

Councillor Conduct Tribunal: Summary of Decision and Reasons for Department's website

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

Note that the Tribunal is prohibited from giving another entity information that is part of a Public Interest Disclosure unless required or permitted under another Act; or including in this summary the name of the person who made the complaint or information that could reasonably be expected to result in identification of the person: S150AS(5)(a) and (b).

1. Application details:

Reference No.	F20/6028
Subject Councillor	Councillor Mark Edwards (the Councillor)
Council	Redland City Council (the Council)

2. Decision (s150AQ):

Date:	16 January 2023
Decision:	The Tribunal has determined, on the balance of probabilities, the allegation that on 7 November 2018, Councillor Mark Edwards, a councillor of Redland City Council, engaged in misconduct as defined in section 176(3)(b)(ii) of the Local Government Act 2009, by breaching the trust placed in him as a councillor when, having a material personal interest in a matter, he influenced a local government employee who was authorized to decide or otherwise deal with the matter to do so in a particular way, which contravened section 175I(3) of the Act and the conduct was therefore inconsistent with the local government principle requiring 'ethical and legal behaviour of councillors and local government employees', is not sustained as the councillor was found not to have engaged in misconduct.
Particulars:	The Particulars of the alleged conduct: a. On 5 November 2018, <i>Company XX Pty Ltd (details redacted)</i> submitted a development application to Redland City Council. The development application MCU18/0251 related to a mixed use "shop and storage facility" on Fernbrook Avenue, Russell Island.

	<ul style="list-style-type: none"> b. Councillor Edwards was notified of the development application on 5 November 2018 as the relevant divisional councillor. c. On 6 November 2018, Councillor Edwards sent an email to Louise Rusan, General Manager - Community and Customer Services. In the email, Councillor Edwards referred to a discussion between himself and John Oberhardt, General Manager Operational Services, in which he had disclosed his own conflict of interest in the matter and raised community concerns about the development application. Councillor Edwards asked Ms Rusan if council officers could present the application to councillors. d. On 7 November 2018, in response to an email from Ms Rusan, Councillor Edwards sent an email to Ms Rusan confirming that he wanted to “call in” development application MCU18/0251 (the <i>Tribunal noted this email contained a notification by the councillor of a personal interest and advice that he would not participate in the Council meeting or discuss the</i> circumstances with other councillors). Ms Rusan then forwarded Councillor Edwards’ email to David Jeanes, Group Manager in City Planning & Assessment who arranged for council officers to change the decision-maker for development application MCU18/0251 from a council officer to councillors at a Council meeting. e. Councillor Edwards had a material personal interest in development application MCU18/0251 on the basis that he and his wife were the owners of an existing storage facility on Russell Island. f. By sending the email to Ms Rusan on 7 November 2018 to request the “call in”, Councillor Edwards influenced a local government employee to deal with the development application in a particular way, namely, to remove the decision-making authority from a council officer and instead to bring the decision to a Council meeting. g. This conduct contravened section 175I(3) of the Act and was therefore inconsistent with the requirement of ethical and legal behaviour of councillors and local government employees.
<p>Reasons:</p>	<p>Background</p> <ul style="list-style-type: none"> 1. Councillor Edwards is an experienced councillor and currently serving in his third term with the Redland City Council. The evidence provided to the Tribunal established he has no previous disciplinary history. 2. The complaint received and investigated by the Independent Assessor (the Applicant) alleged the Councillor, having a conflict of interest “called-in” a Development application (DA) for the

	<p>construction of a storage facility in his Divisional area of Russell Island.</p> <ol style="list-style-type: none"> 3. The Councillor was notified by an email received from a Council officer on 5 November 2018 that the DA had been filed with the Council. The Council officer sought comments or concerns from him regarding the proposal. 4. Between 5-7 November 2018 the Councillor confirmed by emails and in discussions with Council officers and Planning managers of his personal interest that placed him in a conflict and consequently he would not participate in discussions or vote regarding the decision to be made in relation to the DA. 5. The Councillor sought guidance from Mr J Oberhardt, the General Manager of Organisational services, regarding his conflict of interest, the call-in process and compliance with his legal obligations as a councillor.¹ 6. On 7 November 2018 the Councillor received an email from a Council officer, Ms Rusan, that stated <i>... I have no concerns if you wish to call in an application and if so officers can provide a briefing for councillors the day before the general meeting when the report is considered. Can you just confirm by email that you would like to call in the application and we will make the arrangements...</i>² 7. The Councillor replied by email and stated <i>... I would like to call the application in and have a briefing with councillors. I will NOT participate in the briefing or the GM agenda item.</i>³ 8. The Applicant alleged that the Councillor’s email to the Council officer to “call-in” the DA was a breach of trust and misconduct as the conduct “influenced” a local government employee to act in “a particular way” in contravention of section 175I(3) of the Act. 9. The Councillor disputed the conduct was misconduct.⁴ <p>Did the Councillor influence or attempt to influence a local government employee in contravention of section 175I(3) of the Act?</p> <p>Councillor’s personal interests in local government matters- Division 5A -sections 175A, 175B(1) and 175I(1) & (3) of the Local Government Act 2009 (the Act).</p> <ol style="list-style-type: none"> 10. When interpreting and applying legislative provisions the Tribunal accepts the general proposition that ‘the interpretation that will best achieve the purpose of the Act is to be preferred to any other
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¹ Statutory declaration Mark Ronald Edwards 18 August 2022 at[1]

² Affidavit D J Jeanes 29.06.2020 Exhibit DJ-4 .

³ Ibid.

⁴ Application to Tribunal(s 150AJ(1) by Independent Assessor 4 August 2020.

	<p>interpretation'⁵ (whether or not that purpose or object is expressly stated in the Act).</p> <p>11. The purpose of Division 5A as provided by section 175A is “...to ensure the personal interests of councillors are dealt with in an accountable and transparent way that meets community expectations, if the interests relate to matters to be considered –</p> <p style="padding-left: 40px;">(a) at a meeting of the local government...; or</p> <p style="padding-left: 40px;">(b) by a local government employee,...authorized to deal with the matter.”</p> <p>12. Section 175I(3) provides - “The councillor must not influence, or attempt to influence, a local government employee... who is authorized to decide or otherwise deal with the matter to do so in a particular way.”</p> <p style="padding-left: 40px;"><i>Maximum penalty -200 penalty units or 2 years imprisonment. Offence for councillor with material personal interest or conflict of interest to influence others.</i></p> <p>13. The term “influence”, is not defined by the Act and reliance on the literal meaning of “influence” although informative is a starting point only to understanding the meaning of the provision. The Tribunal accepts the meaning and application of a provision must be determined ...”by reference to the language of the instrument as a whole...”⁶</p> <p>14. The ordinary dictionary meaning of ‘influence’ in relation to section 175I(3) and the context and purpose of the Act was previously considered in the case of <i>Independent Assessor v Councillor O’Pray</i> to be to “exercise influence on, modify, affect or sway” (2nd edition Macquarie Dictionary).</p> <p>15. Councillor O’Pray was found to have attempted to influence an employee when having a conflict of interest. Councillor O’Pray telephoned the employee and attempted to “affect or modify” a change to her report and its recommendations. The Tribunal distinguishes the facts of the matter of Councillor O’Pray from the circumstances relevant to Councillor Edwards. Councillor Edwards was not found to have engaged in conversations with the employee in an attempt to achieve a particular decision or outcome in relation to the DA. The Councillor had declared his intention to withdraw from the decision process and the final determination.</p> <p>16. There was no dispute on the facts and evidence regarding the basis of the complaint made against Councillor Edwards that included he held a material personal interest in relation to the DA.</p>
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⁵ Section s 14A Acts Interpretation Act 1954. Qld;

⁶ *Project Blue Sky v Australian Broadcasting Authority*(1999) 194 CLR 355;

	<p>17. Throughout the period of the alleged conduct, 5-7 November 2018, the Councillor was found to have transparently declared and managed the material personal interest owned by his company. Both the councillor and his wife, as Directors owned a storage facility on Russell Island located within 2 kilometers of the proposed development.</p> <p>18. The Tribunal noted the construction of a second storage facility in close proximity to that owned by the Councillor’s company could potentially have an impact on the business operations as provided by section 175B(1) of the Act.</p> <p>19. The crux of the Applicant’s submissions and Particulars a-g (above) appeared to be that the Councillor, because he held a material personal interest, was forbidden by section 175I(3) of the Act to take any part in the management process including by sending the email to Council Planning Officers to “call-in” the DA.⁷</p> <p>20. The Councillors email request of 7 November 2018 to call-in the DA would ultimately lead to the final decision being determined by all councillors, at a Council meeting, without the Councillor participating in this process. The Tribunal noted the call-in process to be transparent and accountable and consistent with the Purpose of Division 5A “to ensure personal interests of councillors are ...” dealt with in an accountable and transparent way that meets community expectations...”</p> <p><i>Council management of Development applications.</i></p> <p>21. At the date of the alleged conduct the evidence established two management approaches appeared to be routinely implemented by Planning Officers and councillors to progress Development applications. The authority for these processes originated from the Council resolution of 27 July 2011 (11.1.15) that provided an overriding authority ... “that any councillor could request a “call-in” for a DA to be considered at Committee”.</p> <p>22. The Tribunal considered the exercise of the management option, by the Councillor to call-in the DA, followed established and authorized practice to progress Development applications and in these circumstances was not considered “influence of an employee” within the meaning of section 175I(3) of the Act as there was no attempt to alter standard operating practice.</p> <p>23. The evidence of Mr D Jeanes , the Group Manager of City Planning and Assessment, confirmed the ‘call-in’ by the councillor was consistent with the ‘typical’ management process for development applications.⁸</p>
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⁷ Applicant’s submission 22 July 2022 at [15].

⁸ Affidavit David Jeanes 29 June 2020 at [24-25] & [29].

	<p>24. Whether the DA was managed and determined by Council Officers pursuant to delegated authority, or by councillors following a “call-in” at a Council meeting, the Tribunal considered the evidence and circumstances of this matter confirmed either management option to be in compliance with the provisions of section 175I(3) and 175A of the Act, the Council resolution of 29 July 2011, and followed established management practice.</p> <p>25. The Tribunal considered there was an absence of evidence to establish the Councillor, having declared the material personal interest, “influenced a local government employee”. The Councillor’s evidence that ...” he had never discussed the application with assessing officers...”⁹ and his declaration of a material personal interest by email on 6 and 7 November 2018 was accepted by the Tribunal.</p> <p>26. The Applicant’s evidence was not found to be sufficient to persuade the Tribunal that the Councillor’s conduct constituted <i>‘influence or attempted influence of a local government employee who was authorised to decide or otherwise deal with the matter to do so in a particular way’</i> in contravention of section 175I(3) of the Act.</p> <p>27. The Tribunal was not satisfied on the balance of probabilities the Councillor contravened section 175I(3) of the Act and thereby breached the trust placed in him and engaged in misconduct pursuant to section 176(3)(b)(ii) of the former Act.</p> <p>28. Accordingly the allegation is not sustained.</p>
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3. Orders and/or recommendations (s150AR - disciplinary action):

Date of orders:	Not applicable.
Order/s and/or recommendations:	Having found the councillor has not engaged in misconduct, pursuant to section 150AR(1) of the Act, the Tribunal is not required to make orders or recommendations.

⁹ Applicant’s statement of Facts at[16 f].