

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

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

1. Complaint:

CCT Reference	F20/1173
Subject Councillor	Councillor Nigel Waistell (the former Councillor)
Council	Scenic Rim Regional Council

2. Decision (s150AQ):

Date:	26 May 2021
Decision:	<p>The Tribunal has determined, on the balance of probabilities, that the allegation that on 9 March 2019, Councillor Nigel Waistell, a Councillor for the Scenic Rim Regional Council, engaged in misconduct as defined in <i>section 150L(1)(c)(ii) of the Local Government Act 2009</i> (the Act) in that the conduct contravened the Acceptable Requests Guidelines of the local government under section 170A of that Act, has been sustained.</p> <p>The Particulars of the conduct provided by the Independent Assessor are that:</p> <p>a. On 24 September 2018, the Scenic Rim Regional Council (SRRC) adopted by resolution the Council Policy-(CM03.17CP) Acceptable Requests, which sets out the acceptable requests guidelines required by section 170A(7)¹ of the Act.</p> <p>b. On 25 February 2019 at 9.10am, Councillor Waistell sent a request to Mark Lohmann (Mr Lohmann), who was the Acting Manager Planning for the SRRC at that time. The email requested the following information</p>

¹ The Tribunal notes that the Council’s Acceptable Requests Guidelines and Policy does not refer to section 170A(7) of the Act. The provision that applied at the time the conduct occurred is section 170A(6) as it appears in the relevant Act in force at 3 December 2018.

	<p>about a stockpile located on Lot 13 RP 852359, land number 21514: Scenic Rim Regional Council</p> <p>(i) When was it approved;</p> <p>(ii) The categorization of the land at the time; and</p> <p>(iii) Whether the use was deemed consistent.</p> <p>c. On 9 March 2019 at 1.31pm, Mr Lohmann replied to Councillor Waistell’s email with preliminary advice about the stockpile and a request for further clarification about the concerns related to the stockpile. Mr Lohmann’s reply included the standard confidentiality clause required by section 3, paragraph 4 of the SRRC Acceptable Requests Guidelines namely:</p> <p>(i) “The content of this email is confidential and intended for the recipient specified in the message only. It is strictly forbidden to share any part of the message with any third party, without written consent of the sender”</p> <p>d. On 9 March 2019 at 6.29pm, Councillor Waistell forwarded the entirety of Mr Lohmann’s reply to a member of the public, Ms Louise Hargreaves (Ms Hargreaves), explicitly directing her attention to Mr Lohmann’s response, using the words:</p> <p>(i) “Dear Louise, Ref email below, an opportunity may have arisen. Please can you provide dot points on concerns and I will submit. Regards”</p> <p>e. Councillor Waistell did not obtain verbal or written consent from Mr Lohmann before forwarding the email to Ms Hargreaves.</p> <p>f. On 10 March 2019, Ms Hargreaves replied to Councillor Waistell’s email.</p> <p>g. On 11 March 2019, Councillor Waistell forwarded Ms Hargreave’s reply to Mr Lohmann.</p> <p>Councillor Waistell’s conduct in forwarding Mr Lohmann’s email to a member of the public was in breach of section 2 of the SRRC acceptable requests guidelines, which is misconduct under section 150L(1)(c)(ii) of the Act.</p>
<p>Reasons:</p>	<p>1. The material and evidence reviewed by the Tribunal including the parties submissions and statement of agreed facts that outlined the circumstances of the conduct, established that the allegation of misconduct is made out.</p> <p>2. However Councillor Waistell, despite accepting that the conduct as alleged did occur, disputed and continues to dispute that his conduct</p>

constituted misconduct. Under such circumstances the Tribunal must be satisfied on the evidence before it that the allegation is sustained.

3. The Tribunal reviewed the evidence filed by the Independent Assessor and the submissions and statements made by the parties during the hearing. On the basis of the agreed facts and the evidence before it the Tribunal is satisfied to the requisite standard of proof that the Councillor contravened section 2 of the Acceptable Request Guidelines (CM03.17CP) (the Guidelines) adopted by the Council pursuant to section 170A of the Act.

Section 2 of the Guidelines provides in part :

*“ ... that in requesting information or advice by email, a Councillor is not to carbon or blind copy (Cc or Bcc) other officers ... or members of the public, into the request; **nor is the Councillor to forward the response to other officers ... or members of the public**”*. [emphasis added]

4. The evidence available to the Tribunal established to the requisite standard of proof that on 9 March 2019 Councillor Waistell forwarded a Council email containing information that he had requested from a Council officer to a member of the public without obtaining written authority from the Officer.

Section 3, *Officer’s Responsibilities*, of the Guidelines specifies that:

“ ... When providing a written response to a Councillor, the officer is to include the ...Council in Confidence footer in the email”.

This confidentiality footer required to be placed on all documents by section 3 and provides that:

*“ The content of this email is confidential and intended for the recipient specified in the message only. **It is strictly forbidden to share any part of this message with any third party, without a written consent of the sender**”*. [emphasis added]

5. The Councillor disputed this could be misconduct and explained to the Tribunal during the hearing that

... I was acting on behalf of a constituent ...².

6. The Councillor provided several explanations for his conduct in releasing the Council email without obtaining the written consent of the Officer including:

² Transcript proceedings 26 May 2021 page 6 at [L2].

- a. The conduct was a 'normal action of councillors'
- b. The conduct was excusable, as "... I think I had implied consent...'
- c. That the Council is incorrectly interpreting the Guidelines and they need to review their interpretation as such conduct 'is normal practice in other businesses ...'³
- d. The Guidelines are not strict Guidelines.⁴
- e. 'Council officers are very busy and I do not wish to waste their time going backwards and forwards'.⁵
7. In the context of the explanations provided by Councillor Waistell the Tribunal reviewed the sworn evidence of Mr Lohmann in particular the statement⁶ that:
- 'Councillor Waistell did not seek either verbal or written consent from me before forwarding my email containing the confidentiality footer to Ms Hargreaves....'*
8. The Tribunal considered all of the explanations for the conduct provided by the Councillor and noted that he held a genuine but misguided view that he was entitled to interpret the Acceptable Request Guidelines in the way that he did. It was also noted that he was apologetic for his conduct and believed that he was acting in the best interests of the constituent.
9. However the Tribunal does not accept that the conduct or explanations provided by the Councillor acknowledge the regulatory nature of the Guidelines and the obligations and responsibilities of councillors to comply with sections 4(2), 12(3)(a), and 170A of the Act and the Guidelines by section 2.
10. On the basis of the material before it the Tribunal finds that on March 9 2019, the Councillor did not seek written consent or any consent from Mr Lohmann before forwarding his complete email to a member of the public in contravention of the procedure contained in section 2.
11. The Acceptable Request Guidelines once adopted by resolution of the Council, pursuant to section 170A of the Act, become a mandatory procedure that regulates and limits the conduct of councillors when seeking information from Council officers and transmitting information received from Council officers.

³ Transcript page 6 at[L5].

⁴ Ibid.

⁵ Ibid page 11 at[L3]

⁶ Affidavit R M Lohmann sworn 25 November 2019 at[9]

	<p>12. The Tribunal formed the view that the Councillor knew or should have reasonably known that the Acceptable Requests Guidelines prohibit the transmission of specified emails received from Council officers to members of the public without written authority.</p> <p>13. Accordingly the Tribunal determined that the contravention of section 2 of the Acceptable Requests Guidelines constitutes misconduct pursuant to section 150L(1)(c)(ii) of the Act.</p> <p>In this context and having regard to the evidence presented by the parties the Tribunal is satisfied that the allegation is sustained.</p>
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3. Orders and/or recommendations (s150AR - disciplinary action):

Date of orders:	26 May 2021
Orders and/or recommendations:	<p>The Tribunal found that the Councillor engaged in misconduct, pursuant to section 150AR(1) of the Act, and orders that:</p> <p>Pursuant to section 150AR(1)(b)(ii) of the Act former Councillor Waistell is reprimanded for the conduct.</p>
Reasons:	<p>1. The Act provides specifically by section 150L(1)(c)(ii) that a contravention ‘<i>of the acceptable request guidelines of the local government under section 170A</i>’ is misconduct, accordingly it must be taken that the legislature considers that this type of conduct is serious or potentially serious.</p> <p>2. The Tribunal considered the relevant factors in the agreed statement of facts and sought submissions from the parties regarding the appropriate orders to be made. The Respondent did not make a submission in relation to the proposed orders.</p> <p>3. The Orders made by the Tribunal took account of the relevant mitigating and aggravating factors outlined in the agreed statement of facts including that:</p> <ul style="list-style-type: none"> • The Councillor has a previous disciplinary history with a finding of inappropriate conduct similar to the conduct outlined in this matter; • the Councillor was an experienced local government councillor and in his second term of office when the conduct occurred;

- the Councillor had undertaken relevant in-service and councillor induction training;
- the Councillor admitted that he was aware of the procedures provided in the Guidelines;
- the Councillor from the outset has not denied the essential circumstances of the alleged conduct and has apologized for the conduct;
- the Councillor is no longer elected as he did not re-nominate at the most recent elections.

4. The Tribunal noted that the Councillor did receive and attend several training sessions between 2012 to 2018. The Tribunal formed the view the Councillor's explanation for the conduct that there is some doubt that this prior in-service training equipped the Councillor with sufficient guidance and an understanding of the seriousness of the issues outlined in this matter.

5. However the Tribunal accepted that the conduct of the Councillor did not arise from any lack of knowledge of the provisions in the Guideline. The Tribunal noted that Councillor Waistell was an experienced councillor, and that a similar disciplinary finding had been previously made against him that a disciplinary order was appropriate.

6. The Tribunal considers that in the interests of deterrence of this type of conduct and to maintain community confidence in the system of governance and transparency by local government that an order be made reprimanding Councillor Waistell for conduct pursuant to section 150AR (5) and 150AR(1)(b)(ii) of the Act.