

Summary Report

Police investigation into complaints about John Banks' return of expenses and donations at the conclusion of the 2010 Auckland Super City Mayoral election

INTRODUCTION

1. On 27 April 2012 a formal complaint was made to Police by the Auckland City Council Electoral Officer, who advised they had in turn received a complaint from Hon Trevor Mallard alleging that Hon John Banks had provided a false return in respect of donations, in breach of section 134 of the Local Electoral Act 2001. Auckland Police also received a complaint from two other individuals, Penny Bright and Lisa Prager, alleging the same offence. In essence the complaint was that Mr Banks had failed to properly declare details of donations as required and therefore committed a criminal offence.
2. Police conducted an investigation into the matter and decided not to prosecute Mr Banks. This decision was announced publicly on 26 July 2012.
3. A private individual, Graham McCready, initiated a prosecution against Mr Banks. This prosecution was subsequently taken over by Crown Law. On 5 June 2014, in the High Court, Mr Banks was found guilty of one count of transmitting a return of electoral expenses, knowing it to be false in one or more material particular.¹ Mr Banks was sentenced on 1 August 2014 to two months' community detention and 100 hours' community service.

¹ An offence under section 134(1) of the Local Electoral Act 2001 which was in force at the time.

4. Mr Banks appealed the conviction and, on 28 November 2014, the Court of Appeal set aside the conviction and ordered a retrial. On 19 May 2015 the Court of Appeal cancelled the retrial order and directed that a verdict of acquittal be entered in respect of Mr Banks.
5. The Independent Police Conduct Authority (the Authority) received five complaints from individuals about the Police investigation and decision not to prosecute. None of these individuals were personally involved in the matter. One complaint was received in October 2013, one in January 2014 and the three others after the High Court decision in June 2014. The Authority notified Police of the complaints. Following the first High Court trial the Authority decided to conduct an independent investigation.
6. The investigation looked at the adequacy of the Police investigation and decision not to prosecute based on the information known to Police at that time in July 2012. This report sets out the results of that investigation and the Authority's findings. The Authority's investigation was concluded in April 2015. However, the report was not able to be publicly released until all court proceedings had been concluded.

BACKGROUND

Summary of events

7. In 2010 Mr Banks was Mayor of Auckland City. He ran for election in the 2010 Super City Mayoral campaign. He was one of over 20 candidates. The election was held on 9 October 2010 and won by Mr Len Brown.
8. In accordance with the requirements of the Local Electoral Act 2001² all candidates had to file a return of expenses and donations ('the return') within 55 days after the day on which the successful candidate at the election was declared to be elected. At the first High Court trial it was found that the return was required to be filed by 10 December 2010. Mr Banks signed his return of expenses and donations on 9 December 2010. It was filed on the same day.
9. In relation to donations the return form sets out the requirements as follows:

"Here set out the name and description of every person or body of persons from whom or which any donation (whether of money or of the equivalent of money or of goods or services or a combination of those things) of a sum or value of more than \$1000 (such amount being inclusive of any goods and services tax) and of a series of donations made by or on behalf of any one person that aggregate more than \$1000 (inclusive of any goods and services tax) was received by the candidate or by any other person on the candidate's behalf for use by or on behalf of the candidate in the campaign for his or her election. The amount of each donation received is to be set out separately. If a donation of a sum of more than \$1000 was received from an anonymous person, the amount of the donation must be stated and the fact that the person who made the donation is anonymous must also be stated.

² Section 109

‘Anonymous’ means a donation made in such a way that the candidate does not know who made the donation.”

10. As outlined in paragraph 1, Auckland Police received two complaints alleging that Mr Banks had breached section 134 of the Local Electoral Act 2001.
11. There were four specific donations which were the subject of the complaints to Police. The complaints acknowledged that the donations had been declared on the return but alleged that the donations had been recorded as being anonymous when the details of the person/entity making the donations were known to Mr Banks, and therefore these details should have been recorded on the return. The following donations (all of which were recorded as anonymous on the return) were the subject of the Police investigation:
 - 11.1 **Donation 1** – made in May 2010 in the sum of \$15,000 from SkyCity.
 - 11.2 **Donations 2 & 3** – made in June 2010, each in the sum of \$25,000 from Megastuff Ltd, a company owned by Mr Kim Dotcom.
 - 11.3 **Donation 4** – made in September 2010 in the form of payment for radio advertising. This was recorded on the return both as an expense and donation in the sum of \$15690.

Police investigation

12. Following receipt of the complaints Police commenced an investigation. Terms of reference for the investigation were compiled on 1 May 2012. Detective Inspector Benefield was the officer in charge of the investigation which was overseen by Detective Superintendent Read. Detective Inspector Benefield headed a team of five detectives who undertook the investigation. This was conducted during May and June 2012, with the final report being compiled on 3 July 2012.
13. The purpose of the investigation was to establish whether Mr Banks was criminally liable for alleged irregularities in respect of electoral funding donations. This involved Police conducting various enquiries in relation to the legal responsibilities and requirements of election candidates, analysing the way in which Mr Banks’ election campaign was run and donations obtained, assessing bank account and election team records for Mr Banks’ election campaign (called ‘Team Banksie’), and conducting interviews of all relevant individuals.

Campaign processes

14. Fundraising was a vital component of the election campaign. Mr Banks’ mayoral campaign had a management team of five volunteers and one paid individual. One, Ms Michelle Boag, had the responsibility of fundraising. Mr Lance Hutchison was the treasurer for the campaign and dealt with all the campaign finances. He administered the bank accounts and kept all the records. Mr Hutchison completed the return from the records he kept throughout the campaign, with the assistance of Ms Boag.
15. Police established during their investigation that Mr Banks distanced himself from the receiving and recording of donations to his campaign. He did not want to know any details from his staff, simply wanting to be assured that they had enough money to continue with the campaign and

that all was in order. He did not access the 'Team Banksie' bank accounts. He abdicated all responsibility for the recording of donations and expenses to the treasurer, Mr Hutchison. This had been his standard approach over a number of election campaigns. Mr Hutchison (a bank manager) was the treasurer in four of Mr Banks' election campaigns since 2001.

16. Mr Hutchison and Ms Boag confirmed to Police that it was their decision whether to include details of the donor on the return or whether to record a donation as anonymous. Mr Hutchison outlined that, even if he and Ms Boag knew the identity of a donor, that may not have been known to Mr Banks and accordingly it could be recorded as being anonymous.
17. Mr Hutchison outlined to Police what his understanding of 'anonymous' was, namely that if a person had donated money but they wanted to stay anonymous then it could remain anonymous. Mr Hutchison acknowledged that he had never read the Local Electoral Act 2001 (see paragraph 23 below) but had read the section on the return relating to donations (see paragraph 9). He was comfortable that the form had been completed accurately and thoroughly in accordance with the requirements set out.
18. While Mr Banks ultimately signed the return he did not check the information provided at that time, simply asking Mr Hutchison whether he could rely on him to make sure it was true and correct. Mr Hutchison assured Mr Banks he could.

Police enquiries re donations

19. The Police investigation established the following in relation to each of the donations considered:
 - 19.1 **Donation 1** – An envelope was personally handed to Mr Banks by SkyCity CEO Nigel Morrison at a meeting on 24 May 2010. Mr Banks could not recall this meeting. The envelope contained a cheque for \$15,000. The cheque was deposited on 25 May 2010 by Mr Hutchison who made a note on the bank statement - '*Deposit slip – wants kept anon – check??*' Mr Hutchison stated he telephoned the legal department of SkyCity to acknowledge the donation and check if they wanted a receipt. During that call he asked if they wanted the donation to be anonymous and was advised they did. However this was not corroborated by any interviews Police conducted with SkyCity staff.
 - 19.2 **Donations 2 & 3** – Mr Banks, and his wife, attended a lunch meeting at Mr Dotcom's house in early June 2010 at which Mr Banks and Mr Dotcom discussed a donation. There were different accounts of the date this meeting occurred, who was present at the lunch and who was party to the discussion about a donation. In his statement to Police Mr Banks explained, in detail, the contents of his discussion with Mr Dotcom in respect of donations. Mr Banks accepted that he asked for support and Mr Dotcom offered to make a donation.

On 14 June 2010 two cheques in the name of Megastuff Ltd, each in the sum of \$25,000, were deposited in the Team Banksie bank account via the Albany Branch drop-box. Mr Hutchison did not know about Mr Banks' visit or anything about Mr Dotcom at the time.

The bank statement in relation to these two amounts had no reference to the payee. Mr Hutchison made a note on the bank statement - 'Anonymous.'

Mr Dotcom, Mrs Dotcom and Mr Wayne Tempero (security consultant for Mr Dotcom) all stated that Mr Banks subsequently personally confirmed receipt of the donations during telephone calls. Mr Banks disputes this.

Mr Gregory Towers, lawyer for Mr Dotcom, spoke to Mr Banks on 8 February 2012 and made a contemporaneous file note of the telephone conversation. At this time Mr Dotcom was on remand and had asked Mr Towers to seek assistance from Mr Banks with getting additional mattress support to relieve the aggravation of his back injuries. In his statement to Police dated 21 May 2012 Mr Towers records that Mr Banks said to him:

“as much as wishes to publicly support Kim that may backfire on Kim if it becomes known about the election support.”

Mr Banks was interviewed by Police on 15 June 2012 but was not asked about the details of this conversation with Mr Towers.

19.3 Donation 4 – sometime in September 2010, near the end of the campaign, Mr Banks phoned Mr X seeking support. Mr X agreed to assist by paying for a series of radio adverts up to the value of \$15,000. This was to be a personal donation, not on behalf of his company (of which he was the managing director and deputy chairman). Mr X wanted the donation to be anonymous. Arrangements were made via the Radio Bureau and a campaign running from 6-8 October 2010 was booked and billed to Mr X's company. The campaign cost was \$11,478.14 inclusive of GST (charged at the company's discounted contract rate). Mr X subsequently refunded the amount to the company. Mr Hutchison was unaware of the specific details but was advised by one of the team that there had been a free advertising campaign organised which was at a cost of \$15,690. Accordingly he entered the amount of \$15,690 as an expense and an anonymous donation on the return. He later discovered that this amount was actually incorrect and a lesser amount had been received.

Police conclusions

20. The investigation concluded that the return submitted by Mr Banks contained false particulars as follows:

- The details of the donors (SkyCity, Mr Dotcom and Mr X) were known to Mr Banks and should have been included on the return.
- The amount recorded for the radio advertising campaign expense and donation was wrong. It should have been recorded as \$11,478.14.

21. This breached section 134(2) of the Local Electoral Act 2001. However it was not open to charge Mr Banks under this section as the time limit of six months had expired.

22. In relation to the more serious offence under section 134(1) of the Local Electoral Act 2001 Police focused on Mr Banks' knowledge of the specific information in the return at the time it was signed i.e. on 9 December 2010. Police concluded that they could not prove, beyond reasonable doubt, that at the time Mr Banks signed the return he did so knowing that the particular donations were falsely recorded as anonymous. This was for the following reasons:

- Mr Banks had abdicated responsibility for the data in regards to donations and expenses to Mr Hutchison and Ms Boag, and throughout the campaign had made a conscious effort to distance himself from such information.
- Mr Banks trusted Mr Hutchison to complete the return correctly and there was an established practice from previous campaigns of that occurring.
- Mr Banks did not read the return before signing it and so was unaware of the specific details of how the donations were recorded.
- There was no evidence of Mr Banks instructing or directing Mr Hutchison on how to complete the return and so Mr Banks could not have known how Mr Hutchison would record such donations in the document.

RELEVANT LAW

23. Section 109 of the Local Electoral Act 2001 relates to the return of electoral expenses and states:

(1) Within 55 days after the day on which the successful candidates at any election are declared to be elected, every candidate at the election must transmit to the electoral officer a return setting out—

(a) the candidate's electoral expenses; and

(b) the name and address of each person who made an electoral donation to the candidate and the amount of each electoral donation; and

(c) if an electoral donation of money or of the equivalent of money is made to the candidate anonymously and the amount of that donation exceeds \$1,000,—

(i) the amount of that donation; and

(ii) the fact that it has been received anonymously.

(2) Every return under subsection (1) must be in the form prescribed in Schedule 2 or to similar effect.

(3) If the candidate is outside New Zealand on the day on which the successful candidates are declared to be elected, the return must be transmitted by the candidate to the electoral officer within 21 days after the date of the candidate's return to New Zealand.

(4) It is the duty of every electoral officer to ensure that this section is complied with.

24. Section 5(1) of the Local Electoral Act 2001 defines ‘anonymous’ in the following terms:

anonymous, in relation to an electoral donation (as defined in section 104), means a donation that is made in such a way that the candidate concerned does not know who made the donation.

25. Section 104 of the Local Electoral Act 2001 defines an electoral donation:

electoral donation, in relation to a candidate at an election,—

(a) means a donation (whether of money or the equivalent of money or of goods or services or of a combination of those things) of a sum or value of more than \$1,000 (such amount being inclusive of any goods and services tax and of a series of donations made by or on behalf of any one person that aggregate more than \$1,000) made to the candidate, or to any person on the candidate’s behalf, for use by or on behalf of the candidate in the campaign for his or her election; and

(b) includes, if goods or services are provided to the candidate, or to any person on the candidate’s behalf, under a contract at 90% or less of their reasonable market value, the amount of the difference between the contractual price of the goods or services and the reasonable market value of those goods or services; but

(c) does not include the labour of any person that is provided to the candidate free of charge by that person

26. Section 134 of the Local Electoral Act 2001 was in force at the time of the election³. It concerned a false return:

(1) Every candidate commits an offence who transmits a return of electoral expenses knowing that it is false in any material particular, and is liable on conviction on indictment to imprisonment for a term not exceeding 2 years or to a fine not exceeding \$10,000.

(2) Every candidate commits an offence and is liable on summary conviction to a fine not exceeding \$5,000 who transmits a return of electoral expenses that is false in any material particular unless the candidate proves—

(a) that he or she had no intention to mis-state or conceal the facts; and

(b) that he or she took all reasonable steps to ensure that the information was accurate.

³ This section was repealed on 29 June 2013 by section 40 Local Electoral Amendment Act 2013

Was the Police investigation thorough and robust?

27. Upon receiving the complaints a team was established to conduct the criminal investigation. The team of detectives was based in Auckland. The investigation was overseen by Detective Superintendent Read who was based in Christchurch. All personnel confirmed they had no conflict of interest. The investigation conducted by the Police was comprehensive and thorough. In the Authority's view, all documentation that was relevant to the inquiry was obtained, and all relevant witnesses who could be identified were interviewed.
28. The Police investigation looked firstly at the circumstances of each donation and whether Mr Banks had knowledge of the donations at the time they were made. In relation to the donations the position was as follows:
 - 28.1 **Donation 1** - Mr Banks could not recollect attending a meeting with SkyCity or receiving an envelope containing a cheque. There was no evidence that he discussed this donation with Mr Hutchison. It was Mr Hutchison who decided to enter this donation as anonymous on the return, following a conversation he says he had with SkyCity's legal department.
 - 28.2 **Donations 2 & 3** – Mr Banks accepted he had discussed donations with Mr Dotcom at a lunch meeting in early June 2010. Police established that the two cheques had not been handed to Mr Banks at that meeting but rather deposited into the Albany Branch's drop box. As such Police did not need to enquire further into the details of the lunch meeting, including identifying and interviewing the American businessmen who were alleged to have been at the lunch. Their focus was on establishing whether Mr Banks had knowledge that the donations had in fact been made. The evidence on this was conflicting and disputed as outlined at paragraph 19.2 above.
 - 28.3 **Donation 4** – Mr Banks outlined his conversation with Mr X in September 2010 seeking his support. Mr X agreed to assist. A member of Mr Banks' team then made the specific arrangements and Mr Banks states he did not have knowledge of the amount involved.
29. Police then assessed Mr Banks' knowledge of the details on the return at the time that he signed it on 9 December 2010. This was in the context of the way that the handling and recording of donations had been dealt with during the campaign and the fact that Mr Hutchison had completed the return (as detailed in paragraphs 14 to 18 above).
30. Some of the complaints to the Authority questioned, in general terms, whether there was interference or pressure on the investigation team from the Police Executive or politically. The Authority is satisfied, from its inquiry and interviews, that there was no such interference or pressure.
31. Police conducted the investigation in accordance with policy and good practice. There was a detailed investigation plan which was regularly updated. Appropriate enquiries were made in a timely manner.

FINDINGS

The Police investigation was thorough and robust.

There was no interference or pressure on the investigation team from the Police Executive or politically.

Was the decision by Police not to prosecute Mr Banks reasonable?

32. As outlined in paragraph 20 above the Police investigation concluded that the return contained false particulars. As the time limit had expired for a charge under section 134(2) of the Local Electoral Act 2001, Police had to determine whether they could prove, beyond reasonable doubt, that Mr Banks knew at the time he signed the return on 9 December 2010 that these false details were recorded. If Police believed there was evidential sufficiency they would then consider if it was in the public interest to charge Mr Banks under section 134(1) of the Local Electoral Act 2001.
33. Police concluded there was not sufficient evidence for the reasons outlined in paragraph 22 above. Accordingly they did not go on to consider the public interest test.
34. When assessing Mr Banks' knowledge at the time he signed the return Police took a narrow view of what was necessary, namely that they needed to prove that Mr Banks had provided direction to Mr Hutchison as to how the donations should be recorded i.e. anonymously, and also that he actually knew the contents of the return.
35. The Authority's investigation revealed that Police did not take a wider view of the evidence and in particular did not fully analyse the evidence provided by Mr Towers of his telephone conversation with Mr Banks on 8 December 2012. Mr Banks was not asked in interview about the details that Mr Towers had provided. The Police assessment of Mr Towers' evidence was that it added no weight to the overall circumstances given that Mr Hutchison completed the return and there was no evidence to suggest that Mr Hutchison knew the identity of the donor (being Mr Dotcom) when he filled out the return.
36. With the benefit of hindsight we think it would have been open to Police to make the following analysis of the evidence they obtained during their investigation in relation to Donations 2 & 3:
 - Mr Banks discussed a donation from Mr Dotcom at a lunch meeting in early June 2010 (which Mr Banks accepted during the course of his Police interview).
 - It could be inferred from the file note of Mr Towers that Mr Banks intended the donation to be anonymous. This is because the words *"as much as wishes to publicly support Kim that may backfire on Kim if it becomes known about the election support"* could be interpreted as meaning:
 - (a) that Mr Banks knew about the donation because that is the only conceivable electoral support he could be referring to; and

(b) that Mr Banks intended it to be anonymous as if it had been public there is no way it could possibly ‘backfire’.

- Mr Hutchison could never have been in a position to fill out the return with the correct details because he didn’t have the necessary information. Mr Banks had not told any of the campaign staff about his meeting with Mr Dotcom and his discussion about a donation.
- Therefore even without reading the return Mr Banks would have known that the details of the donor could not have been recorded, and as such the return would be false.

37. Although Police could have analysed the evidence in the manner set out in paragraph 36 above, we do not think that they can be criticised for failing to do so. The investigation involved consideration of conflicting evidence on a number of points. Police needed to weigh up all of the evidence and decide whether it was enough to substantiate a prosecution.

38. The approach Police took (set out in paragraph 22 above) was reasonable. While they considered Mr Banks was negligent, they also had to be satisfied that he had the requisite knowledge of the contents of the return at the time he signed it. Their decision that the evidence did not reach that threshold was open to them, particularly given Mr Banks had lost the election and had no particular motive for non-disclosure.

39. It has been suggested that Police should have obtained an independent opinion from a Crown Solicitor, but it is not normal practice for Police to do so unless they are dealing with a particularly complex or evidentially difficult matter that might proceed to a jury trial. The alleged offence did not meet these criteria. The fact that Mr Banks was a high profile suspect did not mean that a different approach was required or justified. It was reasonable for Police to reach their own judgment on evidential sufficiency.

FINDING

Police’s decision not to prosecute Mr Banks was reasonable.

CONCLUSIONS

40. The Authority received five complaints about the adequacy and integrity of the Police investigation into alleged offending by Mr Banks in connection with his return of expenses and donations following the 2010 Auckland Super City Mayoral election.
41. The Authority's investigation focussed on the Police investigation conducted between May and July 2012 and their decision not to prosecute Mr Banks based on the evidence obtained from their investigation.
42. The Authority's investigation has concluded:
 - 42.1 The Police investigation was thorough and robust.
 - 42.2 There was no interference or pressure on the investigation team from the Police Executive or politically.
 - 42.3 Police's decision not to prosecute Mr Banks was reasonable.



Judge Sir David Carruthers

Chair
Independent Police Conduct Authority

28 May 2015

ABOUT THE AUTHORITY

Who is the Independent Police Conduct Authority?

The Independent Police Conduct Authority is an independent body set up by Parliament to provide civilian oversight of Police conduct.

It is not part of the Police – the law requires it to be fully independent. The Authority is overseen by a Board, which is chaired by Judge Sir David J. Carruthers.

Being independent means that the Authority makes its own findings based on the facts and the law. It does not answer to the Police, the Government or anyone else over those findings. In this way, its independence is similar to that of a Court.

The Authority employs highly experienced staff who have worked in a range of law enforcement and related roles in New Zealand and overseas.

WHAT ARE THE AUTHORITY'S FUNCTIONS?

Under the Independent Police Conduct Authority Act 1988, the Authority:

- receives complaints alleging misconduct or neglect of duty by Police, or complaints about Police practices, policies and procedures affecting the complainant in a personal capacity;
- investigates, where there are reasonable grounds in the public interest, incidents in which Police actions have caused or appear to have caused death or serious bodily harm.

On completion of an investigation, the Authority must form an opinion about the Police conduct, policy, practice or procedure which was the subject of the complaint. The Authority may make recommendations to the Commissioner.



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