

**Report of:** Monitoring Officer

**Date:** 8 March 2018

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**NOT FOR PUBLICATION**

**This item must be taken in private session as it is exempt information as defined in Paragraph 16 of Part 4 of Schedule 12A to the Local Government Act 1972.**

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**PEMBROKE ST MARY NORTH ELECTORAL DIVISION -  
SECTIONS 85 AND 86 OF THE LOCAL GOVERNMENT  
ACT 1972**

Section 86 of the Local Government Act 1972 provides that; “where a member of a local authority ceases to be a member of the authority by reason of failure to attend meetings of the authority [in accordance with Section 85(1)] the authority shall...forthwith declare his office to be vacant”. The relevant Sections are enclosed at **Appendix 2**

The relevant wording in Section 85(1) refers to failure to attend “any meeting of the authority” during a six month period.

The Local Authorities (Executive Arrangements) (Functions and Responsibilities) (Wales) Regulations 2007, Schedule 1–Council functions. This includes the Section 86 “duty to declare vacancy in office in certain cases”.

By virtue of Section 101(1) of the Local Government Act 1972 and the Council’s Constitution, the local authority has delegated this function to the Chief Executive.

The Chief Executive cannot lawfully exercise his delegated power to declare a vacancy following receipt of clear in-house and Leading Counsel’s independent, professional legal advice which is enclosed in **Appendix 1**. Leading Counsel has provided initial and further advice in the matter which is enclosed at **Appendix 3** and **Appendix 4** respectively.

Albeit Section 101(4) of the Act states that such delegation by the authority does not prevent the authority from [itself] exercising those functions, the authority is likewise in the same position as the Chief Executive in that it cannot lawfully declare a vacancy in these circumstances.

Section 85 of the Act is purely a matter of fact and law, and no extraneous matters can be taken into account.

**RECOMMENDATION:**

For Council to note the clear legal judgment which has been reached on the facts and to note that Section 86 of the Local Government Act 1972 cannot be lawfully invoked in these circumstances.

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**Background Documents:**

Strictly Confidential and Exempt Information "Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings".

## APPENDIX 1

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### NOT FOR PUBLICATION

**This item must be taken in private session as it is exempt information as defined in Paragraph 16 of Part 4 of Schedule 12A to the Local Government Act 1972.**

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This is a narrow, self-contained legal issue which requires careful consideration of the law contained in Section 85 of the Local Government Act 1972. Sections 85 and 86 of the Act are enclosed at **APPENDIX 2**.

Independent legal advice has been provided by the Monitoring Officer and by Leading Counsel, Mr James Goudie, QC. Mr Goudie's initial and further advice are enclosed at **APPENDIX 3** and **APPENDIX 4** respectively

The relevant wording to be considered is contained in Sub-section 85(1) of the Act as follows:- "...if a member of a local authority fails throughout a period of six consecutive months from the date of his last attendance to attend any meeting of the authority, he shall...cease to be a member of the authority."

"Meeting" is not defined for the purposes of this Sub-section and there is no case-law which specifically addresses the point.

One reading of Section 85(1) would mean that "any meeting of the authority" would have to be an official rather than informal meeting of the authority which fully complies with the Schedule 12 characteristics, namely three days' notice, being open to the public and production of formal minutes.

The legal advice must however consider how the courts would interpret the words; "any meeting of the authority" in the event of challenge, whether that be from a prospective candidate, a political party or a Councillor facing disqualification.

There is case-law which, although not directly on the point, indicates that the Courts would apply a wide interpretation to the word "meetings".

In the case of *R v Eden District Council ex parte Moffat* (1988), it had been maintained that any gathering of members dealing with Council business must be either a committee or a sub-committee and the public access and notice provisions must therefore apply in all cases. However, the Court of Appeal found that the concept of an informal working party meeting was acceptable in law as a part of the Council structure.

Also at first instance, in the case of *R (on the application of Richardson and another) v North Yorkshire County Council and others*, Judge Richards emphasised the wide application of Section 85(1) in the following terms:—"Attendance by a councillor at *any* meeting of a committee of a council, whether or not he is a member of that committee, counts towards fulfilment of the minimum attendance requirement imposed on members by Section 85 of the Local Government Act 1972".

Although not an authoritative exposition of the law, Knowles on Local Authority meetings: 'a Manual of Law and Practice', Sixth Edition states as follows in relation to Section 85:- "It does not matter how informal the meeting is, so long as attendance is recorded". "Attendance is generously defined...it is likely that the court would probably tend toward favouring preservation of a councillor's qualification rather than otherwise: certainly if the councillor was entitled to an attendance allowance on the particular occasion concerned, it would be difficult to argue that their attendance did not count".

In the Eighth Edition it states:-"Failure to attend a committee is extended to failure by a member of the executive to attend an executive (cabinet) meeting. Continuing the vein of generous application, for these purposes exercising delegated authority as an individual member is counted as attendance."

Another Welsh local authority has adopted an internal convention to interpret whether a councillor has satisfied the "6 month rule" and attendance at a working group, task and finish group or a member workshop (whether or not the public is entitled to attend some or all of the meeting) was deemed sufficient to satisfy the attendance requirements.

In the explanatory report in relation to that convention, it was stated:- "The 6 month rule was clearly established long before the advent of executive decision making and the Cabinet/Scrutiny process. It reflects a

time when committees and sub-committees undertook much more of the work for the Council. Since the creation of Cabinet style decision making it is fair to say that the work undertaken by non-Cabinet members within their own wards has taken on greater importance. However the legislation has not kept pace and so does not recognise such ward work as a means of complying with the 6 month rule. Councillors might therefore wish to give a broad interpretation to the 6 month rule to allow more scope for Councillors to satisfy their obligations”.

It is clear that a Councillor’s role is conducted in a very different way to the pre Local Government Act 2000 position. For instance at the Corporate Governance Committee on 2<sup>nd</sup> February 2018 it was argued strongly that Councillors were under no duty to serve on Overview and Scrutiny Committees and could scrutinise outside the Committee system.

On balance therefore, the clear professional judgment of the Monitoring Officer is that a court would find that attendance at a number of seminars during a six month period would satisfy the requirements of section 85 so that Section 86 of the Local Government Act 1972 would not be engaged. In particular, the Corporate and Financial Planning Seminar was formally included as part of the timetable for approval of the 2018/19 Budget reported to Council. This view also takes into account the fact that the courts may be reluctant to interfere in democratic process, particularly where such interference may undermine the will of the electorate as expressed as recently as May 2017.

More fundamentally, in relation to determination of this legal issue, information has come to light, the facts of which further supports the legal advice and indeed places the matter beyond all reasonable doubt. Section 85(2) of the Act states the following; “attendance as a member at a meeting of...any other body...who were appointed to advise the authority on any matter relating to the discharge of their functions...shall be deemed for the purposes of subsection (1) above to be attendance at a meeting of the authority”.

The Councillor in question attended such an event on 22<sup>nd</sup> November 2017. This was an LUC stakeholder engagement event entitled; “Green Infrastructure in Pembrokeshire”. The Council and PCNPA had commissioned LUC, Environmental Planning, Design and Management Consultants, “to undertake a green infrastructure study to identify,

protect and enhance green infrastructure opportunities for the main towns within Pembrokeshire.”

Attendance at this particular meeting means that the Councillor in question has fully complied with Section 85(2).

In summary, Pembrokeshire County Council finds itself in a unique and invidious position. It has been required to balance the democratic rights and the will of the electorate as expressed in May 2017 with its paramount safeguarding role which has been carefully managed in a challenging environment, whilst also seeking to preserve the Council’s reputation.

Nevertheless, a professional legal judgment has to be reached based solely on the facts of the case. The clear legal judgment is that the Section 86 function cannot be invoked.

Claire N Jones

Monitoring Officer  
Pembrokeshire County Council

28<sup>th</sup> February 2018



## APPENDIX 2

### **85. Vacation of office by failure to attend meetings.**

(1) Subject to subsections (2) and (3) below, if a member of a local authority fails throughout a period of six consecutive months from the date of his last attendance to attend any meeting of the authority, he shall, unless the failure was due to some reason approved by the authority before the expiry of that period, cease to be a member of the authority.

(2) Attendance as a member at a meeting of any committee or sub-committee of the authority, or at a meeting of any joint committee, joint board or other body by whom for the time being any of the functions of the authority are being discharged, or who were appointed to advise the authority on any matter relating to the discharge of their functions, and attendance as representative of the authority at a meeting of any body of persons, shall be deemed for the purposes of subsection (1) above to be attendance at a meeting of the authority.

(2A) Subject to subsections (2B) and (3), if a member of a local authority which are operating executive arrangements, who is also a member of the executive of that local authority, fails throughout a period of six consecutive months from the date of his last attendance to attend any meeting of the executive, he shall, unless the failure was due to some reason approved by the local authority before the expiry of that period, cease to be a member of the local authority.

(2B) For the purposes of this section—

(a) the discharge by a member, acting alone, of any function which is the responsibility of the executive; and

(b) in respect of a mayor and cabinet executive or leader and cabinet executive, attendance as a member at a meeting of a committee of the executive,

shall each be deemed to be attendance at a meeting of the executive.

(3) A member of any branch of Her Majesty's naval, military or air forces when employed during war or any emergency on any naval, military or air force service, and a person whose employment in the service of Her Majesty in connection with war or any emergency is such as, in the

opinion of the Secretary of State, to entitle him to relief from disqualification on account of absence, shall not cease to be a member of a local authority by reason only of a failure to attend meetings of the local authority or of a failure to attend meetings of the executive if the failure is due to that employment.

(3A) Any period during which a member of a local authority is suspended or partially suspended under section 66, 66A, 73, 78, 78A or 79 of the Local Government Act 2000 shall be disregarded for the purpose of calculating the period of six consecutive months under subsection (1) or (2A) above (and, accordingly, a period during which a member fails to attend meetings of the authority or, as the case may be, meetings of the executive that falls immediately before, and another such period that falls immediately after, a period of suspension or partial suspension shall be treated as consecutive).

(4) In this section “local authority” includes a joint authority, an economic prosperity board, a combined authority and a joint waste authority.

#### **86. Declaration by local authority of vacancy in office in certain cases.**

(1) Where a member of a local authority—

(a) ceases to be qualified to be a member of the authority; or

(b) becomes disqualified for being a member of the authority otherwise than under the Audit Commission Act 1998 or section 66A, 78A or 79 of the Local Government Act 2000 or by virtue of, a conviction or a breach of any provision of Part II of the Representation of the People Act 1983; or

(c) ceases to be a member of the authority by reason of failure to attend meetings of the authority;

the authority shall, except in any case in which a declaration has been made by the High Court under this Part of this Act, forthwith declare his office to be vacant.

(2) In this section “local authority” includes a joint authority, an economic prosperity board, a combined authority and a joint waste authority . . .



**STRICTLY CONFIDENTIAL**

**PEMBROKESHIRE COUNTY COUNCIL  
("PCC")**

**"Councillor X"**

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**OPINION**

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INTRODUCTION

1. I am asked to advise PCC with respect to one of its elected Members, Councillor X. He has been charged with serious sexual offences relating to children. His trial has not yet taken place.
2. He last attended a Full Council Meeting on 14 August 2017. He has not attended a Committee or Sub-Committee Meeting since then.
3. All he has attended are four Seminars, Equality and Diversity Training, and Whistleblowing, both on 17 November 2017, Highways and Construction – Expenditure and scheme delivery, on 4 December 2017, and Corporate and Financial Planning on 2 February 2018.
4. Six months from 14 August 2017 is at the point of expiring. The question is whether Councillor X automatically ceases to be a Member.

STATUTORY FRAMEWORK

5. Part V of the Local Government Act 1972 (“LGA 1972”) contains general provisions as to members and proceedings of local authorities. Within Part V, Sections 83-91 inclusive relate to acceptance, resignation and vacation of office, and casual vacancies; and Sections 99 and 100 relate to meetings and proceedings.

6. Section 85 relates to vacation of office by failure to attend meetings. Section 85(1) provides (emphasis added):-

“(1) Subject to subsections (2) and (3) below, if a member of a local authority fails throughout a period of six consecutive months from the date of his last attendance to attend any meeting of the authority, he shall, unless the failure was due to some reason approved by the authority before the expiry of that period, cease to be a member of the authority.”

7. There has been no such approval in the case of Councillor X.

8. Section 85(2) provides (emphasis added):-

“(2) Attendance as a member at a meeting of any committee or sub-committee of the authority, or at a meeting of any joint committee, joint board or other body by whom for the time being any of the functions of the authority are being discharged, or who were appointed to advise the authority on any matter relating to the discharge of their functions, and attendance as representative of the authority at a meeting of any body of persons, shall be deemed for the purposes of subsection (1) above to be attendance at a meeting of the authority.”

9. None of the Seminars that Councillor X has attended during the six month period appear to come within any of these categories.

10. Section 85(3) is not material for present purposes. Nor are Sections 85(3A)-(3D) inclusive material for present purposes, save that a distinction does seem to be drawn between meetings of the local authority and of the executive, so that not all meetings are meetings “of” the authority.

11. Section 86(1) provides (emphasis added):-

“(1) Where a member of a local authority –

(c) ceases to be a member of the authority by reason of failure to attend meetings of the authority;

the authority shall, except in any case in which a declaration has been made by the High Court under this Part of this Act, forthwith declare his office to be vacant.”

12. Section 99 relates to meetings and proceedings of local authorities. It states that the provisions of Schedule 12 shall have effect with respect to the meetings and proceedings of local authorities, meaning generally of Full Council. Paragraph 44 provides however that paragraphs 39-43 shall broadly apply in relation to a committee or sub-committee as they apply in relation to a local authority. Again, there is the express extension to committees and sub-committees, but not beyond.

13. “Meetings” are not defined.

#### ADVICE SOUGHT

14. I am asked whether Council Seminars are capable of constituting “meetings” for the purposes of the Sections 85/86 attendance requirement.

ADVICE

15. The starting point appears to be that a “meeting of the authority” is a meeting of Full Council. This is then extended in certain respects, notably to committees and sub-committees, attendance at which is “deemed” for the purposes of Section 85(1) of LGA 1972 to be attendance at a meeting of the authority.

16. Section 85(2) may be regarded as a comprehensive code of the “deemed” meetings of the authority that are not meetings of the authority itself.

17. On the other hand, Section 85(2) is not expressed to be exhaustive.

18. Moreover, an authority can have, pursuant to Section 111(1) of LGA 1972, meetings of an authority body that is not a committee or sub-committee. An example is a Working Party, as in Moffatt v Eden District Council, 8 November 1988, unreported, Court of Appeal.

19. Further, the Seminars have a degree of formality, albeit I believe outside PCC’s statutory Constitution. Attendance is recorded. They are, at any rate for some purposes, it would seem, part of, and/or an aspect of, PCC’s structure.

20. I consider that the Seminars are “meetings”. They are indeed PCC meetings, not something extraneous.

21. The sole question to my mind is whether they are excluded from being meetings “of” PCC in the context of Sections 85/86 and LGA 1972 as a whole.

22. I find it a finely balanced question to which there is no authoritative answer. On balance, albeit the contrary is arguable, my view is that the Seminars do satisfy the relevant attendance requirements so as not to invoke Sections 85 and 86 of LGA 1972.

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**JAMES GOUDIE QC**  
14 February 2018



**STRICTLY CONFIDENTIAL****PEMBROKESHIRE COUNTY COUNCIL  
("PCC")****COUNCILLOR "X"**

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**FURTHER OPINION**

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INTRODUCTION

1. This is further to my Opinion dated 14 February 2018 (my previous Opinion"). I adopt the same abbreviations. I advise further for two reasons:-

- (1) I now have a fuller understanding of the four "Seminars" referred to in my earlier Opinion; and
- (2) Importantly, it has emerged that Councillor X attended another event ("the Other Event") during the 6 month period.

THE FRAMEWORK

2. In my previous Opinion I addressed Section 85(1) and (2) of LGA 1972. This has effected that a member remains member if he or she has within the past 6 months attended any qualifying meeting. This is a meeting in any of the following categories:-

- (1) Full Council;
  - (2) A Council Committee;
  - (3) A Council Sub-Committee;
  - (4) A Joint Committee;
  - (5) A Joint Board;
  - (6) An “other body” by whom functions of the authority are being discharged;
  - (7) A “body” appointed to “advise” the authority on “any” matter relating to the discharge of their functions;
  - (8) Attendance as a “representative of the authority” at a meeting of “any body of persons”; and
  - (9) On the basis that Section 85(2) is not expressed to be exhaustive, “any meeting of the authority” within Section 85(1).
3. These provisions apply both to the Seminars and to the Other Event.

4. I previously advised that “Meetings” are not defined. Nor are “other body”, “body of persons” or “representative”. There is no requirement for the “body” to be a corporate body.

#### SEMINARS

5. My conclusion in my previous Opinion was that the Seminars do satisfy the relevant requirements so as not to invoke Sections 85 and 86 of LGA 1972. That, however, was expressed at that stage as an “on balance” view.

6. What I had not then appreciated, but do appreciate now, is that the so-called Seminars are also, and more accurately, described as “Member Workshops” and inform PCC’s debates and decision making on the budget etc. That reinforces my conclusion. It is no longer a conclusion merely on balance even as regards only the Seminars/Member Workshops.

7. In particular, as regards the most recent of the Seminars, on 2 February 2018, the Report to Full Council on 14 December 2017 on the draft Council Budget for 2018-19 and Medium Term Financial Plan 2018-19 to 2021-22 states (paragraph 1.9) that the Council’s Budget Strategy not only for 2018-19 but also beyond was approved by Cabinet on 6 November 2017, and that, as

approved by Cabinet, on 12 June 2017, the Timetable for approval of the 2018-19 Budget, included “02 February 2018: Member Workshop: Final Local Government Settlement: Cost Reductions/Efficiencies/Service Transformation”. This satisfies the relevant requirements so as not to trigger Sections 85 and 86 of LGA 1972 until 1 August 2018.

#### THE OTHER EVENT

8. The Other Event took place in PCC’s Committee Rooms on 22 November 2017. Councillor X’s attendance was formally recorded. The Other Event was about green infrastructure in PCC’s area. It was hosted by PCC and Pembrokeshire Coast National Park Authority (“PCNPA”), albeit it was not they or either of them who sent out the Invitations.

9. I am asked whether Councillor X’s attendance at this Other Event satisfied his relevant attendances, so not to invoke Sections 85 and 86 of LGA 1972. In my opinion, it did and continues to do so until 21 May 2018.

10. This is for each of two reasons.

BODY APPOINTED TO ADVISE

11. First, in my opinion the event comes within the Section 85(2) category: attendance as a member at a meeting of a body who were “appointed to advise the authority on any matter relating to their discharge of their functions”.

12. The Other Event related to the discharge of PCC’s functions, which encompasses all its activities. “Any” is very broad.

13. The Other Event was with a view to advising PCC (and PCNPA). PCC and PCNPA had commissioned Land Use Consultants (“LUC”) of Bristol to undertake a green infrastructure “study” to identify, protect and enhance green infrastructure opportunities for the main towns within PCC’s area. An “Action Plan” would:-

(1) Outline (i) the available mechanisms, and (ii) the next steps, to deliver these opportunities; and

(2) Inform local planning for future investment in these towns.

14. The express purpose of the “workshop” was to obtain “ideas, knowledge and understanding” of the green infrastructure issues and opportunities. This

would “help direct” the focus of the green infrastructure audit and “identify” potential projects and opportunities “for inclusion in the Action Plan”.

15. The question is whether the Other Event was a meeting of “a body” appointed to advise. In my opinion it was. It was at least an ad hoc unincorporated association created by and to bring together LUC, PCC and PCNPA, and others. The Other Event does not seem to me to have been a mere LUC occasion. It was indeed described as a “Stakeholder Event”, the literature emanated from both PCC and LUC, and the welcome also included from PCNPA.

16. The position can indeed be more simply and clearly stated, as follows:-

- (1) LUC is a “body”;
- (2) The Other Event was a LUC meeting;
- (3) This was because LUC had been appointed by PCC to advise PCC;
- (4) LUC accordingly sent out the Invitations for the Other Event;
- (5) Councillor X attended the Other Event;



- (6) He did so as a member of PCC;
- (7) The Other Event was a meeting of a body, LUC, appointed, by PCC, to advise PCC, on matters relating to the discharge of PCC functions.

17. In my opinion, the case is plain and compelling that, as regards the Other Event, it was a qualifying meeting attendance for Councillor X within the continuing 6 month period.

#### REPRESENTATIVE OF THE AUTHORITY

18. Second, in my opinion, the event comes within the Section 85(2) category: “attendance as representative of the authority at a meeting of any body of persons” (emphasis added).

19. In my opinion:-

- (1) The Other Event was a meeting of a “body of persons”; and
- (2) The capacity in which Councillor X, and another Councillor, were there was as representatives of PCC in their respective official capacities.

20. As noted above, the Other Event concerned the main towns in PCC's area. Councillor X is PCC member for one of those. He was selected to attend the Other Event precisely because of the electoral division for which he was and is a PCC member. He was at the Other Event as a PCC representative, in the same way as the other PCC member at the Other Event was doing so. Without them PCC would have been unrepresented at this important meeting for it.

#### CONCLUSION

21. I advise that Councillor X remains a member of PCC unless and until:-

- (1) He is disqualified by criminal conviction;
- (2) He is disqualified by non-attendance for 6 months possibly from 21 May 2018, but much more probably from 1 August 2018;
- (3) He is disqualified for some other statutory reason;
- (4) He resigns;
- (5) He dies; or
- (6) His term of office expires.

22. This is because:-

- (1) The “Seminars” were sufficient attendances; and
- (2) In any case, the Other Event was a sufficient attendance.

23. Indeed, the Other Event was a sufficient attendance on each of two bases:-

- (1) He attended as a member of PCC a meeting of LUC who were appointed to advise PCC on a matter relating to the discharge of PCC’s functions; and
- (2) He attended that meeting as a representative of PCC.

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**JAMES GOUDIE QC**  
1 March 2018

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