

Councillor Conduct Tribunal: Councillor misconduct complaint – Summary of decision and reasons for department’s website

Local Government Act 2009: Sections 150AS(2)(c)

1. Complaint:

CCT Reference	F19/6514
Subject Councillor	Councillor [REDACTED] (the councillor)
Council	Bundaberg Regional Council

2. Decision (s150AQ):

Date:	19 February 2020
Hearing:	10.10am 26 November 2019 at Level 19, 239 George street, Brisbane. The matter was heard and determined on the documents, pursuant to s150AP(2) of the <i>Local Government Act 2009</i> (the Act), as it was considered appropriate in all of the circumstances by the Tribunal and agreed by the parties. The Tribunal directed that the final hearing be held in private ¹ .

<p>Decision:</p>	<p>ALLEGATION 1:</p> <p>The Tribunal has determined, on the balance of probabilities, that the allegation that, between 17 May 2018 and 8 June 2018, Councillor ██████, a councillor of the Bundaberg Regional Council, engaged in misconduct as defined in section 176(3)(b)(iii) of the Act, in that he misused information or material acquired in or in connection with the performance of his councillor responsibilities, whether the misuse is for the benefit of the councillor or someone else, has not been sustained.</p> <p>ALLEGATION 2:</p> <p>The Tribunal makes no finding on the basis that the Applicant withdrew this allegation.</p> <p>ALLEGATION 3:</p> <p>The Tribunal has determined, on the balance of probabilities, that the allegation that, on 24 September 2018, Councillor ██████, a councillor of Bundaberg Regional Council, engaged in misconduct as defined in section 176(3)(b)(ii) of the Act, in that the conduct constituted a breach of trust placed in him as a councillor, has not been sustained.</p>
<p>Reasons:</p>	<p>Allegation 1</p> <p>Allegation one alleges that on an unknown date between 17 May 2018 and 8 June 2018, Councillor ██████, a councillor of Bundaberg Regional Council, engaged in misconduct as defined by section 176(3)(b)(iii) of the Act (as applied at the time of the alleged conduct), in that he misused information or material acquired in or in connection with the performance of his councillor responsibilities, whether the misuse is for the benefit of the councillor or someone else.</p> <p>The applicant relies on the Statement of Mr Holloway which is annexed to an Affidavit, and in particular, that on 18 May 2018 the respondent contacted Mr Holloway in response to an emailed newsletter received by the respondent about the demolition of the WWTP.¹⁰ Mr Holloway informed the respondent that the plant was no longer required and that all equipment was to be removed. The respondent enquired who would be carrying out the work and was informed by Mr Holloway that Bundaberg Demolition was to undertake the work.</p> <p>The applicant submits that information about who would be conducting the demolition was not disclosed in the newsletter.¹¹</p> <p>The Tribunal notes that the applicant particularises that the respondent was not the Divisional Councillor where the WWTP was located.</p>

The brief of evidence contains a document dated 27 April 2018 that indicates that Bundaberg Demolitions was approved as the successful tender for demolition of the WWTP, with a purchase order being issued on 9 May 2018. Neither the brief of evidence, nor the parties submissions, that indicates that there were any issues with the agreement with Bundaberg Demolition. Further there is nothing to suggest any contractual conditions that would prohibit Bundaberg Demolitions from entering into a contractual relationship with third parties following the approval of the tender, such as the purchase of equipment located at the demolition site.

Annexure SDJ-1 to the Affidavit of Stephen Johnston, affirmed on 25 October 2019, was an email from Angelina Nakhuda at 8:58am to a number of addressees including the respondent. The email attaches a newsletter titled 'Demolition of Coral Cove Wastewater Treatment Plant' and nominated Mr Holloway as the contact person. The attached newsletter states that works would commence on 21 May 2018 for a duration of 5 weeks (weather permitting). Also, part of the same email was a further email sent by Ms Nakhuda at 10:08am to inform email recipients that the newsletter would be placed on the Bundaberg Regional Council (BRC) website, with hardcopies being distributed to affected residents that afternoon.

Given that information was to be made publicly available on the afternoon of 18 May 2018, it is possible that any member of the public could have made enquiries with Mr Holloway after becoming aware of the newsletter that same day. No submission has been made by the applicant as to whether any member of the public would have been prohibited from being provided with information about who was undertaking the demolition work on the WWTP.

The applicant's evidence includes the affidavit of Stuart Randle affirmed on 24 October 2019. Annexure SR-1 to the affidavit appears a statement which states at paragraph 6:

"...I phoned our Group Manager Water and Wastewater Tom McLaughlin to find out the process we had used for demolition of the treatment plant and thereby the method by which Cr [REDACTED] might have procured the equipment. Tom told me that we had arranged a contractor (Bundaberg Demolition) and the contractor was responsible for the ultimate disposal of the equipment by whatever means they choose".

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On the applicant's own evidence, Bundaberg Demolition had ownership and control of the equipment located at the WWTP from at least 21 May 2018 when it was due to commence works on the demolition.

The respondent's submission indicates that on 23 May 2018, Douglas Dilger, a Director of Abington Aquaculture, contacted Bundaberg Demolition to arrange for an on-site inspection.¹² Ultimately, the equipment was purchased by Abington Aquaculture from Bundaberg Demolition on 6 June 2018, some 19 days after it was made publicly known that the WWTP was to be demolished.

The respondent admits that he is a shareholder of Abington Aquaculture and that he personally contributed to allow Abington Aquaculture to purchase the equipment from Bundaberg Demolition.

The respondent accepts that he should have waited until Monday, 21 May 2018 to avoid any confusion.¹³ He believed that he was going 'over and above' what was required to ensure the equipment was no longer a Council asset.

It is determined that the respondent did not misuse information or material acquired in or in connection with the performance of his councillor responsibilities, for his benefit or someone else.

In circumstances where the information was not publicly known or able to have been released to the public, it would be questionable to use the information, namely that the WWTP was being demolished and that Bundaberg Demolitions was awarded the demolition contract by BRC. However, on the applicant's own evidence the information about the demolition was made known publicly on 18 May 2018 when the newsletter was published on the BRC website.

The applicant's own evidence also indicates that Bundaberg Demolition had ownership and possession of the equipment located at the work site and was responsible for its removal and disposal. There is nothing on the evidence that suggested that Bundaberg Demolition was prohibited from entering into a contractual relationship with a third party, such as Abington Aquaculture to purchase the equipment. The applicant's evidence shows that on 9 May 2018, a purchase order was issued to Bundaberg Demolition for the works and that works were to commence on 21 May 2018. The handshake deal made between Bundaberg Demolition and Abington Aquaculture was not finalised until 6 June 2018. The Tribunal finds that there was sufficient time from 18 May 2018 to 6 June 2018 to allow any member of the public to have made enquiries into

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the demolition works and to engage with Bundaberg Demolition in the same way that Abington Aquaculture did.

In the context of the information about the demolition being made public on 18 May 2018, the successful tender process having been finalised on 9 May 2018, that works had commenced on 21 May 2018, the purchase was made on 6 June 2018 and it was not the Divisional Councillor for the WWTP, the Tribunal finds that allegation one is not sustained.

Allegation 2

Allegation two withdrawn at the Tribunal's discretion in accordance with section 213 of the Act.

Allegation 3

Allegation three alleges that on 24 September 2018, Councillor [REDACTED], a councillor of the Bundaberg Regional Council, engaged in misconduct as defined in section 176(3)(b)(ii) of the Act, in that the conduct constituted a breach of trust placed in him as a councillor.

The Statutory Declaration of Kim Maree Ovens, Protocol Officer with the Council states that on 10 May 2017, the respondent came to her desk and requested some example letters of introduction he could use, as he had been asked to draft one. The brief of evidence contains an email sent by Ms Ovens to the respondent at 12:10pm on 10 May 2017 attaching a letter entitled "2017 Mr Liu Weimin Deputy Mayor Nanin – Scott Mackey visit and potential delegation visit May 2017". This letter was included in the brief of evidence and appears to be an unsigned draft, without Council letterhead with the author appearing as Cr Jack Dempsey, Mayor of the Bundaberg Regional Council and is dated 10 April 2017. The letter contains a paragraph that states:

"...Mr Mackey and I have become good friends of Mr Sheng Wei. We hope to also meet Mr Wei if he is in Nanning and available during the visit. Mr Wei who has recently invested in our region is a great example of the benefits of our two cities working closely together to promote trade and investment and I am confident that with both our government support this will continue to grow."

It appears that the respondent took issue with this paragraph and in particular the use of the words "good friends of Mr Sheng Wei".

Ms Ovens' Statutory Declaration states that she has no recollection of advising the respondent if the letter was a final document.

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At 6:51am on 27 January 2018, the respondent sent an email to the Mayor, Jack Dempsey, requesting advice from the Mayor's office about whether "Scott Mackey and his Remax delegation to Nanning with a letter of introduction to our Sister City contact". The respondent did not indicate at this time that he was in possession of the example letter addressed to Mr Liu. The brief of evidence does not contain any direct evidence from Mayor Dempsey of a response to this email.

The brief of evidence does contain an email from Stephen Johnston, Chief Executive Officer to the respondent at 3:49pm on 13 February 2018 and attaches a letter. The letter appears to be a signed letter addressed to Mr Zhou Hongbo from the Mayor, dated 19 April 2017. The letter does not contain words to the effect of "good friends of Mr Sheng Wei" as appears in the example previously sent to the respondent on 10 May 2017. The addressee of the example letter appears different to that in the signed letter sent under the hand of the Mayor on 19 April 2017.

On 24 September 2018 an Ordinary Meeting of Council was held in Gin Gin, with the respondent and the Councillor Jack Dempsey (Mayor and Chairman) present, amongst other members of Council. The Chamber considered a development application which was connected to Mr Wei.

The brief of evidence contains a transcript of what appears to be the Ordinary Council Meeting held on 24 September 2018. The transcript shows that Mr Wei is mentioned as part of an item in the meeting and Councillor Trevor (Deputy Mayor) declared a conflict of interest due to his relationship with Mr Wei. The Mayor then calls on the Chamber to declare any material interest or conflicts of interest.

The respondent, relying on section 175G of the Local Government Act 2009, announced to the Chamber that he believes or suspects that a Councillor (the Mayor) had a material personal interest or conflict of interest, which is set out in sections 175C(2) and 175E(2) of the Act which should have been declared. The respondent mistakenly, referred to sections 75C(2) and 75E(2). The respondent announced he was in possession of a letter that indicated that the Mayor was "good friends" with the applicant, Mr Wei. He then produced the unsigned letter. The following dialogue is said to have occurred:

"...Mayor: Have you received any other letters pertaining to this particular matter that you are not providing today for the information of Councillors to make a decision that you knowingly have?"

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Cr [REDACTED]: *No. But Mr Mayor I ask you that that letter was provided to me and I was told that it had been sent. So I guess if it wasn't sent, then the onus would be on you to advise the meeting that, that was never sent and that there was never a valid email.*

Mayor: *No [REDACTED] the onus is on you – to provide the copy. You are putting accusations here that could be or may be seen as very frivolous or incorrect or disparaging at the best. So could you please provide that evidence?*

Cr [REDACTED]: *Mr Mayor the member of staff that provided me the document told me that it had been sent, that is the only information I have. I do not have access to your emails, neither should i. But if this document was not sent, then I'll ask you to state that to the meeting and I'll withdraw my request..."*

The dialogue continued for a time with the Mayor denied any personal interest as per the evidence supplied by Cr [REDACTED].

The respondent held the belief and suspicion that a material personal interest, real conflict of interest or perceived conflict of interest arose. He submits that he sought guidance from the Queensland Integrity Commissioner and his legal representative to support his belief.¹⁴

On the face of the draft letter of introduction dated 10 April 2017 it indicates some form of relationship between the Mayor and Mr Wei. Whilst the respondent received a copy of the signed letter to Mayor Zhou Hongbo on 19 April 2017, Cr Dempsey did not confirm or deny whether the draft letter was sent to Mr Liu Weimin nor the relationship to Mr Wei. Given that the development application related to Mr Wei, and it appears to not have been an ordinary business matter, the respondent was required by law to raise his concerns and did so. Had Cr Dempsey disclosed this information, it would have possibly resolved the issue as the transcript indicates that the respondent would have withdrawn the request.

The Tribunal finds that on the facts and evidence provided, the respondent complied with the statutory duty to inform the presiding member, Cr Dempsey, the Mayor and Chairman of the meeting in

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	accordance with s175G of the Act. The onus would then have been on Cr Dempsey to comply with his obligations under section 175C(2) or 175E(2) of the Act. It is not necessary to make a finding with respect to Cr Dempsey as it is not subject of the referral by the applicant. Accordingly, the Tribunal finds that allegation three is not sustained.
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3. Orders and/or recommendations (s150AR - disciplinary action):

Date of orders:	Not applicable
Order/s and/or recommendations:	

ⁱ S298 of the *Local Government Regulation 2012* requires that a hearing must be held in public unless the decision-maker directs the hearing is to be held in private.