

COMPLAINT NUMBER	19/367
COMPLAINANT	S Chambers
ADVERTISER	C&R Communities and Residents
ADVERTISEMENT	C&R Communities and Residents, Print
DATE OF MEETING	2 October 2019
OUTCOME	Upheld Advertisement to be removed

Description of Advertisement

The advertisement is a pamphlet for C&R candidates for the Waitemata Local Board and includes contact details for contact via Facebook, website, or email. Three panels of the advertisement have images of candidates standing for election along with short bios. Two panels summarise the policy platform for C&R candidates. Under the heading “Cut Council Waste”, it states: “The incumbent Local Board was 40% over budget this year, so we’ll get Waitemata Local Board’s books back in the black”.

Summary of the Complaint

The Complainant said the claim the Local Board was 40% over budget this year was wrong and misleading.

Issues Raised

- Truthful Presentation
- Advocacy advertising

Summary of the Advertiser’s Response

The Advertiser provided financial information to support the claim.

Summary of the Complaints Board Decision

The Complaints Board upheld the complaint about the pamphlet advertisement for C & R Communities and Residents. The Board agreed the advertisement was an advocacy advertisement and the identity and position of the Advertiser was clear.

The Complaints Board said the substantiation provided by the Advertiser did not support the 40% claim in the statement “The incumbent Local Board was 40% over budget this year”, made in the advertisement.

The Complaints Board unanimously ruled the advertisement was in breach of Principle 2 and Rule 2(b) of the Advertising Standards Code.

The Complaints Board ruled the complaint was **Upheld**.

Advertisement to be removed.

[The Complaints Board noted the Advertiser advised the claim had been changed to “The incumbent Local Board have been over budget this year.”]

COMPLAINTS BOARD DECISION

The Chair directed the Complaints Board to consider the complaint with reference to the Advertising Standards Code.

ADVERTISING STANDARDS CODE

Principle 2: Truthful Presentation: Advertisements must be truthful, balanced and not misleading.

Rule 2(b): Truthful Presentation: Advertisements must not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust or exploit their lack of knowledge. This includes by implication, inaccuracy, ambiguity, exaggeration, unrealistic claim, omission false representation or otherwise. Obvious hyperbole identifiable as such is not considered to be misleading.

Rule 2(e): Advocacy Advertising: Advocacy advertising must clearly state the identity and position of the advertiser. Opinion in support of the advertiser's position must be clearly distinguishable from factual information. Factual information must be able to be substantiated.

Relevant precedent decision

In considering this complaint the Complaints Board referred to a precedent decision, Decision 19/275 which was Upheld.

The full version of the decision can be found on the ASA website <https://www.asa.co.nz/decisions/>

Decision 19/275 concerned a New Zealand National Party Facebook advertisement about the true cost of the Labour-led Coalition Government's proposed Clean Car Discount feebate and Clean Car Standard schemes. The Complaints Board said the substantiation provided by the Advertiser was insufficient for the level of claim made in the advertisement and it was likely to confuse or deceive consumers.

Complaints Board Discussion

Preliminary matter

The Complaints Board noted the Advertiser's concern about the short timeframe provided for a response and the Chair's acceptance of the complaint under a 'fast-track process' for local election advertising.

The Secretariat confirmed to the Board that a 'fast-track' process was generally applied to complaints received about election advertising for both local and national elections within a month prior to the voting period closing. The Secretariat noted that few complaints are generally received about local election advertising, so the process is less well-known. The ASA has committed to shorter timeframes to process election complaints to support responsible advertising during election periods.

The Complaints Board noted the timeframe relating to this complaint. The Complaints Board agreed that due process had been followed and sufficient time had been given for a response to the issue raised in the complaint.

Consumer Takeout

The Complaints Board agreed the consumer takeout for the advertisement is that the local board spent 40% over budget in 2019 and C & R candidates will do a better job if voted in.

Is the advertisement advocacy advertising?

The Complaints Board said the advertisement before it fell into the category of advocacy advertising and noted the requirements of Rule 2(e) of the Advertising Standards Code. This Rule required the identity of the advertiser to be clear; opinion to be distinguished from factual information and factual information must be able to be substantiated. The Advocacy Principles developed by the Complaints Board in previous decisions considered under Rule 11 of the Code of Ethics remain relevant. They state:

1. That section 14 of the Bill of Rights Act 1990, in granting the right of freedom of expression, allows advertisers to impart information and opinions but that in exercising that right what was factual information and what was opinion, should be clearly distinguishable.
2. That the right of freedom of expression as stated in section 14 is not absolute as there could be an infringement of other people's rights. Care should be taken to ensure that this does not occur.
3. That the Codes fetter the rights granted by section 14 to ensure there is fair play between all parties on controversial issues. Therefore, in advocacy advertising and particularly on political matters the spirit of the Code is more important than technical breaches. People have the right to express their views and this right should not be unduly or unreasonably restricted by Rules.
4. That robust debate in a democratic society is to be encouraged by the media and advertisers and that the Codes should be interpreted liberally to ensure fair play by the contestants.
5. That it is essential in all advocacy advertisements that the identity of the advertiser is clear.

Having established the advertisement was an advocacy advertisement promoting candidates in the current local elections, the Complaints Board noted that political advertisements were not only acceptable but encouraged, as they were an essential and desirable part of the functioning of a democratic society.

The Complaints Board also observed that in a free and democratic society, differences of political opinion should be openly debated without undue hindrance or interference from authorities such as the Complaints Board, and in no way should political parties, politicians, lobby groups or advocates be unnecessarily fettered by a technical or unduly strict interpretation of the rules and regulations. Therefore, the Complaints Board considered the rest of the complaint in conjunction with this liberal interpretation under the application of the Advocacy Principles.

Is the identity of the Advertiser clear?

The Complaints Board agreed the Advertiser had met the identity requirements for advocacy advertising under Rule 2(e). The association's name and purpose are obvious and options to find further information are included.

Is the advertisement misleading?

The Complainant said the claim “The incumbent Local Board was 40% over budget this year, so we’ll get Waitemata Local Board’s books back in the black” was misleading and the reference to 40% could not be substantiated.

The Complaints Board reviewed the information provided by the Advertiser to substantiate the claim. The Board noted the Advertiser referred to two calculations to support the 40% claim. The first was Waitemata Local Board Operating performance financial summary FY2019 Quarter 3 and the second was the Local Board’s Funding Impact Statement for the period to 30 June 2019.

The Complaints Board said that the Complainant had used the Waitemata Local Board Operating performance financial summary FY2019 Quarter 3 to compare the operating budget for Quarter 3 with the Annual Operating spend for the full financial year. The Complaints Board agreed that this information comparing figures from two different periods did not substantiate the factual claim made that the Waitemata Local Board was 40 % over budget this year.

The Complaints Board referred to the 30 June 2019 Funding Impact Statement for substantiation and noted it included actual and budgeted numbers.

The figures provided show a 2018/2019 budgeted spend for “total applications of operating funding” of \$26,285,000. This compared to an operating spend of \$29,492,000. The Complaints Board agreed that based on these two numbers the overspend as a percentage was 12.20%.

The Board then considered the capital expenditure and noted the budgeted figure was \$3,837,000 compared to actual capital expenditure of \$6,487,000. The Complaints Board said this overspend as a percentage was 69.06%. The overall portion of this budget is small in comparison to the total budget.

The Board noted that combining operating and capital expenditure compared a budgeted amount of \$30,122,000 to actual expenditure of \$35,979,000. As a percentage this was 19.44% over budget.

The Board confirmed the information the Advertiser provided showed expenditure in excess of budget by the Local Board in the 2018/19 year. However, the claim in the advertisement states: “The incumbent Local Board was 40% over budget this year”. The Board agreed this was presented as a statement of fact. The Board agreed the information provided by the Advertiser in the Funding Impact Statement to June 30, 2019 did not substantiate the claim.

The Complaints Board unanimously ruled the advertisement was in breach of Principle 2 and Rule 2(b) of the Advertising Standards Code.

Outcome

The Complaints Board ruled the complaints were **Upheld**.

Advertisement to be removed.

[The Complaints Board noted the Advertiser advised the claim had been changed to “The incumbent Local Board have been over budget this year.”]

APPEAL INFORMATION

According to the procedures of the Advertising Standards Complaints Board, all decisions are able to be appealed by any party to the complaint. Information on our Appeal process is on our website www.asa.co.nz. Appeals must be made in writing via email or letter within 14 days of receipt of this decision.

APPENDICES

1. Complaint
 2. Response from Advertiser
-

Appendix 1

COMPLAINT FROM S CHAMBERS

Please process this complaint under the "ASA fast-track process" used for election related complaints. As voting papers have started arriving this week, time is of the essence.

The advertisers are all Communities & Residents candidates standing for election within the Waitemata & Gulf ward, and the Waitemata Local Board area; namely Sarah Trottmann, Amy Calway, Denise L'Estrange-Corbet, Josh Doubtfire, Roger Burton, Jen Brown and Greg Moyle. The advertisement is an advocacy advertisement under the ASA code, for the councillor position of the Waitemata & Gulf ward, and the 7 positions for the Waitemata Local Board of Auckland Council in the 2019 local body elections.

The advertisement is an A4 DLE fold pamphlet delivered or intended to be delivered to every household within the relevant ward and Local Board area boundaries. We attach a copy of the pamphlet concerned. This pamphlet was delivered to the writer's letterbox recently in advance of the voting period for the election. The writer is aware of the delivery of the pamphlet to many households.

The offending advocacy point is that on the middle inner panel of the pamphlet headed "OUR POLICIES: Cut Council Waste". It reads "The incumbent Local Board was 40% over budget this year, so we'll get Waitemata Local Board's books back in the black."

The advertisement is in contravention of the ASA Code Rule 2(b) Truthful Presentation and Rule 2(e) Advocacy Advertising as the claim in the advertisement is untruthful and misleading and the claim that has been made cannot be substantiated as factual.

I note that the claim is not an exaggeration, puffery or deliberate hyperbole. Please note that I have read the ASA Guidance Note on Advocacy Advertisement.

I am aware from comments and feedback that the reader of the advertisement was intended to be misled into believing that the claim in the advertisement was true.

The writer of this complaint is an incumbent member of the Waitemata Local Board, and has been a member of that Board for nine years; the first six years being its inaugural chair. As such, I am familiar with its finances. The writer is also not seeking re-election at this election....

The writer has been unable to figure out where the advertisers could possibly get the 40% over budget claim from. The councillor candidate advertiser has been challenged on Facebook to justify the claim, but has elected not to respond.

We attach a summary of the management year end finances of the Waitemata Local Board relating to the 2018/19 Financial Year. The audited accounts of Auckland Council are yet to be published but will reflect the post-audit position relating to these management generated figures.

There are three parts to the Waitemata Local Board budget. Locally Driven Initiatives (LDI). This is a budget envelope that cannot be overspent. The Waitemata Local Board was slightly

underspent for 2018/19. This budget is approximately \$1.5M per year and is the Local Board's only discretionary budget.

The second budget is the Capex Budget for new projects and renewals. This is budgeted across three years as that can be the life of a project to delivery point. A single year view cannot be taken of this budget, as delayed delivery under expenditure in one year is rectified by over delivery the following year. The Capex Budget in 2018/19 was slightly underspent by 3.5% to revised budget, which takes into account the delivery of projects deferred from the previous year, and those planned for the current years in turn deferred to the following year. The third budget is for Opex. The year-end position was 4.5% overspent against revised budget and 13.5% overspent against annual planned budget because of increased maintenance and trees and ecological services. This is an operationally determined expenditure and effectively is from a regional budget, although reported at the Local Board level. Local Boards do not have delegated authority to exceed asset-based operational budgets. That is determined from their LDI.

This complaint is made in the light of the ASA Guidance Note on Advocacy Advertising. As stated above, the advertisement is in contravention of Rules 2(b) and 2(e) of the Code as the claim in the advertisement is misleading and cannot be substantiated as factual.

I request that the advertiser immediately remove the advertisement and cease delivery of any undelivered pamphlets. I also request that the advertiser agrees not to repeat the misleading claim or make different misleading claims in future advertisements which, under the ASA Code, includes written statements and verbal statements.

Kindly confirm that the advertiser has been instructed to respond to this complaint within 24 hours required by the fast-track process.

Kindly also confirm when the ASA Complaints Board will meet to consider this complaint.

Appendix 2

RESPONSE FROM ADVERTISER, COMMUNITIES AND RESIDENTS (C&R)

NOTE: Our reading of the complaints process shows a fast-tracking ability of a complaint for National Elections but not for Local Elections. We contest the timelines set down for us to respond are not adequate, we have not had satisfactory time to receive advice and as such have prepared the interim response below.

Re: – C&R Communities and Residents Print Advertisement Complaint 19/367

S. Chambers' complaint was about a Communities and Residents (C&R) Waitemata Local Board candidates A4 DLE folded pamphlet that was distributed to a select number of households in the Waitemata Local Board area. The middle inner panel read, "The incumbent Local Board was 40% over budget this year, so we'll get the Waitemata Local Board's books back in the black".

This information was supplied to the C&R Waitemata Local Board candidates by an independent source close to the incumbent Waitemata Local Board. Further investigation by the C&R Waitemata Local Board candidates revealed a revised Capex budget showing an increase of over 50%.

The C&R Waitemata Local Board pamphlet was first distributed on 14th September 2019 and the team ceased distribution under discussion on Friday 20th September, and issued an official media release regarding it

: <https://www.c-r.org.nz/news/greater-transparency-of-local-board-finances-needed>

As this is a robust political discussion, the C&R Waitemata Local Board candidates amended a second brochure. The new statement, as seen in the attached, reads "The incumbent Local Board have been over budget this year, so we'll get the Waitemata Local Board's books back in the black."

Following the recent release of the Waitemata Local Board's financial reports, the C&R Waitemata Local Board candidates are able to justify the 40% figure. The March 2019 Waitemata Local Board Financial Report shows an Opex of \$21,088, which was the Board's budgeted amount in their annual plan. The actual Opex, however, was \$29,492 ($\$29,492 / \$21,088 = 1.398 = 40\%$ over). Consequently, from their original calculation in their annual plan, the incumbent Waitemata Local Board spent 40% more on Opex than anticipated.

It was definitely not the C&R Waitemata Local Board candidates' intention to deliberately "mislead", we withdrew the claim as soon as it was challenged but in fact the numbers used have been subsequently confirmed. For this reason and the ones mentioned above, the original complaint should be dismissed.

The below Waitemata Local Board funding impact statements shows they budgeted to have an Opex surplus of \$95,000.00, but actually had an Opex overspend of \$3,679,000.00 (well over 40%).

On the Capex side they budgeted to spend \$3,837,000, but actually spent \$6,487,000.00- an overspend of \$2,650,000.00 (69% overspend).

Funding impact statement

For the period ended 30 June 2019

\$000s	NOTES	ACTUAL 2018/19	ANNUAL PLAN 2018/19*	ANNUAL PLAN 2017/18
Sources of operating funding:				
General rates, UAGCs, rates penalties		15,277	15,277	20,031
Targeted rates		7,802	8,265	7,810
Subsidies and grants for operating purposes		15	20	15
Fees and charges		2,578	2,687	2,885
Local authorities fuel tax, fines, infringement fees and other receipts		140	131	1,437
Total operating funding		25,813	26,380	32,178
Applications of operating funding:				
Payment to staff and suppliers	1	26,161	22,955	25,891
Finance costs		867	867	2,215
Internal charges and overheads applied		2,463	2,463	4,055
Other operating funding applications		0	0	0
Total applications of operating funding		29,492	26,285	32,161
Surplus (deficit) of operating funding		(3,679)	95	18
Sources of capital funding:				
Subsidies and grants for capital expenditure		273	0	0
Development and financial contributions*		0	0	0
Increase (decrease) in debt	2	9,892	3,742	8,927
Gross proceeds from sale of assets		1	0	0
Lump sum contributions		0	0	0
Other dedicated capital funding		0	0	0
Total sources of capital funding		10,166	3,742	8,927
Application of capital funding:				
Capital expenditure:				
- to meet additional demand		206	331	1,238
- to improve the level of service		273	607	2,500
- to replace existing assets		6,008	2,899	5,207
Increase (decrease) in reserves		0	0	0
Increase (decrease) in investments		0	0	0
Total applications of capital funding	3	6,487	3,837	8,945
Surplus (deficit) of capital funding		3,679	(95)	(18)
Funding balance		0	(0)	0

Variance explanation Actual 2018/2019 to Annual Plan 2018/2019

- Supplier payments are above plan due to higher than anticipated maintenance expenditure incurred for the maintenance of local facilities and assets. In 2018/2019, significant areas of spend in Waitematā included streetscaping services for trees and ecological maintenance services.