Councillor Conduct Tribunal:
Decision and Reasons
Misconduct Application

Local Government Act 2009: Sections 150AQ and 150AS

Application details:

Reference No.	F22/4259
Date of Application/s from the IA	28 June 2022
Applicant:	Independent Assessor
Respondent:	Councillor Nicole Johnston (the Councillor)
Council:	Brisbane City Council (the Council)
Complainant[1]:	The Tribunal is not permitted to publish the name or identifying details of the Complainant in the decision to be published (section 150AS(7)(b)).
Public Interest Disclosure:	No
Allegation/s:	**Allegation One** It is alleged that on 3 December 2019, Councillor Johnston, a councillor of Brisbane City Council, contravened section 173(3) of the *City of Brisbane Act 2010* (the Act) by publishing information on her public Twitter page and releasing information during a Channel 7 News Report, namely information contained within a Briefing Note for Council, that she knew, or ought reasonably to know, was confidential to Council. Particulars of the alleged conduct which could amount to misconduct are as follows: a. On 22 February 2019, Councillor Johnston requested from Council "*all documents relating to the Ipswich Road corridor study announced in the 2018-19 budget*". b. On 12 April 2019, [redacted] sent a letter to Councillor Johnston, identifying that documents subject of her request "*are in draft form and have not in any sense been considered for adoption as Council's formal position on the corridor*." The letter further noted that "*Plainly the release of these concept documents may have a detrimental impact on Council's*

[1] Section 150AS(5)(a): The conduct tribunal must not give another entity any information that is part of a public interest disclosure under the *Public Interest Disclosure Act 2010*, unless giving the information is required or permitted by another Act.

future options in relation to the potential upgrade to the corridor and the particular owners and tenants of such properties. As such the release of any such material would be considered to have a detrimental impact on Council and could amount to misconduct and a breach of section 173 of the Act";

c. On 15 April 2019, Councillor Johnston was advised that she would be provided access to the documents subject of her request for "*all documents relating to the Ipswich Road corridor study announced in the 2018-19 budget*" and reminded "*of your obligation/responsibility under s 173 of the City of Brisbane Act 2010 and the privacy provisions contained under the Information Privacy Act*." On 16 April 2019, Councillor Johnston was provided access to view the relevant files she requested.

d. On 23 September 2019, Councillor Johnston further requested from Council "*all files related to the Ipswich Road Annerley corridor study and Ipswich Road Annerley pedestrian safety review*".

e. On 17 October 2019, Councillor Johnston was advised that she would be provided access to the documents subject of her request for "*all files related to the Ipswich Road Annerley corridor study*" and reminded "*of your obligation/responsibility under s 173 of the City of Brisbane Act 2010 and the privacy provisions contained under the Information Privacy Act*." On 22 October 2019, Councillor Johnston was provided access to view the requested files. One of the documents requested and provided by Council was a briefing note, titled "*Ipswich Road – Granard Road to Vulture Street Planning Summary*" ("Briefing Note"), dated 5 September 2019.

f. The Briefing Note was authored by [redacted] and was directed to the [redacted]. The purpose of the Briefing Note was "*to provide a consolidated summary of recent planning into Ipswich Road and to seek endorsement to the proposed approach to planning and staged improvements for the Ipswich Road transport corridor*." The Briefing Note was expressed to be for internal use. Page 13 of the Briefing Note provided five points of recommendation in relation to recent planning for the Ipswich Road.

g. The security label of the Briefing Note was "*FOR OFFICIAL USE ONLY*".

h. BCC has a AP212 Confidentiality Policy (Version 1.1), which applied at the time of the conduct.

   i. According to the AP212 Confidentiality Policy, "*confidential information*" is information "*created by or received by Council in the clear and reasonable expectation that the information will not be publicly disclosed or its distribution will be restricted to specified persons and it is not in the public interest to disclose or distribute*".

   ii. The AP212 Confidentiality Policy notes that the policy should be read in conjunction with other documents, including the

ICT29(iD29) – Information Security Classification and Control Guideline.

iii. The ICT29 Information Security Classification and Control Guideline provides that information labelled as "*FOR OFFICIAL USE ONLY*" is not for release to non BCC parties without approval from an appropriate manager, and provides the meaning of the label as follows: "*Meaning: Official information that is not sensitive, but not for release into the public. It still needs a level of protection and control. Unauthorised disclosure or compromise of FOR OFFICIAL USE ONLY information may, to some extent, undermine public confidence in Government operations*."

i. On 3 December 2019, Councillor Johnston published on her public Twitter page a copy of the five points of recommendation from the Briefing Note.

j. Also on 3 December 2019, a Channel 7 News report featured Councillor Johnston leafing through a copy of the Briefing Note and relevantly stating, in reference to the Briefing Note:

"These are detailed Council reports, maps, recommendations, research …"

k. In the news report, sections of the Briefing Note were further broadcasted and read out by the reporter, who relevantly stated:

"This briefing note, summarising recent planning into Ipswich Road dated 5 September 2019, specifically recommends Council 'undertake a high-level pre-feasibility study of a tunnel', the benefits 'the potential to dramatically improve almost all parameters'."

l. Councillor Johnston knew or ought reasonably to have known that the contents of the Briefing Note was confidential to the Council, as:

i. On 12 April 2019, [redacted] informed Councillor Johnston by letter that documents subject of her request for "*all documents relating to the Ipswich Road corridor study announced in the 2018-19 budget*" "*are in draft form and have not in any sense been considered for adoption as Council's formal position on the corridor*." The letter further noted that "*Plainly the release of these concept documents may have a detrimental impact on Council's future options in relation to the potential upgrade to the corridor and the particular owners and tenants of such properties. As such the release of any such material would be considered to have a detrimental impact on Council and could amount to misconduct and a breach of section 173 of the Act*."

ii. On 15 April 2019, Councillor Johnston was advised that she would be provided access to the documents subject of her request for "*all documents relating to the Ipswich Road corridor study announced in the 2018-19 budget*" and

	reminded "*of your obligation/responsibility under s 173 of the City of Brisbane Act 2010 and the privacy provisions contained under the Information Privacy Act".* iii. On 17 October 2019, Councillor Johnston was advised that she would be provided access to the documents subject of her request for "*all files related to the Ipswich Road Annerley corridor study*" and reminded "*of your obligation/responsibility under s 173 of the City of Brisbane Act 2010 and the privacy provisions contained under the Information Privacy Act*"; iv. The Briefing Note contained information "*created by or received by Council in the clear and reasonable expectation that the information will not be publicly disclosed or its distribution will be restricted to specified persons and it is not in the public interest to disclose or distribute*", pursuant to the AP212 Confidentiality Policy; and v. The Briefing Note was marked "*FOR OFFICIAL USE ONLY*" and contained "*Official information that is not sensitive, but not for release into the public. It still needs a level of protection and control. Unauthorised disclosure or compromise of FOR OFFICIAL USE ONLY information may, to some extent, undermine public confidence in Government operations*" and was "*not for release to non-BCC parties without approval from an appropriate manager*", pursuant to the *ICT29 Information Security Classification and Control Guideline*.

Decision (s150AQ):

Date:	18 June 2024
Decision:	The Tribunal has determined, on the balance of probabilities, that Allegation One **has been sustained.**

Orders and/or recommendations (s150AR - disciplinary action):

Date of orders:	18 June 2024
Order/s and/or recommendations:	Pursuant to sections 150AQ(1)(b) and 150AR(1) of the Act, the Tribunal orders that: a. Pursuant to section 150AR(1)(b)(i) and within 60 days of the date of this decision, the Respondent must make a public apology for engaging in misconduct during an Ordinary General meeting of Council at a time when that meeting is open to the public; and b. Pursuant to section 150AR(1)(b)(iii) and within 60 days of the date of this decision, the Respondent must attend training to address the councillor's conduct, such training to specifically include

	compliance with the Council's confidentiality and information handling policies. Any expenses shall be borne by the councillor.

Tribunal:

Chairperson:	Brendan Walker-Munro
Member:	Danielle Brown
Member:	Grant Wilson

Conflict of interest disclaimer/declaration (s150DT)

1. Having reviewed the material provided, all Tribunal members confirmed that they did not have a real or perceived conflict of interest in proceeding to decide the complaint.
2. The Chair disclosed that they had previously conducted an inappropriate conduct investigation for the Tribunal in relation to the Respondent; however, the Members did not consider that this amounted to a real or perceived conflict of interest.

Hearing (s150AP & Chapter 7, Part 1):

Time and Date:	10:30am on 30 May 2024
Heard at:	By telephone conference with all members in attendance
Appearances: (where applicable)	This matter was heard and determined on the documents pursuant to section 150AP(2) of the *Local Government Act 2009* with no parties appearing. The Tribunal considered the provisions of section 298 of the Regulation and determined that it was appropriate in the circumstances of this matter to conduct the hearing in private. Accordingly, the Tribunal directed that the hearing be held in private.[2]

[2] Section 298 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.

Reasons for decision:

Abbreviations

The following abbreviations have been used in this determination:

the Act	the *City of Brisbane Act 2010*
the Department	the Department of Housing, Local Government, Planning and Public Works
the Regulation	the *Local Government Regulation 2012*
the CEO	the Chief Executive Officer of the Council
the complainant	the person who lodged the complaint
the Council	Brisbane City Council
the Councillor	Councillor Nicole Johnston (the Respondent)
the IA	The Independent Assessor (the Applicant)
the Tribunal	the Councillor Conduct Tribunal constituted to hear and determine the allegations made by the IA concerning the Councillor's conduct.

Background

1. Councillor Johnston, the Respondent to this Application, has been a Councillor at the Council since being elected at the 2008 local government elections. She has held the position of Councillor consistently during this time and has received at least one round of training on her obligations as Councillor.[3]
2. Councillor Johnston was notified of the Applicant's intention to file proceedings in the Tribunal by way of a notice (as required by section 150AA of the Act) on 12 April 2022. Her response, filed by [redacted] was dated 21 April 2022.
3. Notwithstanding that response, the Applicant commenced proceedings in the Tribunal by way of an application under section 150AJ of the Act on 28 June 2022.

Conduct of hearing

4. The President constituted the Tribunal under section 150AM(a) of the Act on 24 January 2024.
5. On 5 February 2024, the Tribunal issued its first set of directions. These directions intended to provide a brief structure for timely filing of submissions and a hearing of the matter on the documents, as is contemplated by the Tribunal's *Practice Direction #2 of 2020 - General Hearing Protocol No. 2*.
6. The Applicant then emailed the Tribunal Registry on 13 February 2024 (with the Respondent's consent) seeking variations to the directions of 5 February 2024, citing issues with workloads within the Applicant's office.
7. Also on 13 February 2024, the Respondent wrote to the Registry, foreshadowing that the Respondent would be seeking an in-person hearing, and would be providing submissions on that request in due course.

[3] See for example the Applicant's Statement of Facts (SOF) at [4].

8. On 15 February 2024, both the Applicant and Respondent wrote to the Registry, seeking an urgent update on their separate requests. The Tribunal responded that same day (15 February 2024), issuing amended directions in the terms proposed by the Applicant and consented to by the Respondent.

9. On 16 February 2024, the Applicant wrote again to the Registry. The Applicant sought to reserve their rights to be given an opportunity to respond to the submissions foreshadowed by the Respondent in respect of the oral hearing prior to the Tribunal making any formal decision on the matter.

10. To deal with these matters, the Tribunal issued a set of directions on 21 February 2024. Without displacing the directions of 15 February 2024, the Tribunal set 29 February 2024 as the date for a directions hearing by teleconference between the parties. The parties were required to provide contact telephone numbers to the Registry by no later than 23 February 2024.

11. The directions hearing was held on 29 February 2024.

12. At that hearing, the main thrust of the Respondent's submissions to the Tribunal seemed to centre on the need to orally present the Respondent's case, apparently given the complexity of the evidence and the nature of the allegation made against the Respondent. The Respondent sought an oral hearing on the grounds that it offered the "*best forum*" to provide their client with natural justice given the "*key legal issues highlighted by counsel*". The Respondent also raised that an oral hearing would reduce the amount of paperwork involved and reduce the Tribunal's costs in hearing.

13. The Applicant maintained their position that the matter could be dealt with on the papers, and sought confirmation of the existing directions. The Applicant noted that there was affidavit evidence of three witnesses which was largely uncontested, and that – at least in the Applicant's view – the matter turned on the Respondent's knowledge or constructive knowledge of the confidentiality of the documents alleged.

14. The Tribunal did briefly explore the contentions of both parties, with particular reference to the need for "*testing the evidence*" if no witnesses were intended to be called, i.e., the Tribunal hearing would focus on the oral submissions of the parties, rather than evidence-in-chief and cross-examination of the witnesses.

15. After a brief deliberation in the absence of the parties, the Tribunal Chair gave a brief oral decision that the Tribunal was satisfied that a hearing on the documents was appropriate in all of the circumstances under section 150AP(2)(a) of the Act. Notwithstanding that finding, the Tribunal Chair indicated to the parties that the directions would address the Respondent's desire for procedural fairness, by permitting a further round of submissions in reply by the Respondent.

16. Those directions were issued on 1 March 2024. The Respondent was asked to notify the Applicant and the Tribunal Registry by 15 March 2024 if they intended to call any witnesses in the matter. A hearing on the documents was then set for 30 May 2024, following two rounds of submissions from both Applicant and Respondent.

17. That same day (1 March 2024) the Applicant notified the Registry by email that all evidence intended to be relied upon by the Applicant had already been filed in the matter.

18. On 15 March 2024, the Respondent filed her evidence, consisting of a Statutory Declaration attested to on 14 March 2024 and attaching a single Exhibit. The covering email to that filing notified the Tribunal that the Respondent did not intend to call any witnesses in the matter.

19. The remainder of filing occurred in accordance with the Tribunal's directions of 1 March 2024, that is:

    a. The Applicant filed their submissions on 12 April 2024;

    b. The Respondent filed her submissions on 10 May 2024;

    c. Submissions in reply of the Applicant were filed on 17 May 2024;

d. Submissions in reply of the Applicant were filed on 24 May 2024.

20. The Tribunal held its hearing without the parties or their representatives on 30 May 2024.

21. The full procedural history of this matter is set out to demonstrate the Tribunal's compliance with the statutory need, as a decision maker under the Act, to "*act as quickly and informally as is consistent with a fair and proper consideration of the issues raised in the hearing*".[4] The Tribunal considers that it acted as quickly as practicable, noting the need to protect the Respondent's procedural fairness in the matter.

Considerations pursuant to the Human Rights Act 2019 (Qld) ("HRA")

22. As a "*public entity*", the Tribunal must ensure it does not "*act or make a decision in a way that is not compatible with human rights*" and/or "*in making a decision… fail to give proper consideration to a human right relevant to the decision*".[5] As a general proposition, in its adjudicative mode the Tribunal engages with a number of human rights under the HRA, including section 15 (recognition and equality before the law), section 20 (freedom of thought, conscience, religion and belief), section 21 (freedom of expression), section 23 (taking part in public life) and section 25 (privacy and reputation). In this case, section 31 of the HRA (fair hearing) has been specifically invoked by the Respondent, and bears special consideration.

23. The relevant rights applying to this decision will be dealt with as they arise; however, the Tribunal is of the view that the Respondent's fair hearing rights have been respected. Relevantly:

    a. The Tribunal is a "*competent, independent and impartial court or tribunal*" established by law and authorized by that law to conduct the hearing;

    b. Although the hearing was not "public" (as contemplated by s 31(1) of the HRA), the Tribunal excluded "*the general public*" in the public interest and the interests of justice, noting the Tribunal's statutory requirement to "*act as quickly and informally as is consistent with a fair and proper consideration of the issues raised in the hearing*";[6]

    c. Further, the human right of a public hearing protected by section 31 of the HRA can be limited under section 13(1) of the HRA, if "*demonstrably justified in a free and democratic society based on human dignity, equality and freedom*" – such as the limitation provided by section 150AP(2)(a) of the Act which empowers the Tribunal to determine the circumstances in which a private hearing may be held;

    d. Finally, the decision of this Tribunal will be made publicly available, given the Tribunal's obligation to provide a publication notice to the Department's chief executive as required by section 150AS(2)(c) of the Act, containing the matters described in section 150AS(7).

Standard of Proof

24. The Tribunal has considered all of the evidence provided to it although it has not found it necessary to refer to, or comment on, each item of that evidence. In considering any allegation of complaint, the Tribunal is obliged to decide, in terms of sections 150AL & 150AP of the Act, whether or not the Respondent engaged in misconduct as defined in section 150L(1) of the Act.

25. The onus of proof is borne by the Applicant in the hearing on the balance of probabilities (section 150AP(4) of the Act). In making its decision the Tribunal considered *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362 where it was said:

[4] The Act, ss 212(2) and 213(1)(b).
[5] *Human Rights Act 2019* (Qld), s 58(1).
[6] The Act, ss 212(2) and 213(1)(b).

Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved.

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

26. In *Qantas Airways Limited v Gama* [2008] FCAFC 69, the learned Judge commented on the above statements and said:

His Honour made plain that before accepting the truth of evidence of a particular allegation, the tribunal should give consideration to the nature of the allegation and the likely consequences which will follow should it be accepted.

Evidence and material considered

27. The Tribunal considered the following list of evidence in making its decision:

A. Documentary Evidence

Initial documentation provided to the Tribunal including:

- The Notice issued to the Councillor under section 150AA of the Act on 12 April 2022 and the Respondent's response of 21 April 2022;
- The Application to the Tribunal about alleged misconduct (including the particulars) under section 150AJ of the Act;
- The Applicant's Brief of Evidence. This was a voluminous document filed by the Applicant, and contained a Statement of Facts (which the Tribunal notes was not agreed), documents collected by the Applicant during its investigations including various documents (including relevantly *Administrative Policy AP212 – Confidentiality Policy* ("the Policy")), emails, statements, Departmental and Council records, as well as emails and Notices issued by the Applicant's investigators and the responses to those Notices.

Additional material including:

- Statutory declaration of the Respondent, including a substantial Exhibit to that document, containing responses of the Council to the Respondent's requests for documents, newspaper articles regarding the development of Ipswich Road, and an email to the Respondent from a journalist;
- Submissions and correspondence as mentioned above from the Applicant and Respondent to the Tribunal.

Discussion and findings

Relevant legislation

28. The impugned conduct occurred on 3 December 2019.

29. With respect to the Respondent's conduct, as a Councillor of Brisbane City Council, her conduct was regulated at that time by the *City of Brisbane Act 2010* (Qld) ("COBA"). Section 290 of the COBA provides that the Tribunal must, in deciding how to deal with the conduct, "*apply the former conduct*

definitions to the conduct" and "*only make an order that is substantially the same as an order that could have been made under former section 183*" of the COBA.[7]

30. The "*former conduct definitions*" are prescribed in section 290(4) of the COBA to establish a definition of misconduct under the former section 178(3), with a qualified extension of misconduct as supplied by the former sections 183(5) and (6).

31. Section 178(3)(c) of the COB Act – as it appeared as on 3 December 2019 – stated (irrelevant sections omitted):

Section 178 What this division is about

…

(3) ***Misconduct*** *is conduct, or a conspiracy or attempt to engage in conduct, of or by a councillor—*

…

(c) that contravenes section 173(3) or 177G(2)…

32. Section 173(3) of the COBA was

173 Use of information by councillors

(1) A person who is, or has been, a councillor must not use information that was acquired as a councillor to—

(a) gain, directly or indirectly, a financial advantage for the person or someone else; or

(b) cause detriment to the council.

Maximum penalty—100 penalty units or 2 years imprisonment.

(2) Subsection (1) does not apply to information that is lawfully available to the public.

(3) A councillor must not release information that the councillor knows, or ought reasonably to know, is information that is confidential to the council.

Note—

A contravention of this subsection is misconduct that may be dealt with by the BCC councillor conduct review panel.

33. More broadly, the Respondent was also obligated to comply with the local government principle in section 4(2) of the Act (which applies to the Respondent because of section 4(1) of the Act):

4 Local government principles underpin this Act

(1) To ensure the system of local government is accountable, effective, efficient and sustainable, Parliament requires—

(a) anyone who is performing a responsibility under this Act to do so in accordance with the local government principles; and

(b) any action that is taken under this Act to be taken in a way that—

(i) is consistent with the local government principles; and

(ii) provides results that are consistent with the local government principles, in as far as the results are within the control of the person who is taking the action.

(2) The local government principles are—

[7] COBA, s 290(2).

(a)transparent and effective processes, and decision-making in the public interest; and

…

(d)good governance of, and by, local government; and

(e) ethical and legal behaviour of councillors and local government employees.

34. It is worth noting that although section 173(1) of the COBA (as it then was) does create the circumstances of a criminal offence, the Applicant does not allege (and the Tribunal cannot find) that the Respondent engaged in any criminal conduct.

Applicant's submissions

35. The Applicant's submissions proceed with a brief introduction to the matter prior to a preliminary observation, in which the Applicant draws attention to the respondent's evidence, and submits:[8]

> *The Respondent has filed a statutory declaration dated 14 March 2024 and also relies on her previous responses to the Applicant prior to the Application being filed in the Tribunal.*
>
> *The Applicant notes that the Respondent makes various admissions in her statutory declaration and confirms the accuracy of certain material filed by the Applicant. As a result, it is apparent that the Respondent's evidence is not that she did not release the relevant information, but that she did not (and still does not) consider that the information was confidential.*
>
> *The Respondent plainly cannot give evidence as to whether the information was in fact confidential or not, as this is an objective question to be determined by the Tribunal based on the evidence. The Respondent's evidence as to her perception of the information being confidential is relevant only to the question of whether she knew, or ought reasonably to have known, that the information was confidential.*

36. The Applicant then submits that "*there is no real dispute about particulars (a) through to (k) of the allegation*" and as such, the Tribunal ought to limit itself to considering the answer to two questions: firstly, "*was the information that the Respondent released confidential to council?*" And secondly, "*did the Respondent know, or ought she reasonably to have known, that the information was confidential to the council?"*

37. With regard to the first submission, the Applicant draws attention to the affidavit of its investigator [redacted] (filed as part of the Applicant's Brief of Evidence) of 24 June 2022, in which [redacted] produces into evidence a copy of *Administrative Policy AP212 – Confidentiality Policy* ("the Policy") and Council records which record the Respondent's presence at the Council meeting where that Policy was adopted on 3 September 2013.

38. Although it was not clear on the evidence, the Tribunal believes it safe to assume – consistent with general Council practice – that the Respondent would have been provided with a copy of the Policy prior to the Council meeting on 3 September 2013 as part of the Council's agenda for that meeting. The Tribunal also believes it safe to assume – this time consistent with a general assumption of the conduct of proper due diligence by Councillors in the discharge of their duties – that the Respondent would have devoted at least some time to familiarizing herself with that Policy prior to voting on its adoption.

39. The Applicant then submits that the Policy :

    a. applies to the Respondent by force of its adoption,

    b. applies to information that Council representatives have created, acquired or been exposed to while elected to, employed by, or engaged by Council and

[8] Applicant's submissions of 12 April 2024 at [21]-[22].

c. involves certain extraneous materials for interpretation, one of which is Council's *ICT29 Information Security Classification and Control Guideline* ("the Control Guideline").[9]

40. The Applicant then summarises certain aspects of the Policy. Relevantly:[10]

    a. "*confidential information*" is defined as:
    …any type of information that is created by or received by Council in the clear and reasonable expectation that the information will not be publicly disclosed or its distribution will be restricted to specified persons and it is not in the public interest to disclose or distribute. Examples include:

    - material required to be kept confidential by law (e.g. personal information)

    - material required by agreement to be kept confidential (e.g. land resumption agreements)

    - trade secrets and other business sensitive material (e.g. commercial-in confidence)

    - material marked confidential.

    b. Information is defined as including "*but is not limited to, a document or documents or knowledge communicated or received, in forms including letters, reports, facsimiles, emails, attachments, recordings, electronic media, presentations, briefings and/or other forms of information and communication, including discussions during meetings*".

    c. The release (of confidential information) includes the following acts:

    - telling any person in any way about any part of confidential information, including providing the original or a copy of confidential documentation, paraphrasing any confidential information and providing that in writing or orally

    - making that confidential information available for inspection whether intentionally or otherwise, but does not include telling a Council employee whose duties include dealing with that information, provided that it is not publicly disclosed.

41. The Applicant submits that the Control Guideline provides further context in the present matter. The security label on the documents was "*OFFICIAL USE ONLY*" (or "*FOR OFFICIAL USE ONLY*"), which the Control Guideline specifies is "*not sensitive, but is not for public release"* and that the label may be used *"when disclosure may cause 'Minor' or 'Negligible' impacts*".[11]

42. The Applicant further submits that the Control Guideline also promotes the handling of "*Council information, documents and records commensurate with their Information Security Classification*". In this context, the Control Guideline specifies that information labelled as "*FOR OFFICIAL USE ONLY*" is "*not for release to non-BCC parties without approval from an appropriate manager*".[12] For contrast, the Control Guideline permits information to be labelled as "*PUBLIC*", which applies to information which "*is not sensitive and has been approved for public release by an appropriate Council manager*".[13]

43. The Briefing Note that is central to this allegation carried a label of "*FOR OFFICIAL USE ONLY*", was prepared by [redacted] of Council, addressed to [redacted] in her capacity as [redacted] of Council, and contained a number of attachments which were labelled as "*draft*".[14]

[9] Ibid at [28].
[10] Ibid at [29]-[31].
[11] Ibid at [32].
[12] Ibid at [33] and [35].
[13] Ibid at [34].
[14] Ibid at [36].

44. On that basis, the Applicant submits that "*the information in the briefing note is captured by the Confidentiality Policy due to its security label, the type of information it contained and its intended audience*". Further, it was created by Council in the "*clear and reasonable expectation that the information* [would] *not be disclosed"*.[15]

45. The Applicant then submits, by reference to [redacted] affidavit, that "*there is an unusual feature of the Confidentiality Policy that requires that in order for information to be confidential it must also not be in the public interest to release it*". The Applicant draws attention to paragraphs 18 to 20 of [redacted] affidavit, which states:

> *18. Publication of the information which was, and remains, confidential to Council relating to early stage transport planning and investigations causes detriment to Council because it undermines confidence in public administration and impacts the Council's ability to fully consider transport network options that may include public and active transport upgrades, and prioritise those appropriately.*
>
> *19. The use of the information contained in the Briefing Note which was inspected by and provided to Councillor Johnston may also have:*
>
> > *a. Cause a level of distress to property owners about potential acquisition and tunnel portal impacts that have not been identified, considered or assessed;*
> >
> > *b. Raised public expectations about potential infrastructure solutions that have not been considered in enough detail to understand whether they are effective or feasible;*
> >
> > *c. Raised public expectations about the potential removal of heavy vehicle traffic from Venner Road, when there is no identified alternative route and State government co-operations would be required; and*
> >
> > *d. Had the potential to impact negatively on property values in the local area because of speculation about the impacts of future transport solutions such as tunnels which are not approved, designed, tested, or budgeted for.*
>
> *20. The detriment to Council may extend to intergovernmental relationships where one of the recommendations included references to Council working with the State of Queensland (Department of Transport and Main Roads) to investigate opportunities which relate to public transport facilities.*

46. The Applicant then submits that it is not required to prove actual detriment arising from the Respondent's conduct and that in any event, proof of such detriment is irrelevant to determining whether the allegation has been substantiated.[16]

47. The Applicant submits that the Respondent's evidence in relation to the disclosure is "*not compelling*". In particular, the Applicant submits that although "*residents in the area were broadly interested in the Ipswich Road issue. This does not in any way mean that there is an automatic public interest in releasing internal BCC documents*".[17] The Applicant also submits that "*Councillors by resolution may well determine that it is in the public interest to release certain confidential information, but an individual councillor who has acquired information through their position as a councillor…ought not to be entitled to make the operational decision to disclose that information to the public*".[18]

48. The Applicant also submits that the evidence before the Tribunal does not support the Respondent's contention that she "*corrected the public record*" and, in any event, such correction is unnecessary

[15] Ibid at [37].
[16] Ibid at [39].
[17] Ibid at [40].
[18] Ibid at [41].

and irrelevant for the Tribunal's purposes in determining whether the allegation is made out. The Applicant submits instead that "*when information is prima facie confidential, as in this matter, a finding that the information was not confidential due to public interest considerations should not be made lightly*".[19]

49. With regard to the second submission, the Applicant submits that the Tribunal should approach the assessment of the Respondent's level of knowledge as an objective one.[20]

50. The Applicant's submissions on this point relate to similar requests for information filed by the Respondent, and which the Applicant submits put the Respondent on notice as to her obligations of confidentiality:

    a. The Respondent's receipt of a briefing note on 27 September 2019 regarding a "Pedestrian Safety Review". This Briefing Note was specifically addressed to the Respondent and articulated various information regarding Council's "*official positions and proposed actions on various matters*" on that review;

    b. The Respondent "*identified that this other briefing note was labelled 'OFFICIAL USE ONLY' and appropriately sought clarification about the use to which the document could be put. Upon being provided with a copy of the extract from the Control Guideline… the Respondent asserted that 'It seems silly to me now that Council has a course of action that I can't discuss it with the Annerley community…' and sought permission to discuss the material publicly. In response, she was advised by a BCC officer that it was that officer's 'understanding' that the Respondent could use the information to discuss with her constituents but the document itself should not be directly distributed*".[21]

51. The Applicant submits that the "*Respondent's reliance on this advice is misplaced*" in the present allegation on grounds of both qualification of the advice received as well as the fact that the Respondent went well beyond "*discussing with her constituents*", instead posting the document itself on her Twitter account and providing it to the media.[22]

52. The Applicant thus submits that the allegation has been made out, and that the Tribunal should be satisfied that the Respondent has engaged in misconduct.

Respondent's submissions

53. The Respondent's submissions opened with acceptance of certain grounds of the Applicant's case. Relevantly, the Respondent has not contested particulars (a) to (k) of the Applicant's allegation, which relate to the actions of the Respondent in requesting the information from Council, and then disclosing the material on her Twitter account and to the media (as seen in the Channel 7 report).[23]

54. The primary thrust of the Respondent's submissions is that the information in the Briefing Note as disclosed by the Respondent was not "*information confidential to Council*" within the bounds of the COBA, and so the allegation must fail.[24]

55. As a preliminary matter, the Respondent then submits that the Tribunal should apply the standard of proof articulated by the balance of probabilities, as refined by *Briginshaw*. The Respondent also highlights the evidentiary burden upon the Applicant articulated in section 150AN(2) of the Act.[25]

[19] Ibid at [42]-[44].
[20] Ibid at [47].
[21] Ibid at [49]-[50].
[22] Ibid at [52]-[55].
[23] Respondent's submissions of 10 May 2024 at [3]-[4].
[24] Ibid at [5].
[25] Ibid at [8].

56. The Respondent's submissions then take a similar path to the Applicant, in that the Respondent submits the Tribunal ought to consider whether the information was "*confidential to Council*" prior to determining whether the Respondent knew, or ought reasonably to have known, that the information was "*confidential to Council*".[26]

57. The Respondent refers to the Policy before submitting that "*in order to fall within the definition of confidential information under Policy AP212, the Applicant must prove that the information she released was created and received in the clear and reasonable expectation that the information will not be publicly disclosed* ***AND*** *that it was not in the public interest to disclose or distribute the information*" (emphasis in the original).[27]

58. On the first limb of that test, the Respondent submits that the information was not created and received in the clear and reasonable expectation that the information will not be publicly disclosed. On that point the Respondent submits that the "*FOR OFFICIAL USE ONLY*" label on the Briefing Note "*is an extremely common classification that would be placed on a vast amount of routine council documentation and that label does not, in itself, have the effect of transforming otherwise routine Council information into 'confidential information'".*[28]

59. In support of that submission, the Respondent draws attention to the Control Guideline which states, by reference to "*FOR OFFICIAL USE ONLY*" labels, that they include "*[r]outine information with low confidentiality requirement"* and "*this type of information constitutes the majority of Council information (by volume) and does not require any special confidentiality or handling requirements*".[29]

60. The Respondent also submits that the Briefing Note was "*markedly different*" from the examples of confidential information included in the Policy. The Respondent submits that "*if documents labelled "OFFICIAL USE ONLY" were intended to be captured in the definition of confidential information, then that would be reflected in the examples listed in the policy*".[30]

61. The Respondent also submits that the information was "*markedly different from the type of information that has been recognized by the Tribunal as amounting to confidential information*", referring to the Tribunal's decision in *Stewart*.[31]

62. The Respondent's primary contention is that the information was obtained through a routine request; it was not marked as confidential; it was not obtained by any process imparting confidentiality; and it did not contain any budgetary, commercial-in-confidence, privileged or other class of information requiring protection by law.[32]

63. The Respondent also drew attention to her evidence, particularly paragraphs 21 to 27 of her Statutory Declaration, in which she observed public commentary on the tunnel feasibility study (the subject of the Briefing Note) by the [redacted] and [redacted]. As such, the Respondent submits the appearance of that information in the public domain destroyed any confidentiality that might have attached to it.[33]

64. The second limb of the Respondent's proposed test was also not, in the Respondent's submissions, made out. Relevantly, the Applicant's evidence did not make out that it was "*in the public interest*"

[26] Ibid at [9].
[27] Ibid at [14].
[28] Ibid at [16].
[29] Ibid.
[30] Ibid at [17]-[18].
[31] Ibid at [19]; citing *Independent Assessor v Stewart* (CCT reference F20/1270, 1 December 2020) at [9].
[32] Ibid at [21].
[33] Ibid at [22]-[23].

for that information to be deemed as not confidential to Council, i.e., that there was a matter of "*considerable public interest and importance*" in disclosing the information.[34]

65. The Respondent also submitted that the common law definition of equitable actions for breach of confidence had relevance to the allegation before the Tribunal.[35] Such well-known legal principles do not warrant repeating here, suffice to say that the Respondent submits that the circumstances of the Respondent's disclosure did not meet the threshold requirements for finding a breach of confidence, and so do not meet the requisites of a charge of misconduct under the COBA.[36]

66. The Respondent also submits that the Applicant has not made out that the Respondent knew, or ought to have known, that the information was confidential to Council. On that ground, the Respondent submits that she had previous experience in dealing with "*sensitive*" and "*commercial-in-confidence*" documents, and that had "*always complied with the confidentiality obligations*" and never had any "*adverse finding*" against her in respect of confidential documents.[37]

67. The Respondent then submits that she had sought clarification on her obligations with regards to documents labelled "*FOR OFFICIAL USE ONLY*" from [redacted] and [redacted], and that the "*significance of this exchange*" was that information able to be disclosed to the Respondent's constituents in some form could not be information confidential to Council.[38]

68. The Respondent closes by submitting that the Applicant's evidence that one tranche of documents being required to be afforded a certain obligation of confidence was not relevant to then determining whether a second tranche of documents (including the Briefing Note disclosed) was subject to the same obligations.[39]

Applicant's and Respondent's submissions in reply

69. The Applicant's submissions in reply were brief.

70. In response to the Respondent's submission that the notion that the "*FOR OFFICIAL USE ONLY*" label "*would capture a large volume of council information*" the Applicant asserted that this "*does not mean that the information is not confidential to council. The information belongs to council until decided otherwise by proper process. The fact that the information may not have any 'special' confidentiality requirements is distinct from having 'no' confidentiality requirements*".[40]

71. The Applicant also submits in reply that if the "*FOR OFFICIAL USE ONLY*" label did not render such information confidential, then it was "*meaningless*". Further, "[t]*he Respondent has not articulated what the purpose of the security label would be, if not to put the reader on notice that the document was confidential to council*".[41]

72. The Applicant also takes issue with the Respondent's submission that the examples of confidential information listed in the Policy ought to be treated as an exhaustive list, noting that it is "*clear*" that documents with the "*FOR OFFICIAL USE ONLY*" label are not for public release, especially given that the Briefing Note was not labelled "*PUBLIC*".[42]

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[34] Ibid at [24]-[27].
[35] Ibid at [29]; citing *Ramsay Health Care Ltd v Information Commissioner & Anor* [2019] QCATA 66, [94]; *Optus Networks Pty Ltd v Telstra Corporation* (2010) 265 ALR 281; *SmithKline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73.
[36] Ibid at [31].
[37] Ibid at [34].
[38] Ibid at [35].
[39] Ibid at [36].
[40] Applicant's submissions in reply of 17 May 2024 at [2].
[41] Ibid at [3].
[42] Ibid at [5].

73. The Applicant also submits that the case of *Stewart* is of no assistance to the Respondent, as that case "*discusses council decisions being made openly and transparently*", as opposed to the present matter involving "*preliminary work by council officers*".[43]

74. The Applicant then submits that the Respondent's submission that the information was already in the public domain – courtesy of the [redacted] and/or [redacted] – was erroneous, because "[t]*he Respondent has not identified any comments by the* [redacted] *or* [redacted] *that disclose information contained in the Briefing Note. In fact, curiously, the Respondent claims that their comments were misleading and that she felt the need to correct the public record. It is difficult to reconcile that evidence (which has its own difficulties) with a submission that the content of the Briefing Note was already in the public domain*".[44]

75. On that ground, the Applicant submits that "[t]*he Respondent's submission about the* [redacted] *stance is immaterial to the key issues for the Tribunal's consideration. The Applicant submits that the requirement for transparency does not imply a requirement of unrestricted or unfiltered disclosure of confidential information*".[45] The Applicant submits that not only is the reference to equitable breaches of confidence erroneous, but it is unfair to, as the Respondent suggests, impart tests of equitable obligations of confidentiality on Councillors given that "*councillors by resolutions adopt policies and procedures specifically for the purpose of classifying and managing confidential information*".[46]

76. Finally, the Applicant submits that the Respondent's reliance on the "*general*" advice of [redacted] and [redacted] was misplaced. Not only did the Respondent go beyond the advice that was offered, the Applicant submits that:

    There is plainly a difference between information that, on the one hand, was specifically compiled and prepared by council officers for the Respondent's attention, and, on the other hand, information that was created for internal officer purposes and was only provided to the Respondent as a result of compliance (pursuant to council policy) with a request for a copy of a document.

77. The Respondent's submissions in reply were brief. The Respondent took issue with paragraphs 2 to 7, 8, 9 to 11, 12 to 15 and 16 of the Applicant's submissions in reply, again repeating the submissions filed by the Respondent on 10 May 2024. As these have already been paraphrased by the Tribunal, they will not be repeated here.

Tribunal's decision

78. The Tribunal has been aided greatly by the parties significantly in reducing the matters being contested. For that, the Tribunal is very thankful to the parties for confining the arguments to a narrow scope as this has saved the Tribunal significant time and resources.

79. The Tribunal is satisfied that the particulars (a) to (k) of the allegation, not being contested by the parties, have been made out. On that basis, the Tribunal is satisfied that the Respondent has "*released*" information.

80. The proper questions – as articulated by both the Applicant and Respondent – are whether the information was confidential to the council, and then whether the councillor knew, or ought reasonably to have known, that the information was confidential to the council.

81. The starting point for such analysis must remain in the COBA. What is important is whether the Briefing Note was "*information confidential to the Council*". It is irrelevant – at least for the purposes of finding misconduct – whether the Briefing Note was also "*confidential information*" or

[43] Ibid at [6].
[44] Ibid at [7].
[45] Ibid at [8].
[46] Ibid at [9]-[11].

"*information for official use only*". Such terms serve as an unhelpful distraction from the task of statutory interpretation the Tribunal must undertake.

82. As a preliminary observation, both the Policy and the Control Guideline are vaguely worded, and confusing documents to navigate. Council appears to have taken a very broadbrush view to handling confidential and sensitive information that has resulted in policies that are overly wordy and unhelpful. The Council would do well to consider revising its information handling policies to be more succinct for Councillors and Council employees and to prevent instances like this occurring in the future.

83. To determine if the Briefing Note is "*information confidential to the Council*" requires that Council make some determination to that effect. Rather than doing so in each case (which would be onerous and unworkable) Council has adopted the Policy. The first line of the Policy, under the heading "POLICY", clearly states that "*Council representatives shall respect Confidential Information and not publicly release it".*

84. On that basis, the Briefing Note would need to satisfy – and such is the Respondent's submission – that "*in order to fall within the definition of confidential information under Policy AP212, the Applicant must prove that the information she released was created and received in the clear and reasonable expectation that the information will not be publicly disclosed* ***AND*** *that it was not in the public interest to disclose or distribute the information*".[47]

85. There is no doubt as to the first point. The Briefing Note was created by [redacted] for the express and limited distribution of [redacted], and no other person. Accepting for present purposes that Councillors could request access to such information *ex post*, the Briefing Note was "*created and received in the clear and reasonable expectation that the information will not be publicly disclosed".* Somewhere in the line of creating the document, someone (that may not have been [redacted], though it was likely him[48]) clearly made a choice, or was otherwise compelled by practice or procedure, to afford the document a security protection of "*FOR OFFICIAL USE ONLY*".

86. According to the Control Guideline, a security label is "*a word or phrase used to indicate the adverse confidentiality impacts to Council of data, information or information assets*". So, once the "*FOR OFFICIAL USE ONLY*" label was applied, the document became subject to a "*phrase*" which clearly "*indicated the adverse confidentiality impacts to Council*" if that document were improperly released. Paragraph 6.3.1.1 of the Control Guideline makes this irresistibly clear: "*Council applies information security labels to all information assets and information systems as a convenient way of understanding the* ***confidentiality requirements****, and so* ***employees know how to appropriately handle, use, store and dispose of the information***" (emphasis added).

87. The Policy is more oblique in its treatment of information confidential to Council, but still stipulates that "*Council acknowledges that Confidential Information may not always be marked as confidential. However* ***all Council representatives have an obligation to treat all information with sensitivity.*** *If in doubt, seek advice from the appropriate designated person"* (emphasis added).[49]

88. On that ground, the Briefing Note would be "*information confidential to Council*". This is because in practical effect the Policy and the Control Guideline together make it irresistibly clear that any document with a security label is subject to (at least some) obligations of confidentiality. Although the Respondent's submission that the "*label does not, in itself, have the effect of transforming otherwise routine Council information into 'confidential information'*"[50] is broadly correct, that

[47] Respondent's submissions of 10 May 2024 at [14].

[48] This is because paragraph 6.1.3 of the Control Guideline requires that "[w]*here new documents/records are created by Council, the originator of the document/record is responsible for selecting the appropriate security label*".

[49] Applicant's Brief of Evidence, page 117.

[50] Ibid at [16].

submission confuses the notion of "*confidential information*" (defined by the Policy) and "*information confidential to Council*" (expressed in the COBA).

89. By contrast, the Tribunal accepts the Applicant's submission in reply that the use of the "*FOR OFFICIAL USE ONLY*" label:

> *…does not mean that the information is not confidential to council. The information belongs to council until decided otherwise by proper process.* ***The fact that the information may not have any 'special' confidentiality requirements is distinct from having 'no' confidentiality requirements. As clearly stated in the meaning of the label as in force at the time, 'it still needs a level of protection and control'.*** (emphasis added)[51]

90. The Respondent's submission about public claims made by [redacted] and [redacted][52] are largely irrelevant. The claims – such as the evidence can articulate them – appear to be possible misstatements or miscommunications by the [redacted] and [redacted] about the depth of certain studies undertaken by Council in respect of the Ipswich Road Corridor. The Respondent presumably takes issue with such statements given that she has seen the Briefing Note, which could tend to prove the incorrectness of those statements.

91. These statements did not however make public the *content* of the Briefing Note, which is the "*information confidential to council*". In *Stewart* for example, the "*information confidential to council*" involved a request to support a major motor homes event in the Council local government area, heard during a time that the Council was "*in committee*", i.e., a practice of Council of closing the meeting to the public and rendering all matters and documents discussed, raised, tabled or considered as confidential to Council.

92. Likewise, the mere fact that the [redacted] and [redacted] talked about the Ipswich Road Corridor in their daily duties did not destroy the confidence of the reports being generated by Council officers to other Council officers.

93. It is further wrong of the Respondent to suggest that the Briefing Note was "*markedly different*" from the examples of confidential information included in the Policy, or "*markedly different from the type of information that has been recognized by the Tribunal as amounting to confidential information*", referring to the Tribunal's decision in *Stewart*.[53] In both cases, the Respondent's submissions are incorrect.

94. The examples given in the Policy are clearly meant to be non-exhaustive. The term "*information*" clearly "*includes, but is not limited to*" objects within the specified classes. Likewise, "*confidential information*" contains "*examples*" which include the four classes referred to by the Respondent, but clearly not limited to them.

95. The Respondent's submission that "*if documents labelled "OFFICIAL USE ONLY" were intended to be captured in the definition of confidential information, then that would be reflected in the examples listed in the policy*"[54] would encourage a wooden and inflexible interpretation of the Policy that could not adapt to the vast volume of information dealt with by Council on a daily basis. Further, there would be no need for the types of security labels outlined in the Control Guideline – either information was listed in the Policy and held to be confidential, or it was not listed in the Policy and could be released to the public at will.

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[51] Applicant's submissions in reply of 17 May 2024 at [2].
[52] Ibid at [22]-[23].
[53] Respondent's submissions of 10 May 2024 at [19]; citing *Independent Assessor v Stewart* (CCT reference F20/1270, 1 December 2020).
[54] Ibid at [17]-[18].

96. The Respondent also submitted that there was a matter of "*considerable public interest and importance*" in disclosing the information.[55] Importantly, this is where the notions of "*information confidential to Council*" and "*confidential information*" diverge. The COBA makes no reference at all to the public interest in the disclosure of information – section 173 simply forbids Councillors from disclosing any information that is confidential to Council. On the other hand, Council imposes obligations on certain classes of information which it treats as "*confidential information*", which Council defines in its Policy as "*not being in the public interest to disclose or distribute*".

97. It is therefore irrelevant whether the information in the Briefing Note was in the public interest to be disclosed or not. What matters is that the Briefing Note contained "*information confidential to Council*", which the Tribunal is satisfied it did.

98. With that finding, there is no need to deal with the Respondent's submissions on equitable remedies for breaches of confidence; however, the Tribunal will do so in the interests of completeness.

99. The Policy sets out certain legislative provisions in its opening recitals, including the COBA and the Act, but also the *Right to Information Act 2009* (Qld) ("RTI Act") and the *Information Privacy Act 2009* (Qld) ("IP Act").

100. It is well established that an equitable or contractual obligation of confidence may be overridden by the operation of statute. In this case, it is the operation of the RTI and IP Acts as "*statutory provision*[s] *compelling disclosure of information"*.[56] Council is compellable to disclose information under its custody or control, even in circumstances that the Council has deemed that information confidential to it – but this does not render that information as non-confidential in the first place.[57] Further, the information contained a marking of "FOR OFFICIAL USE ONLY" which was a phrase imparting some kind of confidentiality requirements (and which the Respondent took steps to identify by speaking to [redacted] and [redacted]) and was information that should have been handled consistently with the RTI and IP Acts.

101. For those reasons the Respondent's submission that the information could not be confidential because "*it was not marked as confidential*", "*it was not obtained by any process imparting confidentiality*", and it did not contain "*any… other class of information requiring protection by law*" were misplaced and are rejected.[58]

102. As to whether the Respondent knew, or ought reasonably to have known, the information in the Briefing Note was confidential to the council, the Tribunal is satisfied that the Respondent had at least constructive knowledge of that fact. The Tribunal is not satisfied that the Respondent actually knew that the information was confidential (owing in part to the confusing drafting of the Policy and the Control Guideline, and in part to her apparent sense of confusion in making enquiries of [redacted] and [redacted].

103. It is not contested that the Policy and the Control Guideline applied to the Councillor. The Tribunal notes that the Respondent was not only a Councillor at the Council at the time the Policy was adopted on 3 September 2013; she has been a Councillor ever since. Together with the Respondent's evidence, the Tribunal finds that the Respondent was aware of the existence of the Policy and, at least on a general level, its content.

104. On 17 October 2019, the "Information Management Services Manager" emailed the Respondent and notified her that the records she had requested (including the Briefing Note) would be supplied to

[55] Ibid at [24]-[27].
[56] *Smorgon and Australia & NZ Banking Group Limited & Ors; Commissioner of Taxation & Ors and Smorgon & Ors* (1976) 134 CLR 475, 486-490.
[57] *B and Brisbane North Regional Health Authority* [1994] QICmr 1; (1994) 1 QAR 279; cited in *Palmer and Townsville City Council* [2019] QICmr 43.
[58] Ibid at [21].

her, and included a sentence "*I would like to take this opportunity to remind you of your obligation/responsibility under S 173 of the City of Brisbane Act 2010 and the privacy provisions contained under the Information Privacy Act*" (sic).

105. Although it is plain that this email was something of a generic – one might almost call "boilerplate" – response, it had the practical effect of putting the Respondent on notice of the application of section 173 of the COBA to the **whole** of the material she had sought from Council.

106. Nor is it contested that the Briefing Note was labeled "*FOR OFFICIAL USE ONLY*". In those circumstances, the Respondent took the correct steps of seeking advice. It is not clear on the evidence before the Tribunal whether [redacted] and/or [redacted] were "*appropriately designated persons*" as the Policy defines them (being the "*CEO or the relevant Divisional Manager, Executive Manager or relevant branch manager*". [redacted] Affidavit does not supply that information, and [redacted] was not called as a witness. In any event, the Respondent sought their advice on the handling of the information.

107. This enquiry of [redacted] and [redacted] seemed to have another purpose, as the Respondent also indicated (at paragraph 17 of her evidence) that she had no record of the Control Guideline "*ever being provided to me or approved by Council, so I was unaware of its use or application,* ***hence my inquiry*** [of [redacted] and [redacted]]" (emphasis added). The Control Guideline is clearly enunciated in the Policy as one that, *inter alia*, should be read alongside other Guidelines needed to interpret the Policy correctly. On that basis, it is unclear on the evidence why the Respondent had not – until this matter arose – sought advice about the application of the Control Guideline (or the other Guidelines). After all, the Respondent was a member of the Council which endorsed the adoption of the Policy, which referenced *inter alia* the Control Guideline.

108. There are two observations to be made here:

    a. Firstly, the Respondent was aware that the Control Guideline existed, but not of its scope or content. She then (correctly, in the Tribunal's view) sought advice about what "*FOR OFFICIAL USE ONLY*" labels meant; and

    b. Secondly, the Respondent was at least unconsciously aware that the information she had obtained may have some requirements of confidence. If she did not have that state of mind, she would not have undertaken enquiries, she would have simply released the information.

109. Going forwards, the Respondent was given advice that – at least in her words at paragraph 18 of her evidence – "*I could discuss the information in such documents with my constituents but that I should not directly distribute the document*". The Respondent's evidence (at paragraph 19) was that she then "*formed a view*" that the "*information contained in the Briefing Note (which was also marked "OFFICIAL USE ONLY")…was able to be discussed with my constituents and was therefore not confidential in nature*".

110. To be clear, the Respondent was the one who determined that the information was not confidential. She was not authorized to make that decision, and she did so in the clear and unambiguous face of advice from two officers who – whilst they may or may not have been "*appropriately designated persons*" – counselled her not to do the very thing she actually did.

111. The Tribunal is satisfied that the Respondent ought to have known that the Briefing Note contained "*information confidential to Council*".

112. The Tribunal therefore finds that Allegation One **is sustained**.

Orders under the Act

113. The Tribunal has found that the Respondent has engaged in misconduct under section 150AQ(1)(a) of the Act, and must therefore consider (as a consequence of section 150AQ(2)) the appropriate orders to be issued under section 150AR.

114. The Tribunal may, for that purpose, consider any previous misconduct of the councillor (section 150AQ(2)(a) of the Act) and any allegation made in the hearing that was admitted, or not challenged, and the Tribunal is reasonably satisfied is true (section 150AQ(2)(c) of the Act).

115. In doing so, the Tribunal is curtailed from the full list of orders it may make by section 290(2)(b) of the COBA, as the Tribunal may only make an order that is substantially the same as an order that could have been made under former section 183 of the COBA.

116. The Respondent has only one previous finding of misconduct according to the evidence provided, that of a failure to pay penalties ordered by a finding of the former Councillor Conduct Review Panel.[59] Such a finding is not presently relevant to this matter.

117. The Tribunal is also satisfied that the Respondent did not challenge particulars (a) to (k) of the Applicant's case, and which the Tribunal was satisfied to find were true. This has saved the Tribunal significant time and resources and is – despite the Applicant's submission on the matter[60] – a strong mitigating factor in her favour.

118. Both the Applicant and the Respondent are correct that the Tribunal's jurisdiction is protective, not punitive. The orders crafted by the Tribunal should aim to rehabilitate the individual as to the error of their ways, and serve as valuable touchpoints to disincentivize other Councillors who may contemplate engaging in conduct similar to the Respondent's.

119. In that vein, the Applicant's submissions referred to a number of similar cases decided by the Tribunal which resulted in broadly similar orders, involving an order to make an admission of misconduct, an order to undertake training or counselling, and a small pecuniary penalty.[61]

120. The Respondent's submissions were that if the charge were sustained, that the Respondent's otherwise good conduct of 16 years as a Councillor (including 4 and half years since the allegation) are relevant, as is the significant admissions of the Respondent which helped narrow the scope of the proceedings.

121. There is no doubt that the Respondent's conduct was serious; however, the Respondent's submissions are highly persuasive. The Respondent has been laboring under the cloud of these proceedings for far longer than was necessary, owing at least in part to this Tribunal's statutory need to afford her the fullest opportunity to be heard on the allegation. Her significant admissions were also made from the very earliest part of the hearing, and stand to her credit before this Tribunal as they saved a significant amount of time and resources in disposing of the matter.

122. That said, the Respondent should take notice that it is not her role to determine what information held by Council is confidential to it. Her breach was serious, and could have compromised delicate commercial negotiations, investigations or tenders into the Ipswich Road Corridor which might have adversely affected her constituents. The fact that there was no material detriment to Council owes more to luck than the Respondent's insight.

123. The Respondent will be ordered to make an apology for her misconduct during a meeting of Council open to the public under section 150AR(1)(b)(i) of the Act. This will hopefully discourage her from

[59] Annexure 1 to the Applicant's SOF.

[60] The Applicant's submissions of 12 April 2024 indicated that the Applicant "*does not submit that there are any applicable mitigating factors in this matter*": at [62].

[61] Ibid at [66]-[69].

engaging in similar acts of unauthorized disclosure and will stand as education to other Councillors who consider engaging in similar actions. The Respondent will also be ordered to undertake a course of training or counselling in her obligations under Council's information handling and security frameworks, so that she more appropriately recognizes and discharges her obligations in the future.

Notices

124. Following the finalisation of this Decisions and Reasons, the Tribunal will arrange for notices to be sent to relevant parties as required by sections 150AS(2) of the Act.

Brendan Walker-Munro[62]	**Danielle Brown**	**Grant Wilson**
Chair	Tribunal Member	Tribunal Member
		
Date: 18 June 2024		

[62] Authorised to sign this determination on behalf of the Tribunal by email from Grant Wilson dated 14 June 2024 and Danielle Brown dated 12 June 2024.