

**LOCAL GOVERNMENT PECUNIARY
INTEREST TRIBUNAL**

PIT NO 2/1994

REPORT OF INVESTIGATION UNDER SECTION
462(1) LOCAL GOVERNMENT ACT, 1993

RE: COUNCILLOR JOHN MCNAUGHTON A.C.
LORD MAYOR, NEWCASTLE CITY COUNCIL

STATEMENT OF DECISION

Dated: 11 May 1995

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INTRODUCTION

On 24 February 1994 a complaint was made to the Department of Local Government & Co-operatives that an inspection on that day of the Register of pecuniary interest disclosures maintained by the Newcastle City Council revealed that there was no return on the Register from the Lord Mayor, Councillor John McNaughton, for the period 1 July 1992 to 30 June 1993.

By section 449(3) and Schedule 7, Clause 53 of the Local Government Act, 1993 a return of pecuniary interests for that period was required to be lodged by all Councillors by 31 December 1993.

On 3 March 1993 the Department received a statutory declaration which formalised the complaint in accordance with section 460(2) of the Act.

After preliminary inquiries to assess the complaint, the Director-General of the Department, pursuant to s462(1) of the Act, decided to conduct an investigation under the following terms of reference:

“To investigate whether the provisions of s449(3) of the Local Government Act, 1993 were complied with by Councillor J. McNaughton in respect to the lodgement of his ‘Disclosures of Pecuniary Interests and Other Matters’ Return for the period 1 July 1992 to 30 June 1993.”

Notice of the investigation was given to the complainant, Councillor McNaughton and the Council's General Manager on 19 October 1994. Notice to this Tribunal pursuant to section 465 of the Act was received on 27 October 1994.

INVESTIGATION

Senior Investigators were delegated to carry out the investigation. They inspected that Council's Pecuniary Interest Register and relevant files and interviewed the following persons:

1. W H Grant - General Manager of the Council.
2. Ms Barbara Brown - Secretary to the Lord Mayor.
3. Councillor John McNaughton - Lord Mayor.
4. Mr Caisley Graham - Legal Services Officer.
5. Ms Lyn Pearson - Personal Assistant to the Executive Director/Public Officer. Formerly Supervisor, Council's Secretariat.
6. Mr Keith Swan - Executive Director/Public Officer.

On completion of the investigation a report dated 10 March 1995 was presented by the Director-General to this Tribunal in accordance with section 468(1) of the Act. The Tribunal received the report on 13 March 1995.

By section 469 of the Act, the Tribunal may, after considering a report, conduct a hearing into the complaint. Section 470 of the Act provides as follows:

470. (1) If the Pecuniary Interest Tribunal decides not to conduct a hearing into a complaint, it must provide a written statement of its decision to the person who made the complaint, and if the complaint was not made by the Director-General, to the Director-General.

(2) The written statement must include the reasons for the decision.

THE REPORT

The essential elements of the evidence gathered by the investigators and set forth in the report which are material to be considered in arriving at a decision whether or not to conduct a hearing may be summarised as follows:

1. The keeping of the Register was under the control of the Executive Director and Public Officer, Mr Swan, but the task of physically inserting returns from Councillors in the Register was carried out by the Legal Services Officer, Mr Graham, or the then Supervisor of the Council's Secretariat, Ms Lyn Pearson or other staff members of the Secretariat into whose hands the returns might come. Mr Graham was responsible for checking to see that all returns were in.
2. Mr Swan first became aware that Councillor McNaughton's return was not on the Register when informed by Mr Graham in January 1994. Councillor McNaughton was then away on holidays.
3. Mr Swan and Mr Graham referred the matter to the Lord Mayor's secretary, Ms Barbara Brown, and thereafter preliminary searches were made of the Lord Mayor's office and Council's files pending Councillor McNaughton's return. These failed to locate the return.
4. The matter was brought to Councillor McNaughton's notice by Mr Swan at the first Council meeting after the holidays which was on 8 February 1994. Mr Swan said to him, "**You haven't submitted your pecuniary interest declaration.**" Councillor McNaughton replied, "**Yes. I have.**" Mr Swan said, "**Well we can't find it.**" Councillor McNaughton replied, "**Oh yes I filled it in before Christmas.**" It was then decided that further searches should be carried out by Council staff at the Lord Mayor's and other Council offices and by Councillor McNaughton at his home.
5. These searches proved to be of no avail, so Mr Swan then asked Councillor McNaughton to submit another return. Councillor McNaughton did so on 1 March 1994, endorsing the return with the following signed statement: "**This is the same as the disclosure**

which I signed before Christmas 1993 and which has apparently been lost in transit or filing.”

6. Councillor McNaughton said that in 1993 he had followed the same routine as for the six previous years in which he had lodged returns. His secretary would prepare the return and put it on his desk for him to sign. He would sign it and place it in a folder with any other documents left for him to sign, close the folder and leave it on his desk for delivery via the Council's internal mail system. He said that he would not have lodged the return personally. He always used the folder on his desk and left it to the internal mailing system to effect delivery. He was asked whether he could remember anything in particular about his 1993 return and whether he could remember signing it. He replied that he could remember signing his pecuniary interest returns over the years on a regular basis with very little change in their contents but he could not say that he could recall actually signing that particular one.
7. His secretary, Ms Brown said that she had followed the normal procedure as for previous years. She prepared the 1993 return for the Lord Mayor's signature. She said that she was “**confident**” that it was on his desk before Christmas 1993 although she could not recall seeing the signed return. (If, as he says, he had put the signed return in the folder, of course, she may not have seen it with his signature on it).
8. The Lord Mayor's Office and the Council's Administration Department where the Register was kept were in separate buildings, called the Round House and City Hall. Letters and documents signed by the Lord Mayor delivered via the internal mail system had to be physically carried from one building to the other and distributed to the appropriate officer. This system was employed for lodging the Lord Mayor's pecuniary interest returns.

9. On the evidence obtained by the investigators, the possibility that the return went astray in the Council's system could not be ignored. The question would have to be asked whether on the evidence it would be improbable that that could have happened. Evidence relevant to that question was:
- (a) Councillor McNaughton criticised the Council Administration's records and filing system, claiming that files were often difficult to find and on occasions had gone astray.
 - (b) Ms Brown said that documents did not often go missing between the Lord Mayor's Office and the Council but it had happened with an important document.
 - (c) Mr Swan said that he was not aware of any problems in the system but he did recall that in November 1993 a pecuniary interest return from another Councillor was found in the wrong file after the Councillor, when he was told that his return was not in the Register, insisted that he had sent it in.
 - (d) Ms Lyn Pearson, being, in her position, directly involved with the Council's records, when asked whether she was aware of any problems with missing documents between the Lord Mayor's Office and the Council offices, said, ***"Sometimes they say they've sent things to us and we never see them."*** She added, ***"But that's not unusual to all parts of Council, sometimes it's a cop-out."*** She said, ***"Records get blamed for a hell of a lot of lost documents."*** Whilst she said that she felt ***"Pretty confident that we never received it in the first place"***, she had also pointed out that it was holiday time and half the staff were on leave, ***"It could have been left somewhere and somebody assumed that somebody else was going to do it, which quite often happens."*** She was asked whether, with staff on leave in the December period, it meant that other staff become involved in the transfer of records between parts of the Council. She replied as follows:

“Our section has traditionally closed down, because Council goes into recess. There’s not really much work for the Secretariat to do, because that’s our job, business papers, taking Minutes of Council and all the rest of it, and we have traditionally closed down for at least two weeks between Christmas break and the New Year. In the meantime any mail, the office is left open, but obviously there’s people coming and going to get bits and pieces. Anybody could come and go. Mail could be put in there, mail could be lost or whatever, and when we come back to work we have to sift through it again and see what’s there.”

Mr Graham was asked whether he was aware of documents going missing between the Lord Mayor's Office and the administration side of the building. He said that every now and then someone would say they had sent something over and it didn't arrive. He was asked whether he could see any deficiencies in the document transfer process between the two buildings and he replied:

“Yes, I suppose you’d have to say that it’s possible and plausible that something could go missing, cos we have a transference of the documents between the two buildings. At that time of the year you wouldn’t know what staff had been involved in the actual conveyance of our courier service. It may not have been put in the right tray at the Lord Mayor’s end, it may have been misplaced when it went over the other side.”

He went on to say that the time of the year at which Councillor McNaughton claimed that his return had gone missing was a significant factor in assessing that possibility.

10. Another significant factor would be Councillor McNaughton's reaction and response to the allegation made to him by Mr Swan in February 1994 that he had not lodged his return. According to Mr Swan, Councillor McNaughton 's reaction was immediate and positive in asserting that he had done so. When asked about this, Mr Swan told the investigators, ***“He was surprised when I told him that he hadn’t filled the form in. ... He appeared to me to be quite sincere in that he had filled one in and submitted it, and he just couldn’t***

recall as to what procedure he'd put in place to come back to the administration." Mr Swan told the investigators that his assessment, based upon Councillor McNaughton's reaction, was that Councillor McNaughton must have taken some action towards furnishing his 1993 return. He said, ***"When he spoke to me he felt quite strongly that he had submitted it"*** He also said, ***"I thought he genuinely believed that he'd submitted it."***

As to the fact that Councillor McNaughton said that he would make a search for the return at his home, Mr Swan explained that this happened only after it was suggested to Councillor McNaughton by himself and Councillor McNaughton's secretary that he should make a search at home to make sure it was not there because their searches of the Lord Mayor's Office and the administration building had not found the missing return.

11. The investigators looked at Councillor McNaughton's past record with regard to disclosure of pecuniary interests. As well as showing that he had lodged returns for previous years, his handwritten notes on draft returns contained in his personal file kept in the Lord Mayor's Office, showed a conscientious approach to his obligations. The notes raised queries designed to ensure that his returns would be complete and accurate. Section 451 of the Act requires that a Councillor who has a pecuniary interest in any matter with which the Council is concerned and who is present at a meeting of the Council at which the matter is being considered must disclose the interest to the meeting, must not take part in the consideration or discussion of the matter or vote on any question relating to it. A record is kept of such disclosures made by Councillors. Councillor McNaughton is a surveyor. He is a shareholder and director of a company conducting a surveying practice in Newcastle and consequently would have a financial interest in matters coming before the Council in which his company was involved. The investigators found in the Council records that

Councillor McNaughton had consistently made disclosures of his pecuniary interest in such matters. Prior to 30 June 1993, that is from 4 November 1991 to 28 May 1993, he had made 18 such disclosures and there were another four made by him up to 7 November 1994.

12. The investigators interrogated Councillor McNaughton as to his attitude to the disclosure by Councillors of their pecuniary interests and his own obligations in that regard. He told them that he supported the idea of disclosure of pecuniary interests by persons engaged in local government, that he had no problem in being scrutinised, that he regarded the lodging of pecuniary interest returns in compliance with the Act as ***“a very important thing”*** and claimed that he had been very diligent and scrupulous in complying with his obligations over the years.
13. Councillor McNaughton’s returns, as he had claimed to the investigators, showed very little change in the particulars of his pecuniary interests from year to year prior to and since the return period here in question. He told the investigators that he was not involved in property development. The Director-General’s report contained nothing on which to base any suggestion that a failure by Councillor McNaughton to lodge a return for the period 1 July 1992 to 30 June 1993 might have been an act of deliberate concealment for the purposes of financial gain or other advantage.

FUNCTION OF THE TRIBUNAL IN DECIDING WHETHER OR NOT TO CONDUCT A HEARING

The Pecuniary Interest Tribunal is not bound to conduct a hearing into every complaint investigated and reported to it. Section 469 provides that the Tribunal ***“may”*** after considering a report conduct a hearing. Section 470(1) provides a course to be followed, ***“If the Pecuniary Interest Tribunal decides not to conduct a hearing ...”***. Read together, these two provisions

leave no room for doubt that the Tribunal has a discretion whether or not to hold a hearing into a complaint.

There are no grounds for the exercise of this discretion specified in the Act but, as the law does not permit such a discretion to be exercised arbitrarily, it must be exercised judicially upon rational and relevant grounds which take into account the object and purpose of the legislation.

Section 463(1) confers upon the Director-General a discretion whether or not to take action upon a complaint but sets out specifically the grounds on which that discretion is to be exercised. It is conceivable that some of those grounds may be applicable to a decision by the Tribunal whether or not to conduct a hearing, such as where one or more of the grounds was not evident or in existence until after the Director-General had carried out an investigation into a complaint or had reported an investigation to the Tribunal.

However, whilst these grounds may be included, grounds for the exercise of the Tribunal's discretion could not be limited to those laid down for the Director-General by section 463(1) because a decision whether or not to hold a hearing may and usually will call for other considerations to be taken into account.

A consideration of what is fair and just to the immediate parties will often be a factor but the public interest in the question whether a complaint should proceed to a hearing will always be relevant.

The object and purpose of the disclosure of interests provisions of the legislation is to impose obligations on persons exercising and participating in the exercise of local government powers and functions to act honestly and responsibly. The requirement that Councillors make public disclosure of the pecuniary interests by annual return to be kept in a Register open to public inspection is one of the means employed to achieve that object and purpose. The Act permits any person to make a complaint that a Councillor has contravened that requirement and, as occurred here, a complaint may result in an investigation and report to the Tribunal.

At that stage some incontrovertible facts relating to the complaint will have become known and the investigation will have ascertained whether and if so, what evidence is available on disputed questions of fact and other relevant matters. The Tribunal is then in a position to consider whether the public interest requires the matter to be further pursued. It will have regard to such considerations as whether public confidence in our local government and justice systems would be promoted by holding a hearing or may be undermined if it was decided not to hold a hearing. The seriousness of the alleged contravention, the circumstances in which it may have been committed and the likely outcome of a hearing would be relevant. For example, if it appeared to the Tribunal that, in all the circumstances disclosed by a report, it was unlikely that an alleged contravention could be proved at a hearing or, if proved, any action would be taken by the Tribunal against the contravener, the conclusion might properly be reached that the public interest did not require the Tribunal's discretion to be exercised in favour of conducting a hearing.

It does not follow that whenever the outcome of holding a hearing appears uncertain because of problems of proof, doubtful issues, or other reasons the Tribunal ought to decide against having a hearing because often the public interest will require that a hearing be held to further investigate or resolve the matter. However, that will not always be so and the Tribunal will have to exercise its judgment on the question in each case according to the particular circumstances.

THE TRIBUNAL'S DECISIONS AND REASONS

In the present case, after considering the Director-General's report, the Tribunal's decision is not to conduct a hearing into the complaint. The Tribunal's reasons for that decision follow:

1. It is highly unlikely in the present case that a hearing would be able to resolve the issue on which the alleged contravention depends. The Tribunal would have to be satisfied by the evidence, on the balance of

- probabilities, before it could find that Councillor McNaughton had failed to lodge the required return.
2. The absence from the Register of a return from Councillor McNaughton is not disputed. Whilst it is prima facie evidence that the return was not lodged it is not conclusive. The circumstances would need to be examined.
 3. The available evidence of the circumstances, as ascertained by the investigation, would lead to a conclusion that it was possible, certainly not improbable, that a document such as the missing pecuniary interest return, could be lost or mislaid in the course of or after being transferred from the Lord Mayor's Office to the administration offices by the internal mail system. This possibility was the greater in the period before Christmas because of reduction and changes of staff due to holidays traditionally taken at that time by the Council's Secretariat.
 4. A routine practice for attending to the lodging of the Lord Mayor's return had been successfully followed every previous year by him and his secretary and it was probable that it would have been followed again in 1993 because there was no reason to change it.
 5. The Lord Mayor's secretary was confident she had followed the same routine for 1993 as for previous years and had placed the prepared return on the Lord Mayor's desk for signature at the time it was due, December 1993.
 6. As he regularly signed the documents left by his staff on his desk for his signature and placed them in the folder provided for transfer of signed documents to the administration offices by the Council's internal mail system, it is probable that he would have done so on this occasion. If he had done so, it would have been an act on his part to effect lodgement of his return sufficient to preclude a finding of a contravention of the Act being made.

7. He believed that he had done so before Christmas 1993 and his behaviour when confronted in February 1994 with a suggestion to the contrary and thereafter was consistent with such a belief. His strong insistence at that time that he had done so impressed Mr Swan who assessed his response to be sincere.
8. The evidence showing that Councillor McNaughton had always in previous years given due attention to lodging his returns and making disclosures of his interests at Council meetings and the fact that there was no evidence of motive or purpose for his not having done so in 1993 would make it more likely than not that he would have done so as he claims.
9. The investigation was thorough and leaves no reason to suppose that if a hearing was conducted the facts ascertained and evidence available would be any different from what appears in the Report.
10. For the above reasons the most likely outcome of a hearing would be a finding that the alleged contravention was not proved.
11. Even if, as the result of a hearing, the alleged contravention was found to be proved, it would not be likely in this case to call for any action by the Tribunal because, according to the material contained in the report, it would have been an isolated lapse by a Councillor who recognised and respected his obligations and had conscientiously performed them prior to and since the occasion in question.

In the Tribunal's judgment, having regard to the foregoing considerations, it would not be serving the public interest to conduct a hearing into the complaint in this case and no injustice to the parties would be occasioned by not doing so.

It may be suggested that the system set up by the legislation for dealing with complaints of the present kind is of little purpose if after an investigation by the Director-General it does not result in a hearing by the Tribunal and formal findings, but this would overlook the fact that complaints are open to be made by persons not in possession of the full facts and

circumstances surrounding a suspected contravention. The value of the procedure as followed in a matter such as this one is that the complaint is set at rest after an independent investigation has been conducted into it, even though it turns out that a hearing into the complaint would not be justified.

Also, the procedure is calculated to expose weaknesses in methods by which the requirements of the legislation are sought to be administered. With the wisdom of hindsight, cases like the present might be avoided if the Council established a system whereby a signed and dated acknowledgment of receipt was issued to all Councillors who lodged returns so that if a Councillor has not been given or received his acknowledgment he will be put on alert that his return may have gone astray, and that he should follow it up. If, on receipt, the return itself was stamped with the date of receipt, it would avoid disputes as to whether it had been lodged out of time. Such disputes have occurred.

Copies of this Statement of Decision will be furnished to the complainant, Councillor McNaughton, the Director-General and the Newcastle City Council.

DATED: 11 May 1995.



K J HOLLAND Q.C.

Pecuniary Interest Tribunal