember exactly what I said, but I conveyed that I didn't find it particularly persuasive, and it hadn't changed my mind. I remember feeling quite shocked at how thin the content of the document was, given the way Mayor Foster had framed it as a 'smoking gun' on several previous occasions.

Excerpts from Interview with Councillor Condie – 4 December 2020

SH Okay. And had you heard anything prior to that which gave you an inkling as to what it might be about?

JC Yes because I'd spoken to Diane Calvert the night before, you know, checking in with her about how she was feeling Shelly Bay and she had said that the Mayor had shown her some documents and I don't remember specifically what she said about them or even really whether she even said documents but she said the Mayor had shown her something and that she hadn't found it particularly persuasive and we talked about, you know, what she was going to vote on but she didn't tell me what was the contents of that, she didn't tell me anything about it.

SH So, nothing other than that she was shown something and it wasn't particularly persuasive?

JC Yeah. And that it was related to Shelly Bay because we were talking about in that context.

SH Right, okay. So, you went up and met with him?

JC Yep.

SH And tell me what happened when you went in and just if you could recall the discussion.

JC *I'll do my best. So, yeah we went in, I went in, we sat down, we had a bit of small talk, I'd been out of the office sick for a few days so he said it was great to have me back in the office and I said I was glad to be back in the office, so we did that. And then he said that he wanted to talk about Shelly Bay, he wanted to know where I was, where I was landing on the issue, what I thought I was going to, which way I thought I was going to vote, and then he said that he had some documents that he wanted to show me and he put those documents down and went and sat on the sofa and said that he wanted to show me those. He said that, I think he said, I don't know if he said it at that time, but he said that he wanted to show them to me because he thought that I was, you know, really cared about good quality advice from officers and transparency and that he thought that these documents would obviously be relevant to that in relation to Shelly Bay.*

He had previously, at that point I had a pretty good idea of what I thought he was going to show me, even without having seen it, based on the context. He had a number of times in meetings, like workshops that we've had with staff, talked about having, made comments along the lines of, 'If you had seen what I had seen you would think differently about this.'

[05:35] SH So, so sorry I'm going to interrupt [unclear]

[inaudible]

SH So, tell me when you had heard him say that before?

JC *So, we'd had at least one, possibly two workshops on Shelly Bay leading up to the development of the paper, over the course of a year. So, I think at least one of them was, was I think even before the lockdown, I would have to actually go back to my records to find out exactly when it was. And a workshop is essentially a meeting of key senior staff and all the councillors in private to discuss a particular policy issue, in this case it was Shelly Bay and it was the new Chief Executive Barbara McKerrow talking about how she was going to take the work forward on Shelly Bay and what her approach was going to be. And essentially having that conversation with councillors about whether they were comfortable with her approach and that what not. So, there was a kind of, relatively free and frank conversation at that point about Shelly Bay and during that conversation the Mayor had said something along those lines if you'd seen, you know, 'If you'd seen what I'd seen you would think differently about this,' and when he made those comments he was challenged I think by Fleur Fitzsimons, possibly Jill Day, possibly both [laughs], saying essentially if you can't, you know, 'We want to see what you've seen if you can show it to us,' and he said, 'I can't show it to you, it's not public,' and they said, 'Essentially if you can't show it to us then stop talking about it. Because if you can't show it to us, then, you know, we can't actually use it in our decision making and therefore you probably shouldn't be using it either.' And I certainly agreed with them, I found it quite frustrating at the time that the Mayor was talking about, that here was this information that he was privy to, that would completely change our minds about this but he couldn't show it us because it wasn't his information to share.*

SH And he did that on two occasions?

JC *He did at it least once, I think he might have done it twice, it was certainly, I've certainly heard him say that more than once, this view. It was fairly common knowledge amongst staff and amongst – senior staff, you know related to Shelly Bay and amongst councillors that the Mayor had some information that he wasn't sharing with everybody. He talked about it quite frequently is maybe too strong a word, but he talked about it quite openly that he's got information that other people don't have and it's really going to change everybody's views on this.*

SH *Did anybody have any idea as to what that information might be?*

JC *No.*

SH *Yep, so then how did the conversation progress and when he gave you the piece of paper and you were looking at it, did he provide any additional comment about what that was?*

JC *So, we talked quite a bit about it before I read it. So, we moved off of talking about where I landed on Shelly Bay and we started talking about the document, we actually talked about it quite a bit before I read it and I'd raised a few questions with him at that time. I asked him about whether he was going to be making this document available to all councillors and?*

SH *What was his response?*

JC *He said that he wasn't going to be. I asked him if he was going to make it public, he said that he did not have permission to make it public. I don't think that I asked him if he'd shown it to any other councillors because at that point I knew that he had, I was pretty confident that this was the same thing he'd shown to Diane, so I don't think I actually asked him that. But I knew that there were a number of councillors he hadn't shown it to. So, that's why I was interested to ask, 'Are you going to show this to everybody?' And then we talked about, I talked about whether I thought, whether thought sharing this document with people privately was fair to [REDACTED].*

SH *You asked him that?*

JC *I asked him that.*

SH *So, sorry had you seen the document by that stage?*

JC *No.*

SH *How did you know what was in there?*

JC *So, that that stage we'd obviously had a conversation, I think he told me basically what it was going to contain, he said he'd had this conversation with [REDACTED] at the time of the advice about how the advice had changed. So, he told me that context, but I still*

hadn't looked at the document. And once he told me that context I knew what it was about because those allegations had been dealt with in the High Court case which I had just been reading the day before because I was trying to prepare for the Shelly Bay vote, so it was quite fresh in mind and there were sections in fact I highlighted on my copy. And so, so the moment that he said that, and it was about the road, I'm like okay I know exactly, I know who this is about, I know roughly what this person's going to say because it's kind of on public record. So, then I was kind of, I was basically having this conversation, I said, 'You know, do you feel like it's fair to ██████ to be showing people this document when, you know, he can't respond to it?'

SH *What did he say to that?*

[21:12] JC *From memory he didn't really answer that question, what I remember is him telling me that, kind of turning it around and saying whether it was fair to ██████ and the traffic advisors that their side of the story hadn't been told properly.*

SH *Okay and then what happened.*

JC *As I said I can't remember if we actually talked about the High Court, if I actually brought up the High Court case, the fact that this had already been dealt with in Court, I think, on reflection, I think I probably didn't because I think that he would have responded to that if I had. But I know, as I said, because I'd just been reading the decision the day before it was in my mind. So, we talked about that and I guess I was kind of gently pushing back on whether he thought it was, whether it was entirely appropriate for him to be showing this document to some people and not other people and whether it was appropriate for him to be showing it, given that it was going to, that my expectation was that it was going to make allegations against a staff member, that had been dealt with in the High Court case. Having had that conversation I then said, 'Well if you still want to show me through it I'll read it.' And he gave it to me. And then we've pretty much described what was on it.*

SH *Yeah, how long did you read it for?*

JC *Not very long. Like I wouldn't say I sat and read it carefully, I skimmed it, I read all of it but I read it relatively quickly. I would say part of that is because it became quite repetitive, so I probably read the first three or four quite closely and then it just, you know, kind of ran my eyes over most of it. I would be shocked if I'd been reading it for five minutes, my guess is probably more like two or three minutes. Particularly given when you're in a meeting with someone that's silent, you know, socially we don't like to drag that out so I'm sure that I kind of went through it reasonably quickly. But my immediate reaction, I can remember quite clearly was just shock at how thin the evidence was in the document given how much Andy had talked it up in previous meetings.*

SH *Yeah. Was there any reference to this being 'the' document that he had been referring to previously?*

JC *That's an excellent question, I'm not sure. I certainly, like I certainly made that assumption and I feel like that was that he kind of indicated that this was the*

document that he'd been talking about, but I couldn't tell you for certain that he'd said to me, 'This is the document that I've been wanting to show everybody.' But I felt like that was pretty clear in the context.

SH So, who else do you know, you mentioned Diane was shown the document, anybody else that you know?

JC I know that Laurie Foon got a phone call from the Mayor, she told me this, I think the night before I was shown it.

SH Do you know whether she was shown it?

JC She was, she told me that he offered to show it to her and I don't know how much information he gave to her about what 'it' was but that she refused, that's what she told me.

SH And anybody else?

JC I don't know for certain, I'm assuming that he did show it to other people.

SH Why do you think he would have?

JC I think, well for starters I think it's unlikely that he just showed it to the three of us and not other people. There are other people who I think in terms of if you were showing it to people whose votes were kind of on the fence or that he was trying to shore up in his direction, there are other people that you would put on that list, that I imagine he would have had a political motive for showing it to them. And, you know, there's at least one councillor whose vote changed quite a bit in the lead up, in that week leading up to the vote and we really had no idea which way they were going to vote. And her having been shown that document would explain a lot, of what happened.

SH Who was that?

[38:25] JC Nicola Young.

SH Right.

JC And it's possible that she wasn't shown it, and she was just, you know, changing her mind, that happens. But when you look at some of the decisions that she made it would be consistent with having been shown the document.

SH Would it though in the sense that you said that I think you said something like underwhelming or not persuasive?

JC Yep.

SH I mean would it be a document that would likely influence people?

JC Some people. I think if you didn't know as much as I know about how policy gets made you might have been influenced by it. If you didn't, yeah I think it's certainly a document that could land differently with different people and certainly if it would land differently with people who were already kind of open to that line of, you know, there's a lot of people who did feel like maybe the High Court missed something or, you know, that there wasn't something quite right happening there. And if you're always somebody who was like, 'I wonder if that was really above board,' then yeah it might be quite persuasive.

JC Yep, and so I started to feel like, really that was quite improper. And we'd all been given really strong advice from staff about how we needed to make decision because staff new, I mean this was a bit of very litigious issue and so staff were really focused on how do we protect the Council and protect the decision from judicial review. So, we've been given a lot of legal advice about what we were, what we were and were not allowed to be considering in making this decision. [REDACTED]

[REDACTED] So we had lots of advice from the Chief Executive, from [REDACTED] who's our chief lawyer, essentially around trying to make sure that we were really clear about what was relevant information for this decision and what wasn't. So, if we went to judicial review which given the litigious nature of this issue was quite possible, the Council decision would be likely to hold up. And as we had that download, you know, I was just like, it became really clear, like that this was information that potentially put that whole decision in jeopardy and that would leave us quite open to a judicial review, potentially overturning a decision that we made.

SH And just to be really plain, you believe it would potentially put the decision in jeopardy why?

JC Because that information was specifically not relevant to the decision before us. I think that would have been the, that would have been the main issue in terms of the judicial review, is that that information was not relevant to the decision about key commercial terms of the sale and lease.

SH Okay, yep.

JC I was also concerned about whether the fact that he'd shown it to some councillors but not all councillors would also result in, and I didn't really know much about this because we hadn't had advice about this, but just that that might be an

opening for a judicial review to say that the process hadn't been proper if some of us had had some information and others hadn't had it. But those were kind of my two main concerns from a legal standpoint. I was also just very peeved and upset that he was essentially making these accusations against [REDACTED] without a lot of evidence where the High Court had already cleared him but that wasn't an issue that I felt would put our decision at risk, that was just something that I thought was pretty stink and might also be improper, but I don't think that the Court would have overturned our decision because of that.

Excerpts from Interview with Councillor Laurie Foon – 11 December 2020

LF So, on the night before the Shelly Bay paper – which I think was the, I can't even remember the date now, but November-the-something – the Mayor rang me that eve, approximately quarter to 10, and I was quite surprised to hear from him because it was late and we were all, you know, trying to collect ourselves, if you like, because probably the next day was going to be the biggest day on the Council agenda possibly over the triennium in my view. And so I had a good discussion with the Mayor and my recollection was the discussion was about where I might be placed on my vote – and, and this is where I can't remember a lot but I know the Mayor did suggest to me that he had something that he could show me about, you know, not, not so that it would change my mind, like I don't remember that being the intention but that, implying that he had something to show me which, yeah. This is where I'm unsure how it, how it landed but it was either to back up the information that he had or something that might be useful for, you know, to help my decision. But whatever that framing was, which I can't say exactly how it arrived, I do remember saying, 'That's okay, thanks Andy, that's not for me.' And at that stage, and the reason why I can remember that because he did say something very lovely which was, 'You're a good woman', and so that's why it was something—. So, I definitely refused something on some grounds and that Andy had responded in that, that way.

Excerpts of Interview with Councillor Diane Calvert – 11 December 2020

DC Yeah, I think it was the day before the Shelly Bay and, as you know, there's quite a lot of information in front of us to review before we came to our views and I had some questions. I remember talking with the Mayor about a particular point, I think it was to do with the road. And he said to me, oh, and he was clarifying some information for me, he said, 'Come and have a look at this,' which, because I think we were either in his office or near his office, and he showed me a document. I had a cursory look at the document, but for me it was all about information from 2000-, maybe '16, '17, probably more 2017. I didn't look at it closely because when I took a first glance at it, it looked like stuff that I'd already seen or was aware of.

SH Can you remember the content? Like, when you say it was stuff you were aware of, what was that?

DC I think, well, I think I remember seeing [REDACTED] name and, and it was, it was the swirl of emails that had been going around since the decision had been made in 2017. And I think it was a summary of some of that information. But again, as I said, I just took a cursory look at it. It wasn't addressing the question that I had at the

time, and I didn't think it was that relevant because the matter had been superseded by the 2009 resource consent.

[13:04] SH *I might come back to just clarify what that means in a minute but before we do, so what did you do when you were shown the document, or what did you say or what discussion was there?*

DC *I can't remember to be, you know, I might have said something, 'Oh yeah, that, but that doesn't—, yeah, that's fine, Andy,' or—. I don't know, I actually can't remember. I mean, I didn't feel, it was like, okay, yeah, I've got another piece of information or that I can either retain or discard and that was it. You know, so, it wasn't a factor and it didn't seem to me, I think the Mayor believed that it might be something that would provide me with some additional information that I didn't already have but I felt it wasn't additional information I already didn't have or I already had. Does that make sense?*

SH *When you say you thought the Mayor thought that it might provide additional information...*

DC *Yes.*

SH *...was there any sort of discussion as to the context of why he was showing you that?*

DC *Umm, no, I think he said, 'Oh, just, I can show you this,' or something like that. But it didn't, it wasn't significant to me, so I didn't really see it as material. And so that's why I'm a bit vague about what I can recall because I don't even know when it was, a month ago or just over a month, so, yeah. And so, as I said, it's not, it, it, it wasn't that particularly relevant.*

SH *Do you believe there's any issue to be had with the, what appears to be the case that some people were shown this document and some people were not?*

DC *Umm, no, I mean, I suppose it might have been because I asked Andy a specific question about, and I think it was to do with the road, just saying I was trying to figure out a few things and he said, 'Let me show you this which might help,' you know, along those lines, which I said, so, which is why I went into his office and he showed me this piece of paper but for me it wasn't, it wasn't relevant because it was sort of information I was aware of.*

SH *Do you think it was shown to you in order to influence your view of matters?*

DC *No. I think it was, it was no different to me going and checking with what, previously had been, you know, asking officers, 'Well, what does this mean'. You know, so, it's no different to clarifying a point or understanding.*

Excerpts from Interview with Mayor Foster– 17 March 2021

[09:04] SH And so, so again I do want to start with the file note because it's chronological, that's what comes first. So, just briefly [REDACTED] position, role sort of where he comes into it.

AF Ah he was the manager the [REDACTED].

SH Was, so he's left?

AF He would have left and I'm going to say probably sometime in 2018 would be my guess, he was certainly there in 2017.

SH Right.

AF And he wasn't there in 2019 so yeah.

SH Okay. And so this is, this records notes of a telephone conversation in April '19, who called who and why?

AF It was verbatim notes so it's everything that he said taken down.

SH So, who called who?

AF I called him.

SH And can you tell me why?

AF I was interested to understand what had happened in terms of some decisions that Council officials had made over a period of time.

SH And was there a particular concern that you had that caused you to want to talk to him, if you can provide further context as to why?

AF That's starting to take this outside the realms originally.

RC No, I think that's okay. Yeah I think that's okay. I mean you're concerned about Shelly Bay.

AF Yeah, so look I mean there had been an extended period of officer advice on matters around the resource consent for Shelly Bay and that advice abruptly changed and I looked at that and thought I wanted to understand why.

SH Yep. And would it be usual, and this is genuinely because I don't have an understanding of the usual mode of contact or communication within Council, but

would it be usual for you to talk to the likes of ██████ directly as opposed to the chief executive and then the chief executive going to ██████ and relaying that conversation or how do those channels of communication usually occur?

AF Well at this stage of course he was a former employee.

SH Right, okay. So, you spoke to him and when you say this is verbatim did you record the meeting, the discussion or did you write notes of the discussion?

AF I wrote it down.

[12:06] RC I believe he said.

SH Okay, notes for word for word.

RC And then obviously put it on a – typed it.

SH Yeah. And in terms of the timing is there a particular reason at that time that you wanted to pursue this discussion? And the reason I'm asking this question is in the context of the High Court proceedings so there was a decision in April 2018, this is about a year later, so why is it an issue in April 2019?

AF Now I'm trying to remember all the timeline of everything that happened. But obviously Council still had decisions to make around what it did with respect to Shelly Bay.

SH Okay so one of the issues that Jenny raises and as I understand it the reason she felt uncomfortable about being shown this piece of paper is, her view, is that it related to an employee ██████ and that he was again her words not mine, exonerated by the High Court decision and that this information was contrary to that decision. Can you comment on that?

AF If she felt that it was dealt with then it becomes a matter which is past tense surely?

SH Let me put it a different way. The High Court decision, so a year prior so April 2018, included consideration of whether or not ██████ and others put pressure on people to change decisions in relation to Shelly Bay.

AF Can I be very clear that this is the words that were spoken to me. I didn't put anybody's name in there and certainly my interest was not any individual person which I think is what Council [unclear] raising this concern [unclear] and I certainly had no concern in damaging in any way any person.

SH Okay. I need to tell you then what the concern is potentially. So, if the High Court decision did deal with the same matters that are dealt with in this file note and if they, as Jenny believes exonerated ██████, and the file note says something different, there are questions as to whether or not it would be appropriate to use the file note or

rely on it in anyway. So, that's what I want to give you an opportunity to comment on. Now I appreciate there's a number of questions in there so if we can start firstly with—.

RC Well there are a number of questions and the first question is, is that what the complainant actually said, and I don't think it's what she said at all.

SH I think it is what she said, she referred in her—.

RC Where is that in her transcript, that she's saying what's in this note was contrary to what was in the ah in the High Court decision.

SH We might need to traverse quite a lot of it but if you grab her notes let's go through that. So, the discussion occurs around page 14 and around page 15. So, at the top of page 15 she says, 'The High Court's decision was that there was no evidence there had been any improper behaviour in terms of putting pressure on people to change their advice.' And then she says at the top of 16, 'So, I started to feel like it was improper,' she talks around the advice from the chief executive and from the chief lawyer that there was the possibility of judicial review, she referred to her concerns in relation to the use of information that shouldn't be considered as part of the decision-making. Also at, two thirds of the way down that page she says, 'I was also just very peeved and upset that he was essentially making these accusations against [REDACTED] without a lot of evidence where the High Court had already cleared him, but that wasn't an issue that I felt would put our decision at risk etcetera.' So, I think she does squarely make these claims and it's really up to you as to whether you want to answer them. I think there is an issue as to—.

[17:48] RC Just hang on. She's saying here there was no evidence that there had been any improper behaviour on teams putting pressure on people to change their advice, that suggests it's improper pressure and there's nothing in this note that suggests that pressure was improper. It's not unusual for traffic, engineering partners to have different views and for one person to put their point of view which can be pressure but perfectly proper.

SH Mmm, okay. So, if I understand Andy's explanation then, she has made these claims and her perception is that the file note did relate to matters that the High Court had considered and had cleared [REDACTED] on. So that's me paraphrasing what I understand her to be saying, and your explanation is that the file note doesn't actually canvas those same issues, it's not about improper pressure, it's just a record of a discussion as to the interactions between Council staff.

RC I think that's the position there.

SH Okay. Is there anything else you want to add about her perception that it was inappropriate effectively to use this file note in light of what the High Court had found?

AF Well I suppose one thing I would add is that in her recollections she seems unclear on both, well she seems to have missed the heading out completely. So, she was both unclear on date, but she was also unclear on the source. In other words that they are [REDACTED] words.

RC *And I think you can also say what she said to you, having read the note—.*

AF *She said it was a matter of no great consequence.*

SH *Where was that- I will get to your interaction with her but was that when you met her?*

AF *Yes.*

SH *She said of no great consequence.*

AF *Or words to that effect, yeah. I think she might have used the word inconsequential or something like that.*

SH *Mmhmm. I just need to test that further because I actually think this is potentially important, but what you've said is that the file note doesn't relate to putting pressure on people, can you just have a look at it because—.*

AF *I think the words we used were improper.*

[20:41] SH *Improper pressure, okay, so that's the-, okay. So, are you saying that there are times when Council staff will be influenced to do certain things and that that's not inappropriate, is there a line at which it becomes improper pressure, and can you explain that to me?*

AF *Well I don't know what the time is that it becomes improper pressure, but clearly there are many, in every walk of life employees are often required to do something by a person who is further up the tree. That doesn't make it improper.*

SH *What was the point that you took from this file note, like what were you taking from what [REDACTED] said to you?*

AF *I was taking it as an explanation as to why they changed their advice in the consent process.*

SH *And what did you think was the reason they changed their advice?*

AF *Well I think it's set out quite clearly in the note.*

SH *Can you explain to me what you took from that?*

AF *Ah they, I'm just having a look at it again. They were clearly persuaded that they needed to change their view by—.*

SH *Where they talk about 'We came under quite a lot of pressure from [REDACTED], great pressure from [REDACTED], [REDACTED] was coming under pressure,' so there's a number of references there to, for an example,*

third line out from the bottom, overriding combination of senior management and planning pressure, are you saying that that pressure was within the scope of what was reasonable or was it improper pressure?

AF I'm making no judgment about that. I'm certainly not saying it was improper.

SH Okay. Okay. So, do you, do you believe that the High Court decision and the process has any relevance to this matter or the issues that have been raised?

AF I would need to go back and reread the particulars of that part of the High Court proceeding.

SH Mmm, okay. Alright, when you received this information from [REDACTED] it talks about [REDACTED] on [REDACTED] behalf doing various things, did you have any concerns about what information you were given as to the activities of Council employees?

AF That wasn't my business to have a concern about.

SH Yeah, so—.

AF I was merely trying to have a conversation to understand why the advice had changed.

SH Okay, so then having received this information prior to it being shown to Jenny and possibly others, we'll get to that, in 2020, did you do anything with it?

AF No.

SH So, basically it just sat there—?

AF Because we hadn't actually had, I don't think in that period between those dates we had a significant decision that was made around, around the subject matter that we would have laid – the only thing we had was a potential review which we laid on the table.

SH Mhmm, okay. Alright now I want to come to the interactions with Jenny and Jenny's statement, so just firstly the first things she says is that for months you had been alluding to secret information regarding the original decisions. Do you agree with Jenny's perception or recollection?

AF Look there's a lot of information about the subject material of Shelly Bay which goes back many years and some of that is public material, some of that isn't. You know, and obviously you've got a lot of new councillors who may not be aware a lot of a large part of information.

SH *I think he was referring in particular to the use of the term 'secret information,' with the suggestion that you had something.*

AF *Oh right. I can't tell you what she's referring to there.*

SH *Do you recall using the term having 'secret information'?*

AF *[sighs] I don't think so. I think, you know, knowing things that other people didn't know but that's not necessarily the same thing is the information is secret. I mean I've been involved in this issue for I suppose it started in 2015, so, you know, that's two rounds of councillors since then so there's a lot of councillors who will not have any of that kind of information at all.*

SH *Did you think that this was secret information?*

AF *Well that, secret is not a word I would use.*

SH *Okay, well confidential?*

AF *It was information that they wouldn't have seen, but then they wouldn't have seen a lot of information too.*

SH *So, just to ask the question a different way, prior to your interaction with Jenny and possibly Diane and Laurie, had you referred to this document in any way either directly or indirectly to other councillors?*

[27:41] AF *Not specifically that I can recall.*

SH *...Just whilst you're finding that can I just put a specific matter to you, what she says here in these notes is, 'He tended to say things like, 'If you'd seen what I'd seen you would be totally against that.' Do you recall saying anything of that nature?*

AF *That again relates, if there's anything in terms of that kind of comment relates to the extensive amount of material that's been around for, you know, in some cases up to six years. So, it's, you know, as I said there have been a lot of councillors who have come to this within the last, at that stage, 12 months. Whereas some of us have been involved, some more extensively than others for a long period of time. I guess it's in that context.*

SH *If that comment was said, 'If you'd seen what I had seen you'd be totally against it',—.*

AF *Well it's paraphrased, I don't know exactly what was said, but anyway it's taken as that way, yeah.*

SH *Yeah, in terms of how that sits for say new councillors who haven't seen that documentation, do you have any comment on whether or not it's appropriate to express a view, and you might well say it is appropriate as Mayor in your leadership capacity, where it's a personal view based on information that other people haven't seen? Without making that other information available.*

AF *Well most of that information is perfectly available, there is a lot of information over a long period of time, which, you know, the bulk of which will be publicly available, but you'd have to do a fair bit of digging to get it.*

SH *Okay, yep. Okay. So, going back to the engagement with Jenny, I mean if it helps I don't think there's anything particularly contentious. [inaudible – more than one voice]*

[32:00] SH *You texted her, you went, she went to your office, you spoke to her for about 10 minutes, you showed her the document, I think what I'd like to put to you are the bits on page two where she says, 'I asked him some questions,' can you go to that bit.*

AF *I've got it, yep.*

SH *If I could get you to comment on each of those statements. Actually, the one that becomes before that first, so, 'He said he wanted to show them to me because he knew I cared about good quality advice and transparency'. Do you recall that?*

AF *Not specifically words to that effect.*

SH *Do you think you may have said that?*

AF *I may have done, I always like to say things that I know people like to hear. In other words, that's like a piece of praise.*

SH *Then I asked him some questions so firstly she says, 'Are you going to show the notes to all councillors? He said he did not intend to do so,' is that accurate?*

AF *Ah look the situation as it was there, I knew there were some councillors were completely in one camp or another camp. But there were some councillors I thought it might be useful to, it became fairly evident from showing it to a couple of people that people didn't see it as having any substance at all so any consequence, therefore, you know, just let it be.*

SH *Okay and the second statement, 'Are you going to make the notes public,' and you said you didn't have ██████ permission is that accurate in terms of the discussion?*

AF *Look I have spoken to ██████ on a number of occasions over time, obviously to get his, you know, his permission to talk and to take notes which he said 'yep' and secondly to say, you know, are you willing to comment further on those and it was a 'yep' and*

then would you be willing in this case to talk with, you know, to participate in this process if need be and the answer was 'yes'.

SH So, okay just to be clear we might be talking about two different things though, you mean this particular investigation process?

AF Mmm.

SH She is saying here, as I understand it that you said you didn't have [REDACTED] permission to make the notes public.

AF I'm always pretty careful with other people's material. And so, I would want to double and triple check before I did that. And as long as it's public which this clearly was not.

SH So, have you checked with [REDACTED] subsequently whether he's prepared to make these notes public?

AF He's prepared to, he's certainly prepared to meet with you if you want.

SH Had you considered providing a copy of this file note to all councillors and whilst you say that some might have dismissed it and others might not have thought it was of consequence, is there a reason why you didn't just give it to everyone?

AF You've observed our Council, I'm sure.

SH Mmhmm.

RC I think what he means by that if I can help is that maintaining confidentiality around a Council table is not a given. And the other aspect of the decision not to make it more widely available was of those people he spoke to, none of them appeared to take a view that it was nothing other than non-consequential. So, there was no support for taking it further and as a result Andy decided not to.

SH Mmhmm yep. Just the last statement she makes here, 'Do you think it's fair to [REDACTED] to be showing those notes to people privately in a way that means he can't give his side of the story and she says you avoided answering the question and talked about the fairness of [REDACTED] view of events being known', is that accurate?

AF Well look I can't remember that part of the conversation. What I can say is that this was not about [REDACTED] at all.

SH Can you just elaborate on that?

[38:09] AF Well this is somebody else's explanation of a situation that has occurred and it wasn't, I don't put names in there or not put names in there. So it's not about any particular person.

SH I hear that you don't remember specifically what was discussed at that time but did you think there was any issue of fairness in respect of [REDACTED] given the claims that were made in here about him?

AF I think we've already covered off, it's not about improper pressure it's just simply, you know, this is what happens, people higher up in an organisation will sometimes say to people, 'Hey this is the decision that we think you should make.'

SH Okay, so I do have to test that further because I think it does go to the nub of this. So, are you suggesting that the file note does not reflect poorly on [REDACTED] ?

AF Oh I don't think it's got any intention to do that. Because I don't, I certainly, I have no intention of doing that and I don't believe that is the intention of the file note, it's an explanation of a change in the decision that the officers made, changing the position in fact.

SH Yeah. Did you consider whether it reflected poorly on any Council employee and whether their explanation should be considered prior to making this available to other people?

RC Neither of them were employees were they at the time?

SH I think [REDACTED] was.

AF Not at the time I made it available to people.

SH Right.

AF No, wouldn't have been.

SH Nonetheless, I mean just as a matter of natural justice to people whether they are current or former employees, if a document reflects poorly on somebody you could argue—.

AF Are you suggesting it reflects poorly?

SH Well I'm asking that question.

AF Because I'm not.

SH Well I think it could be interpreted as potentially doing that, that's certainly Jenny's observation where it talks about [REDACTED] was putting pressure on me, it was really clear that [REDACTED] had an agenda and was going to drive that'. Those things

could be construed as potentially not consistent with professional obligations that █████ might have.

AF They're not my words.

SH So, just to be clear though, did you perceive this in any way as adverse or critical of any Council employee past or present?

[41:01] AF There was certainly no intention on my part that there would be anything related to that, I was simply trying to explain or not trying to explain, I was simply trying to understand that's the nature of the conversation that I had with █████ why Council officers had come to one view after another and I don't know if you've reviewed the lead up material to that? So, I was trying to do what I thought a good elected member would do in trying to understand, you know, how people came to a position. No more, no less.

SH I can understand that was your intention. In terms of what the document actually says and in retrospect, do you think that there is any issue in terms of providing a document which is potentially critical of Council staff to other people without them having had the opportunity to comment on it?

RC He's not Council staff. He's ex-Council staff.

SH Ex-Council staff.

AF The other thing is that in terms of providing it, that's, you know, if you said I was being very careful with it, you know, I wasn't providing, I wasn't splashing it around out there and when it came to names being bandied around, it certainly was not me who was doing it. That's, you know, one of the issues with this process.

SH Yep.

SH Is there, I mean is there any thought process or process that you go through of testing the reliability of information before you're self-relying on it and / or showing that to other people?

AF There is a wonderful wide challenge about all of the information we get.

SH It is just that— so in particular relating to this document, if one person has provided information, █████ and it relates to a range of things including other Council staff or former Council staff, is there a process that you would go through to test whether or not █████ recollection is actually fair and accurate?

AF Is that within the scope of the conversation we're having?

SH Well I think it is in the sense that Jenny's concern is that you showed her a file note presumably with a view to influencing her and her concern is that what was in the file note was inconsistent insofar as [REDACTED] with the High Court decision—.

AF Oh so I'll have to go back to read the High Court decision.

SH Yep you can, I mean I do have that available to you and I can let you do and take a break if you want to. I mean in particular at 124 here it says, 'I conclude there is no basis for a suggestion that [REDACTED] was prevailed on upon to alter his original opinion by other Council officers as alleged by the applicant.' So, it does appear to cover some of the same allegations. But maybe what I should do is let you consider that decision after this meeting and provide any further comments that you want to, I don't want to put you on the spot in terms of, I mean it's quite a lengthy decision.

RC Well we're very happy to have a look at that but I think that we can say that it was not front of mind, the relevance to the High Court decision. That ah and in terms of a process as to what he might need to check something, you know, a confidential discussion with your fellow councillors doesn't seem to be widely outside an appropriate course of action in circumstances such as this.

[47:09] SH Do you have any comment to make on providing information to some but not all councillors, if you're all sort of making a decision, Jenny's concern around the possibility of judicial review was in relation to probably two things, one some councillors having information that other councillors didn't have and two, the appropriateness of the information being taken into account, do you want to comment on that?

AF Yeah. Pretty well every decision that we made, different councils will bring different things to the table in terms of the information that they've got. Obviously in something which is as complex and as longstanding as Shelly Bay issues, different people have remarkedly different routes of information, the question is whether they consider that information to be relevant or not.

SH And did you consider this information to be relevant?

AF Clearly, to councillors I showed it to didn't.

SH Did you?

AF Look we were advised that [REDACTED] the decision that we were making on the day.

SH But I mean if you didn't think the document was relevant why would you have called Jenny and others to your office to show them the document?

AF I thought it would be of interest to them. Clearly it wasn't.

SH ... Is there any issue in your view with yourself as Mayor or in fact any of the councillors seeking to lobby or express personal views to other councillors in order to vote a particular way?

[50:24] AF Oh political process is people do that all the time, they've done that since probably, probably since the Athenians had a democracy.

AF You're always trying to find what the, what might be of interest to people, in this case it wasn't.

SH Does it make any difference that as Mayor your role includes leadership as to whether or not you're seen to have a partisan position on a particular issue?

RC Sorry, the issues of leadership are not relevant to the complaint that's been made. I honestly don't see why that question has been put to him.

SH I can explain that and it's because her issue is that she and selected others were shown information and that if a piece of information was relevant to decision making it should have been available to all. Now the Local Government Act talks about leadership and in the context of that talks about open and transparent processes so that's where the link to leadership in the role of the Mayor comes in.

RC It's a huge leap, what we're talking about is a mayor having a confidential discussion with a councillor with a view to better understanding that person's point of view, sharing their own point of view, ascertaining whether or not there might be some common ground and that's perfectly normal. How we move from there to saying there's an issue about leadership because he didn't have the same discussion with others, is not logical.

SH I'm not, I'm not expressing any concluded view I'm just testing and I think in fairness I need to do that because as I say one of the obligations on the mayor in the Local Government Act is to provide leadership and my question went back to as mayor is there any expectation in your view that that leadership role would include taking a non-partisan approach and providing or making available information that may be relevant to decision making to all councillors rather than some of them.

RC No. Leadership is not an issue in this complaint.

SH Okay so can I—?

RC It's politically charged because of recent events that you should raise that, and I think it's entirely unfair that you do that.

SH I don't, I'm not relying on any recent events, I'm just simply—.

RC *I'm sorry, leadership has not been raised in the complaint, leadership has been raised recently in the public arena and you are now talking and asking questions about his leadership style.*

[53:41] SH *No I don't intend to do that, I'm really...*

RC *You just asked him.*

SH *...just hoping to understand whether there might be any different obligation on the mayor because of the leadership role in terms of making information available to councillors that might be relevant to decision making. So, I understand certainly that councillors are free to and do, lobby, provide information possibly in a selective way, voting blocks I understand all that, my question is simply do you believe that the mayor is equally free to do all of that or are there different obligations that might apply?*

AF *[sighs] I've served with five mayors, every single one of them would have done that every day.*

SH *Yep, okay. Now I just do now come to the Code of Conduct and again I'm not wanting to put legal propositions to you or ask questions that are difficult, I just want to invite you to comment on a couple of points. So, the Code of Conduct talks about open and honest conduct, do you think that showing some but not all councillors a document in confidence amounts to open and honest conduct?*

AF *As I said we have as elected members, conversations among ourselves on a many times a day basis as individuals. That's always been the way and probably always be the way otherwise we'd have to have every conversation we've had as 15 people and that's, you know, like that's completely unrealistic.*

SH *Yep. But are there any sort of understandings of confidentiality that exists between councillors, outside of obviously what Code of Conduct says around information in particular?*

AF *[unclear] If only we're working on that.*

[59:53] SH *So, you've said that there are conversations that go on all of the time between councillors including on an individual as opposed to a collective basis. My question is there any sort of implicit understanding of confidentiality that applies to Council business in that context?*

AF *I think there are some things which are very clearly, we know are confidential but it doesn't necessarily stop people sharing them externally.*

SH Is, you know, does any of that apply in your view to what's happened here, where you show a councillor a document on a confidential basis, I mean is there anything that you want to tell me about the expectations that apply to both parties in that context?

AF Well I would have said, as I said to you, you know, are you showing me that in a, you know, clearly it was a one to one basis, I don't think there's anything there, thanks for showing it to me, but you know, I'd rather you didn't carry on with that, that's all. No more, no or less which is the conversation we've just had.

SH The Code of Conduct also talks about avoiding publicly criticising any employee and treating employees with courtesy and respect, do you want to make any comment on those points in the context of what occurred?

AF Well there are two elements, one is that I have not criticised anybody publicly or privately. And secondly the conversation was private not public.

SH Okay. The Code also talks about raising concerns about employees with the CE and I know you've touched on that. You can comment again if you like but my take on that is that you didn't necessarily see this as raising concerns about any employee, hence you didn't raise it with the CE, is that correct?

AF Look at the time I had longstanding, you know, over months, longstanding correspondence with the then chief executive on a range of matters around a minimum, many, many questions about the whole Shelly Bay process.

SH Yeah. So, what you're saying is that you had raised certain concerns with the CE?

AF I raised multiple concerns with the CE.

SH Were the concerns that you raised with the CE the same as reflected in the file note?

AF Not specifically, they were a part of it, but certainly issues around ah, every issue from planning to transport to, you know, financial arrangement the lot, you know, it's a broad brief statement.

SH And finally in relation to the Code of Conduct the obligation to keep information confidential, you may have answered that question but if you just want to say anything else.

AF Well that's why sharing it I was very limited and did not leave it with people because I wanted to keep it confidential and part that is about protecting people and I am not the one that is potentially putting names in the public arena.

SH *So, the openness and transparency issue and again I have not formed a view on this, I'm just stating what I understand her concern to be and that is you showed a document to some but not all councillors in circumstances where the document was intended to be kept confidential and that was not open and transparent.*

RC *Well, you know, the difficulty with that is the view will be that we're in favour of open and transparent government, but you cannot at the same time say that precludes being able to have a confidential discussion with someone. As soon as you have a confidential conversation with someone, it's not open and transparent and so to try and bring the two together to make one, you know, at odds with the other, I think it's unfair.*

AF *I think that's one of the things Susan that we raised as a concern at the outset in the letters written to you, that if you go down the track the wheels of local government, the wheels of any organisation will stop because you're basically saying you cannot have a one-on-one conversation with anyone without having a conversation with everybody and that means the world as a whole, and that's just untenable.*

SH *Yep.*

AF *So, it's a perfectly normal function to have a one-on-one conversation if we said that that is not a proper thing to do, we would have probably every single councillor up on Code of Conduct charges every day for some conversation they've had which wasn't open and transparent.*

Excerpts from Response of Councillor Condie to Mayor Foster's Interview – 31 March 2021

I want to clarify that I never intended to imply that Mayor Foster had ever used the words "secret information" to refer to information that he held regarding Shelley Bay. I accept Mayor Foster's statement near the bottom of page 8 that he did not ever use that specific phrase.

That said, I stand by my statement that during closed workshops attended by all councillors and many relevant staff members Mayor Foster referred several times to information that he held regarding Shelley Bay that was not in the public arena. When discussing this information he said he was trying to get permission to share it in the public arena, but he did not at that time feel he had permission to share with other councillors. I believe that he likely also referred to this information in conversations with our current Chief Executive and possibly other staff in the lead up to our decision on Shelley Bay. If, as Mayor Foster states at [27:41] these statements were not "specifically" in reference to this file note, then was Mayor Foster referring to other significant information that he holds regarding Shelly Bay which he has not shared with other councillors or staff?

I accept that Mayor Foster had [REDACTED] permission to take notes of his phone conversation as per Mayor Foster's statement near the bottom of page 10. I can see nothing in Mayor Foster's transcript that states that he had [REDACTED] permission to share those notes with other people, including myself and other councillors.

Obviously no one else can shed light on this fact, as it is a matter between Mayor Foster and [REDACTED].

I accept the statements made after [38:09] that none of the people mentioned in the file note were WCC employees when the file note was shared with councillors. However, at the time Councillor Foster had the original conversation with [REDACTED] and created the file note [REDACTED] was an employee of WCC. I further believe that this raises a question about whether our duty of care to staff extends beyond the term of their employment, a matter I will revisit in a later section.

I want to address the view expressed by Mayor Foster near the bottom of page 13 that “if you show somebody a piece of paper, they do it’s inconsequential, they give it back to you, it should be the end of the story.” I searched both my written statement and transcript and did not find any use of the word inconsequential. In my written statement I wrote: “I conveyed that I didn’t find it particularly persuasive.” In my transcript I said I was shocked at how thin the evidence was in the document and repeated that I didn’t find it particularly persuasive.

I intended that to mean that it was not persuasive to me: that it did not outweigh the importance of other information available to us, most important of which in my view is the decision of the High Court, and that it was not relevant to the decision before us as advised by our legal staff. I never meant to imply that the document itself, its existence, or Mayor Foster’s decision to share it with me and other councillors was inconsequential. Clearly I believe it is potentially of serious consequence or I would not have taken the significant step of requesting an investigation into the matter.

After [47:09] Mayor Foster states that [REDACTED] In my view this characterisation borders on misleading. The legal advice we had from our Chief Lawyer was [REDACTED]
[REDACTED]
[REDACTED].

I refute Mayor Foster’s statement near the bottom of page 15 that “she didn’t express any other concerns about, in terms of being proper or not proper”. I accept that I did not use the exact words “proper” or “improper” during our conversation. However, I believe that taken together the three questions I asked him prior to showing me the file note clearly expressed my concern that it may not be appropriate for him to share the file note with me. It is of course possible that Mayor Foster did not understand the subtext of that discussion.

Finally, I’m concerned that nowhere in Mayor Foster’s transcript does he state that he showed the file note to Deputy Mayor Free. As per my email to you on 28 January 2021, the Deputy Mayor has informed me that Mayor Foster did show her a document related to Shelley Bay, that she believes it is likely to be the same document he showed me but that she cannot be certain. Mayor Foster had two opportunities to disclose that information, once at the top of page 14 when you ask “were there any other councillors, in particular Nicola, or any others?” and again on page 22 when you are specifically discussing the Deputy Mayor in relation to another matter and you ask “it’s

really just whether she had any direct involvement or engagement that isn't apparent on the face of the emails." This makes me question if there are other councillors that Mayor Foster showed the information to which he has forgotten to include in his account.

I accept that of course elected members must be able to have one on one conversations with each other, and that these conversations often include what the mayor has termed "lobbying". In my view, appropriate "lobbying" is asking people what their views are, what information and reasoning has led them to that view, and then emphasising different information or different reasoning to explain why you hold a different view, in the hopes you might persuade them to change their view.

As an example, I spoke to several councillors the night before the vote on Shelly Bay and had conversations along those same lines. I asked other councillors about the content of meetings I had been unable to attend, for example the meeting with Mau Whenua hosted by [REDACTED] and [REDACTED] (which I could not attend due to illness). I emphasised information that I found relevant which they may not have read, such as the High Court decision.

The substance of my complaint is not that meetings like this take place. Of course, these conversations take place and they are an appropriate and necessary part of democratic decision making. The difference between those other conversations and the one I had with Mayor Foster was the characteristics of the information the Mayor shared with me.

The mayor's information was not in the public realm and it wasn't clear that he had [REDACTED] permission to share it with anyone else. Mayor Foster had chosen to share it with some councillors but not others. The information in the file note was potentially damaging to the professional reputation of people named in it. The information in the file note was contrary to the findings of the High Court case that had considered similar concerns.

In several places Mayor Foster claims that he held no view about whether the file note was relevant to our decision, that he simply showed it to myself and others because he "thought it would be of interest to them". This characterisation strains credulity.

Given the Mayor's busy schedule I find it hard to believe that he took time out of his morning before the most significant vote of his mayoralty to show me a document that he thought I would find 'interesting'. If he did not intend to influence my decision with that information he could have shown me the file note at another time.

After [20:41] Mayor Foster states "I'm making no judgment about that. I'm certainly not saying it was improper." I find this statement stretches credibility. The only explanation I can imagine for Mayor Foster believing that showing me this file note at that moment would be relevant to my decision about Shelley Bay is that [REDACTED] assertions that he came under pressure to change his advice would raise doubt in my mind about the quality of advice from staff at that time.

After [27:41] Mayor Foster states that during our conversation when he made statements along the lines of “if you’d seen what I’ve seen” he was not referring to information that he held which was not available to others. Rather he claims he was instead referring to the fact that over the course of six years he has had much more time to follow this matter than a new councillor like myself, and therefore he would have read information that was publicly available but which I would not have had time to read. If that was the case, then I would have expected during that conversation Mayor Foster would bring my attention to information in the public arena which he felt was important but which he was concerned I may not have read. (For example, I had a highlighted copy of the High Court decision with me that day, and I mentioned that several times in conversations I had with councillors prior to our vote, because I felt it was an important piece of information that other councillors may not have read.) Mayor Foster did not draw my attention to any other specific documents during our conversation that I recall.

Mayor Foster also repeatedly states that councillors did not find the file note persuasive or relevant. Mayor Foster appears to be implying that no councillors were influenced by the file note (a statement for which we only have his word, as other councillors who may have been shown the file note have not been interviewed). If some councillors’ votes were influenced it may now be unlikely that they would admit that since the matter is now under investigation, so we may never know the accuracy of this statement. If the file note did influence votes then the potential harm done by sharing it is greater, however it doesn’t follow that no harm was done by sharing it if no one changed their vote because of it.

Mayor Foster also claims that sharing the file note did not amount to publicly criticising staff because:

- The file note was not his words*
- The file note is not about any particular person*
- The intent of the file note was not to criticise anyone*
- His intention in sharing the file note was not to criticise anyone*
- He shared the file note privately, not publicly*
- No one mentioned in the file note was an employee at the time he shared the file note*

Personally, I think that Mayor Foster shared the file note with me because he believed the statements it contained; he hoped that those statements would raise concerns in my mind about the quality of the advice provided by staff during the process of the resource consent; and he hoped that those concerns would influence me to vote against the sale and lease of council land later that day.

Given the context in which Mayor Foster shared the file note with me, I believe it is reasonable to infer that he agreed with the statements it contained. They may not have been his words, but in sharing them with me he was endorsing them.

The file note is about the process by which certain officer advice regarding Shelly Bay was developed, and as such I accept that its content is wider than any particular person. However, a number of individuals are mentioned by name in the file note. By sharing these statements about these individuals Mayor Foster is once again endorsing those statements.

Given the wider context that accusations had been made by external parties through a court case challenging the conduct of individuals involved in developing this advice, I find it hard to believe that the intent of the file note was not to criticise any of those people mentioned. Nevertheless, only [REDACTED] can speak to the original intention of his statements.

Mayor Foster may not have intended to criticise anyone mentioned in the file note when he shared it with me, however that doesn't mean that he didn't. If his intention was not to criticise individuals, then this offers some reassurance about the Mayor's behaviour. It does not change what harm may have been done to the reputation of the individuals mentioned in the file note by sharing it with others.

Excerpts from Mayor Foster's response to Councillor Condie's comments of 31 March 2021 – 14 April 2021

Cr Condie may have recently refrained from making further public comment on this matter. However, the mode of the complaint and initial public comment (including on Twitter), has already done the damage, and clearly suggested a political motive. We reiterate earlier comments in this regard.

Mayor Foster does not consider raising a concern that the complaint continues to lack clarity is "clumsy". The concerns in this regard have created a genuine natural justice issue for Mayor Foster, and have been based on direct quotes from Cr Condie's own documents and statements to you in her interview.

This is the first time Cr Condie has acknowledged that the filenote did not contain Mayor Foster's statements or opinions. In fact, previously, Cr Condie said the filenote/document had no heading, date, or comment on what it was about and seemed to have taken the view that it represented Mayor Foster's opinions. That is clearly incorrect. If Cr Condie had paid attention to this at the time she read the document, and/or considered this matter before rushing to make her public complaint, this process could have been avoided altogether.

It appears Cr Condie is now asking you to reach views on whether Mayor Foster has other information, aside from the filenote, that he ought to have shared with other Councillors. Despite this being well outside the scope of the preliminary investigation, and incredibly vague, Mayor Foster has already explained his length of public service means he inherently holds information that other Members do not.

Mayor Foster did not break any promise to ██████████ by sharing the filenote with Cr Condie or very limited others. If Cr Condie is alleging that an alleged breach of confidence to ██████████ is the basis (or one of them) for her complaint, this is the first time we are hearing that, and there is absolutely no foundation for that allegation.

Mayor Foster does not accept it is necessary for you to give the filenote a "characterisation" in your report – doing so would likely create more unnecessary speculation into this matter, and increases the likelihood that the people mentioned in the filenote will be more widely disclosed. Mayor Foster has taken appropriate steps to prevent that happening to date. If anyone is risking making these names public, it is Cr Condie (despite, apparently, being concerned about their reputations, and that that does not happen).

Mayor Foster did not share the filenote with the Deputy Mayor. Mayor Foster recalls he wished to discuss another matter with Cr Foon – relating to a presentation they had both attended on the detailed design of Shelly Bay the previous evening.

Cr Condie appears to be speculating about who the document was shown to, without proper basis for doing so. Mayor Foster explained to you who he recalls he showed the filenote to and why.

Any “damage” or potential damage to reputations has been caused by Cr Condie making her public complaint.

Cr Condie acknowledges there were different avenues to raise any concerns, we agree that would have been appropriate.

Mayor Foster reiterates he was not personally criticising the people named in the document.

Appendix 3 – Councillor Condie’s response to Draft Report – 21 April 2021

From: [Councillor Jenny Condie](#)
To: [Susan Hornsby-Geluk](#)
Subject: Re: Complaint against Mayor Foster - Draft Investigation Report
Date: Wednesday, 21 April 2021 8:32:08 PM

Thank you Susan for the opportunity to respond to your draft report. I have no further comment to add. Thank you for the considerable work that has gone into this investigation and the preparation of your report.

Cheers
Jenny

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From: Susan Hornsby-Geluk <susan@dundasstreet.co.nz>
Sent: Thursday, April 15, 2021 5:34:17 PM
To: Councillor Jenny Condie <Jenny.Condie@wcc.govt.nz>
Subject: Complaint against Mayor Foster - Draft Investigation Report

Dear Jenny

Please see attached my draft report into your complaint against Mayor Foster. You will see that appendix 1 contains excerpts of the written responses and interviews I have conducted and appendix 2 contains the full transcripts.

I would like to receive your written feedback by 5pm 23 April.

Please acknowledge receipt of this email and its attachments.

Regards

Susan

Susan Hornsby-Geluk

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Appendix 4 – Mayor Foster’s Response to Draft Report- 23 April 2021

23 April 2021

Dundas Street

By email: susan@dundasstreet.co.nz

For **Susan Hornsby-Geluk**

Response to Draft Report – Wellington City Council – Investigation into allegations against Mayor Foster

1. We refer to the Draft Investigation Report sent to us on 15 April 2021.

Preliminary Assessment – Full Investigation

2. The Terms of Reference for this investigation referred to a preliminary assessment of whether the complaint was material. According to part 12 of the Terms, if the complaint was found to be material, that would be communicated to Mayor Foster and Councillor Condie by the Chief Executive. Following that, a full investigation would occur.
3. Despite the above, we understand you have reached a view on materiality (which we disagree with), and have moved directly to an investigation, without Mayor Foster first being advised of your decision on materiality.
4. This would appear to be a breach of the Terms of Reference, and Mayor Foster reserves his position in that regard.
5. Without prejudice to that position, Mayor Foster responds to the draft report on your full investigation below.

The Issues

6. This is the first time “the issues” have been clearly articulated throughout this process. For that to occur in the course of communicating draft findings, rather than from the outset of the process so that Mayor Foster could prepare and respond in an informed fashion is disappointing, inconsistent with natural justice and more importantly contrary to the Compliance and Review provisions of the Code of Conduct which requires that “due process is respected”. Further, having been involved in the process from the outset, we can say that both Mayor Foster and ourselves had no inkling as to what you regarded as the key issues.
7. You have found in paragraph 85 of your draft report:

“I have found that the Mayor has breached the Code in one particular respect, relating to the need to maintain public confidence.”



8. In paragraph 89 of your draft report you find:

“The conduct was capable of undermining public confidence in good quality decision making and therefore amounts to a breach of the Code of Conduct. I assess that the breach is at the lower end of the spectrum as there was no intention to act improperly, rather the Mayor failed to give the issue and potential implications sufficient consideration.”

9. With respect, we have some difficulty with these findings:

- (a) We do not see it as possible for the disclosure of a note to a very limited number of Councillors on a confidential basis to have any bearing on public confidence. The matter is simply not public and with respect is not a finding that can be reached on the evidence available.
- (b) “the need to maintain public confidence” or the failure to maintain public confidence is not, with respect, a breach of the Code of Conduct. Councillors and the Mayor can fail to maintain public confidence simply by being, by way of example only, incompetent or inept and that is clearly not a breach of Code.
- (c) “Conduct capable of undermining public confidence in good quality decision making” is not a breach of the Code of Conduct. If undermining public confidence in decision making was a breach of the Code of Conduct, then the behaviour at many Council meetings would be in breach of the Code. In particular it appears that public confidence in Council’s decision making in relation to Shelly Bay has been eroded over many years, without any apparent breach of the Code of Conduct.

10. We pause here to observe that there is, in our view, a very significant difference between:

- (a) maintaining public confidence in the office to which they have been elected, breach of which is a breach of the Code, for example being regularly intoxicated in public;

and

- (b) maintaining public confidence in decision making, breach of which is not a specified breach of the Code.

11. Save for asserting that it is, there has been no attempt to explain how the conduct has breached the Code by reference to the Code.

12. In paragraph 21 of your draft report you set out what you see as the key issues as they relate to the Mayor’s conduct. Not one of the three issues you identify actually refers to whether or not the alleged conduct breached the Code.

13. For present purposes we deal first with the issue upon which you have found an adverse finding. The question you have posed is:

Issue 1 **“Was it appropriate for Mayor Foster to rely on or refer to the file note of his discussion with [REDACTED], in the context of the vote on Shelly Bay on 11 November 2020?”**

14. With respect many people can have different views on what may be appropriate and what might not be appropriate, but the issue is and should have been whether the Mayor’s conduct in this context breached the Code of Conduct.
15. Having said that, you have found the conduct inappropriate and, although it does not logically follow, therefore in breach of the Code. You have given three reasons, summarised in clause 49.
- “49.1 *The file note included content that had been found to be inaccurate in the High Court proceeding.*”
16. It is not unreasonable or uncommon to hold a different view than one communicated by a Court. Here, we note the High Court reached its view on affidavit evidence only, which was summarised in four paragraphs of a large judgement. It was not the focus of the case.
17. In any event, Mayor Foster does not have a view on whether the High Court was correct, or not, and he did not rely specifically on this document in his vote. Even if he did have a view, to suggest Mayor Foster, or more accurately [REDACTED], is not entitled to hold a different view to the High Court, and cannot communicate such contrary view, particularly in confidence, cannot be right.
- “49.2 *The inaccurate content related to a former Council employee and had the potential to damage his reputation.*”
18. As you have accepted, Mayor Foster did not intend any damage to any person’s reputation. This was one of the reasons he was so careful with whom he showed the document to. Even if, for the sake of argument, there was the potential for very limited reputational damage by Mayor Foster showing the document to two Councillors that he recalls (which reputational damage does not seem to have actually occurred here) – the Code of Conduct does not “protect” ex-employees.
- “49.3 *The disclosure, in the context that it occurred, could have created potential legal risks for the Council.*”
19. In order for the file note to have created any potential legal risk (which seems inherently unlikely given it was found to be unpersuasive by all who saw it), its existence would need to have been made public. Mayor Foster did not publicise it, and did not himself rely on its content in his vote – and there is no evidence anyone else did either. In fact,

any legal risk associated with the document appears to have arisen out of Councillor Condie's approach to raising her complaint – which itself created immediate media scrutiny.

Issue 2 Was it appropriate for Mayor Foster to show the file note of his discussion with ██████████ to some but not all councillors?

20. We agree that it was not inappropriate for Mayor Foster to show the file note to some, but not all, Councillors.
21. In our view, that finding ought to influence the finding on Issue 1. That is, the fact of the file note being shown by Mayor Foster being an appropriate course of action, when considered with our comments in relation to issue 1, should mean there is no adverse finding in respect of Issue 1.

Issue 3 Do the leadership responsibilities that the Mayor has give rise to any greater obligations in this context?

22. As expressed in the interview with Mayor Foster, we were surprised by the issue of Mayor Foster's role and leadership function being raised in this process. That was not an issue we understood Councillor Condie to have raised at all – noting of course the issue with the general lack of clarity of her allegations.
23. In any event, we agree that the Mayor's actions were not inconsistent with his leadership responsibilities.

Summary of key findings

24. It is not accepted that Mayor Foster showing a document which was not found persuasive to other Councillors in confidence could undermine public confidence in good quality decision making. Even if it could, failure to maintain public confidence in good quality decision making, is not a breach of the Code of Conduct. We reiterate the comments above regarding the content of the file note and ██████████ views, including that simply because the High Court made a brief finding on a related issue – does not make ██████████ views inaccurate or discredited.
25. The short point is that in our opinion the preliminary findings you have arrived at are simply not available by reference to the Code of Conduct.
26. It follows that we do not accept there has been any, let alone a material, breach of the Code of Conduct by Mayor Foster. We were surprised that there was no substantive attempt to justify the materiality finding, or communicate that to Mayor Foster for comment, prior to commencing the full investigation.
27. It seems to us that consideration ought to be given here as to whether it is appropriate for this process to have gone beyond the preliminary assessment, without notifying Mayor

Foster of that, or draft findings being reached. Had that been communicated to Mayor Foster, he may have taken the opportunity to focus on further issues in his interview – instead, his, and our, focus, was on the issue of materiality.

28. We therefore, with respect, do not consider it open to you to confirm the draft report, and again, reserve Mayor Foster's position in that regard. However, without prejudice to that, in the event you confirm the content of this Draft Investigation Report, and the recommendations:
- (a) We agree that Councillor Condie should be excluded from the any Council consideration of this matter. Mayor Foster should have the opportunity to respond to Council, in the interests of natural justice – since it (as a group) would be making the decision on whether a breach has occurred, and next steps;
 - (b) We do not agree that a letter of censure would be appreciate here, given our comments above;
 - (c) We agree Councillors should be instructed to keep the content of the file note confidential – we also consider such confidentiality should be extended to the content of the investigation, report, and any outcome;
 - (d) We do not agree Mayor Foster should be required to issue an apology – and if such apology was required, it ought to be on a strictly confidential basis;
 - (e) We agree that any LGOIMA request must be considered carefully to protect the privacy of all individuals referred to in the report, apart from Mayor Foster and Councillor Condie.

Yours faithfully
Morrison Kent



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