

Councillor Conduct Tribunal: Decision and Reasons / Publication Notice Misconduct Application

Local Government Act 2009: Sections 150AQ and 150AS

Application details:

Reference No:	F22/5983
Date of Application from the IA:	21 September 2022
Applicant:	Independent Assessor
Respondent:	Councillor Andrew Martin, the Mayor of Blackall-Tambo Regional Council Pursuant to section 150AS(6) of the <i>Local Government Act 2009</i> (Qld), the conduct tribunal must include the councillor's name in a publication notice if the tribunal decided the councillor engaged in misconduct.
Council:	Blackall-Tambo Regional Council
Complainant:	The Complainant's name and identifying information are withheld pursuant to sections 150AS(7)(b) and 150AS(7)(d) of the <i>Local Government Act 2009</i> (Qld), respectively.
Public Interest Disclosure:¹	No
Allegation:	<p>Allegation One</p> <p>It is alleged that between 22 April 2021 and 24 November 2021, Councillor Andrew Martin, Mayor of the Blackall-Tambo Regional Council, engaged in misconduct as defined in section 150L(1)(b)(i) of the <i>Local Government Act 2009</i> (the Act), in that his conduct involved a breach of trust place in him as a councillor, either knowingly or recklessly in that his conduct was inconsistent with local government principle 4(2)(e) of the Act being 'ethical and legal behaviour of councillors and local government employees.'</p> <p>Particulars</p> <p>Particulars of the alleged conduct which could amount to misconduct are as follows:</p>

¹ Section 150AS(5) of the *Local Government Act 2009* (Qld): 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.

	<p>a. Councillor Andrew Martin (Councillor Martin) was at all material times the mayor and a councillor for Blackall-Tambo Regional Council ('Council').</p> <p>b. On Friday 23 April 2021 at 11.12am, WSX,² the advocate of the Complainant, sent an email to QAZ³ entitled "RE: [Complainant]" attaching a letter 'DOC230421-23042021111006.pdf' addressed to QAZ, which included:</p> <ul style="list-style-type: none"> i. confidential information about the Complainant's mental health; ii. reference to a confidential code of conduct matter relating to QAZ; iii. a further request that no contact be made directly to the complainant by QAZ, QAZ's personal assistant, and other staff at the workplace⁴ who are involved in the Complainant's complaint; iv. information relating to the complainant's requested assistance from the relevant government department⁵ in order to take private, personal information off the workplace-issued laptop. <p>c. At 11.35am on the same day, QAZ, in error, forwarded the email received from WSX to Councillor Martin. The email was entitled "RE: [Complainant]" and attached a document titled 'DOC230421-23042021111006.pdf' and contained the signature block for QAZ.</p> <p>d. Two days later on Sunday, 25 April 2021 at 6.20pm, Councillor Martin forwarded the above email entitled "RE: [Complainant]" to Councillor EDC⁶ of the Council. The email did not contain any other content.</p> <p>e. On Tuesday 27 April 2021 at 4.40pm, QAZ sent Councillor Martin an email advising that QAZ had inadvertently sent him an attachment (on Friday 23 April 2021) and asked Councillor Martin to delete the forwarded attachment, writing:</p> <p style="text-align: center;"><i>"Hi Andrew, it looks like I may have inadvertently sent you an attachment that I will need to ask you to delete. Sorry about that. Thanking you kindly..."</i></p> <p>f. On the same day at 5.04pm, Councillor Martin responded to QAZ's email:</p>
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² This person's name and identifying information have been removed to comply with sections 150AS(7)(c) and 150AS(7)(d) of the *Local Government Act 2009* (Qld), respectively.

³ This person's name and identifying information have been removed to comply with sections 150AS(7)(c) and 150AS(7)(d) of the *Local Government Act 2009* (Qld), respectively.

⁴ This identifying information has been removed to comply with section 150AS(7)(d) of the *Local Government Act 2009* (Qld).

⁵ This identifying information has been removed to comply with section 150AS(7)(d) of the *Local Government Act 2009* (Qld).

⁶ This person's name and identifying information have been removed to comply with sections 150AS(7)(c) and 150AS(7)(d) of the *Local Government Act 2009* (Qld), respectively.

	<p><i>"Already done [QAZ], and I admit to opening it very briefly and the minute the first line had sunk in, I was closing, deleting, and deleting again."</i></p> <p>g. In his email response to QAZ, Councillor Martin did not disclose that he had forwarded the email from QAZ and the attachment onto Councillor EDC on 25 April 2021.</p> <p>h. On the same day at 5.05pm, Councillor Martin forwarded the email received from QAZ requesting deletion, to Councillor EDC.</p> <p>i. On 22 July 2021, following a review of the Complainant's work emails the Complainant became aware that QAZ had inadvertently breached the Complainant's privacy by forwarding WSX's email and letter to multiple people in the relevant government department and Councillor Martin.</p> <p>j. The Complainant subsequently lodged an insurance claim⁷ as a result of discovering that emails containing the Complainant's personal and sensitive information had been disclosed including to Councillor Martin.</p> <p>k. On 1 December 2021, as part of the Complainant's insurance claim referred to in paragraph (j) the Complainant received the following in response to the Complainant's claim:</p> <p>i. An email from Councillor Martin to QAZ on 19 November 2021 at 8.29am, entitled "FW: [Complainant]" and the only content in the body of the email was "as discussed".</p> <p>ii. Underneath this email was an exchange between QAZ and Mayor Martin on 27 April 2021 referred to in paragraph (e) and the email exchange between Councillor Martin and Councillor EDC referred to in paragraph (h);</p> <p>iii. A letter signed by QAZ on 24 November 2021, in response to the claim and reference to an email QAZ shared with Councillor Martin; and</p> <p>iv. A signed and witnessed statement by Councillor Martin dated 23 November 2021 which provided the following information in relation to the emails received by QAZ:</p> <p>...</p> <p>7. <i>In relation to the first email of this exchange, and is indicated in the text of my email to [QAZ] at 5:04pm, my recollection is that after reading the first line of the attachment to that email, I closed the email, deleted the email from my inbox, and then deleted the email from the deleted items 'folder' of my Council email account.</i></p>
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⁷ This identifying information has been removed to comply with section 150AS(7)(d) of the *Local Government Act 2009* (Qld).

	<p>8. <i>I no longer have any recollection of the context of the attachment to the first email, nor do I have any recollection of where that first email should have been sent"</i></p> <p>l. Councillor Martin's statement did not include information about him forwarding the original email sent to him by QAZ to Councillor EDC.</p> <p>m. On 7 December 2021, the Complainant further lodged a Right to Information and Information Privacy Access Application with Council relevantly requesting email exchanges between Councillors Andrew Martin and EDC. Council's response to this request identified the email dated 25 April 2021 where Councillor Martin forwarded the email and attachment in question to the Councillor EDC.</p> <p>n. The Complainant did not consent to QAZ or Councillor Martin sharing the Complainant's confidential, personal information.</p> <p>o. Councillor Martin's actions in:</p> <ul style="list-style-type: none"> i. Forwarding an email sent to him in error onto Councillor EDC; ii. Providing a false and/or misleading response to QAZ; and iii. Providing false and/or misleading information in a signed statement dated 23 November 2021, <p>were inconsistent with:</p> <ul style="list-style-type: none"> iv. Section 4(2)(e) of the Act being 'ethical and legal behaviour of councillors and local government employees, <p>And as such was a breach of the trust placed in Councillor Martin, as a councillor, either knowingly or recklessly.</p>
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Decision (section 150AQ):

Date:	5 June 2024
Decision:	<p>Allegation One</p> <p>The Tribunal has determined, on the balance of probabilities, that the allegation that between 22 April 2021 and 24 November 2021, Councillor Andrew Martin, Mayor of the Blackall-Tambo Regional Council, engaged in misconduct as defined in section 150L(1)(b)(i) of the <i>Local Government Act 2009</i> (the Act), in that his conduct involved a breach of trust place in him as a councillor, either knowingly or recklessly in that his conduct was inconsistent with local government principle 4(2)(e) of the Act being</p>

	'ethical and legal behaviour of councillors and local government employees' has been sustained.
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Orders and/or recommendations (section 150AR – disciplinary action):

Date of orders:	5 June 2024
Orders and/or recommendations:	Pursuant to section 150AR(1)(b)(i) of the Act, the Tribunal orders that within 60 days of the date of this decision and reasons/publication notice (5 June 2024), Councillor Andrew Martin, the Mayor of Blackall-Tambo Regional Council, make a public apology for the conduct at a general meeting of the Blackall-Tambo Regional Council open to the public.

Tribunal:

Chairperson:	Gabe Bednarek
Member:	Greg Chemello
Member:	Louise Prychidczuk

Conflict of interest disclaimer/declaration (section 150DT):

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 application.

Hearing (section 150AP & Chapter 7, Part 1):

Time and Date:	10:00am on 16 April 2024
Heard at:	By telephone conference with all three members in attendance.
Appearances:	<p>This matter was heard and determined on the documents pursuant to section 150AP(2) of the <i>Local Government Act 2009</i> (Qld) with no parties appearing.</p> <p>The Tribunal considered the provisions of section 298 of the <i>Local Government Regulation 2012</i> (Qld) 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.⁸</p>

Reasons for decision:

Abbreviations

⁸ Section 298 of the *Local Government Regulation 2012* (Qld) requires that a hearing must be held in public unless the decision-maker directs the hearing is to be held in private.

The following abbreviations have been used in this determination:

the Act	the <i>Local Government Act 2009</i> (Qld)
the Applicant	the Independent Assessor
the Complainant	the person who made the complaint
the Council	Blackall-Tambo Regional Council
the DSDILGP	the Department of State Development, Infrastructure, Local Government and Planning
the HRA	the <i>Human Rights Act 2019</i> (Qld)
the Regulation	the <i>Local Government Regulation 2012</i> (Qld)
the Respondent	Councillor Andrew Martin, the Mayor of Blackall-Tambo Regional Council
the Tribunal	the Councillor Conduct Tribunal constituted to hear and determine the allegation made by the Independent Assessor concerning the Councillor's conduct

Background

1. On 21 September 2022, the Applicant made an application to the Tribunal containing one allegation of misconduct against the Respondent. The factual background regarding the allegation is set out in the **Allegation** section of the table above.
2. The conduct the subject of the allegation is alleged to have occurred between 22 April 2021 and 24 November 2021. At that time, the Respondent was serving his second term as the Mayor of the Council. The Respondent was first elected as the Mayor of the Council at the 2016 Queensland local government elections.⁹ The Respondent was re-elected as the Mayor of the Council at the 2020 Queensland local government elections.¹⁰
3. Regarding Councillor training, the Council confirmed that the Respondent completed the following training:
 - (a) '*Local Government Legislation Amendments Training held in 2018*';
 - (b) '*Belcarra Training held in 2018*';
 - (c) '*Councillor Induction Refresher Training held on 4 June 2019*';
 - (d) '*Councillor Induction Training held on 21 April 2020*';
 - (e) '*Councillor Integrity Training presented on 22 September 2020*';
 - (f) '*Councillor Integrity Framework Refresher training presented 15 February 2022*'.¹¹

The Tribunal notes the instance of training presented on 15 February 2022 above postdates the dates of the alleged conduct.

4. The DSDILGP confirmed that the Respondent completed the following training:
 - (a) '*Councillor Induction Training held on 7 April 2016*';
 - (b) '*Councillor Integrity Training held on 11 September 2018*';
 - (c) '*Councillor Code of Conduct Training held in 2018*';
 - (d) '*So You Want to be a Councillor' Module 1 Training provided in 2019*';

⁹ Annexure A – Statement of Facts [5]; Respondent's affidavit [1].

¹⁰ Annexure A – Statement of Facts [5]; Respondent's affidavit [1].

¹¹ Annexure A – Statement of Facts [12]. The Tribunal notes that the Respondent did not dispute this in the amended Draft Statement of Facts, which was provided to the Applicant along with Annexure C – The Respondent's Response to the Section 150AA Notice dated 2 September 2022.

- (e) *'So You Want to be a Councillor' Module 2 Training provided in 2019*; and
- (f) *'Councillor Induction Training held on 21 April 2020'*.¹²

5. Annexure A – Statement of Facts provided by the Applicant states that the Respondent *'does not have disciplinary history for misconduct'*¹³ but *'has been found to have engaged in inappropriate conduct'*.¹⁴ The Respondent agreed with this in the amended Draft Statement of Facts. The inappropriate conduct arose from the Respondent *'making a number of public comments on Facebook and in a letter'* and this was found to be a *'failure to comply with the Council's Code of Conduct.'*¹⁵ As a result, the Respondent was reprimanded, and further it was ordered *'that any repeat of the inappropriate conduct be referred to the regional conduct review panel as misconduct.'*¹⁶ The Tribunal notes that the actual conduct and the finding of inappropriate conduct occurred in 2016 and 2017, respectively, several years before the conduct the subject of the allegation in this matter.

Conduct of hearing

6. On 23 January 2024, the President constituted the Tribunal panel for this matter.
7. On 25 January 2024, the Chair issued written directions. The directions provided dates by which the parties needed to provide evidence, information and written submissions. The directions also set a time and date for the hearing of the matter.
8. On 30 January 2024, the Applicant with the consent of the Respondent's legal representatives, requested amendments to the directions, namely the dates for filing the Applicant's submissions in reply and the hearing date.
9. On 6 February 2024, the Chair issued amended directions *'to accommodate the parties' availabilities'* but noted that *'the Tribunal has finite resources and cannot accommodate all the requested extensions of time.'*¹⁷
10. After the Tribunal issued the amended directions, the parties sought no further amendments to the amended directions and complied with the amended directions.
11. At 10:00am on 16 April 2024, the Tribunal conducted the hearing of the matter on the documents. The Tribunal considered the matter to be one that could be heard on the documents.
12. The Tribunal noted the evidence and material before it and was satisfied that all procedural steps required by the Act had been complied with. The specific evidence and material the Tribunal considered in this matter is outlined in the ***Evidence and material considered*** section below.

Standard of proof

13. The standard of proof in the hearing is the balance of probabilities.¹⁸ The Applicant bears the

¹² Annexure A – Statement of Facts [13]. The Tribunal notes that the Respondent did not dispute this in the Draft Statement of Facts, which was provided to the Applicant along with Annexure C – The Respondent's Response to the Section 150AA Notice dated 2 September 2022.

¹³ Annexure A – Statement of Facts [14].

¹⁴ Annexure A – Statement of Facts [15].

¹⁵ Annexure A – Statement of Facts [15a].

¹⁶ Annexure D – Brief of Evidence, Document 4.6, pages 134-135; Annexure A – Statement of Facts [15a].

¹⁷ Amended Directions dated 6 February 2024.

¹⁸ Section 150AP(4) of the Act.

onus of proof.¹⁹ In making its decision, the Tribunal considered *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362 where it was said by Dixon J as he then was:

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.

14. In *Qantas Airways Limited v Gama* [2008] FCAFC 69 at [126], Branson J commented on the above statement 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

15. The Tribunal has considered the evidence and material provided to it by the parties, although it has not found it necessary to refer to, or comment on, each item of that evidence and material. In considering an allegation, the Tribunal is obliged to decide whether the Respondent engaged in misconduct as defined in the Act in force at the time of the alleged conduct.²⁰
16. The Tribunal has considered the following evidence and material in this matter:
- (a) The Applicant’s application to the Tribunal about alleged misconduct pursuant to section 150AJ of the Act dated 21 September 2022;
 - (b) Annexure A – Statement of Facts, undated;
 - (c) Annexure B – The Applicant’s letter and Section 150AA Notice and Opportunity to Respond provided to the Respondent, both dated 19 August 2022 (as well as an attached draft Statement of Facts for comment by the Respondent, all sent through in an email also dated 19 August 2022);
 - (d) Annexure C – The Respondent’s Response to the Section 150AA Notice dated 2 September 2022 (as well as an attached amended Draft Statement of Facts, all sent through in an email also dated 2 September 2022);
 - (e) Annexure D – The Applicant’s Brief of Evidence, which contains documents such as:
 - (i) The affidavit from the Complainant affirmed 10 June 2022 containing various exhibits, including emails the subject of the allegation;
 - (ii) The affidavit from a Senior Investigator at the Applicant’s office affirmed 21 September 2022 containing various exhibits, such as the initial web complaint of 3 January 2022 made by the Complainant to the Applicant, which resulted in the misconduct application against the Respondent in the present matter;
 - (iii) Correspondence between the Applicant and the Respondent/the Respondent’s legal representatives;
 - (iv) Correspondence from and documents provided by the DSDILGP, including records of Councillor training attended by the Respondent and training materials from that training;
 - (v) Correspondence from and documents provided by the Council, including records of training attended by the Respondent, training materials from that training, and the finding of inappropriate conduct against the Respondent;
 - (f) Written directions issued by the Tribunal dated 25 January 2024;

¹⁹ Section 150AN(2)(a) of the Act.

²⁰ *Independent Assessor v FJS* [2023] QCAT 244, [38]-[39].

- (g) Email from the Applicant dated 30 January 2024 requesting amendments to the written directions with the consent of the Respondent's legal representatives;
- (h) Amended written directions issued by the Tribunal dated 6 February 2024;
- (i) The Applicant's further evidence filed by email on 8 February 2024 containing:
 - (i) An affidavit from a Principal Lawyer at the Applicant's office exhibiting an email and an attachment from the Complainant sent to the Applicant's office dated 20 January 2023;
- (j) The Respondent's further evidence filed by email on 23 February 2024 consisting of:
 - (i) An affidavit from the Respondent sworn 20 February 2024;
 - (ii) An affidavit from RFV²¹ sworn 22 February 2024;
 - (iii) An affidavit from Councillor EDC sworn 21 February 2024;
 - (iv) An affidavit from YHN,²² initially filed unsworn;
- (k) The Respondent filed the affidavit of YHN sworn 25 February 2024 by email on 26 February 2024 – the Applicant did not raise anything about this, and the Tribunal had no issues with this;
- (l) The Applicant's written submissions dated 8 March 2024;
- (m) The Respondent's written submissions, undated but filed by email on 22 March 2024;
- (n) The Applicant's written submissions in reply dated 12 April 2024.

Discussion and findings

Introduction

17. At all times alleged in the allegation, the relevant definition of misconduct in the Act was as follows:

150L What is misconduct

- (1) *The conduct of a councillor is **misconduct** if the conduct— [...]*
 - (b) *is or involves— [...]*
 - (i) *a breach of the trust placed in the councillor, either knowingly or recklessly; or [...]*

18. The Applicant alleges the misconduct arises from the Respondent's conduct regarding an erroneously received confidential email (henceforth '**the email**' or '**the confidential email**') concerning the Complainant in April 2021. The conduct is alleged to have occurred '*between 22 April 2021 and 24 November 2021*', a period of over seven months. The Applicant alleges a lengthy period of conduct because the Respondent allegedly engaged in conduct in November 2021 that was connected to the email. The Applicant alleges that the Respondent's conduct was inconsistent with the **local government principle** in section 4(2)(e) of the Act, namely '*ethical and legal behaviour of councillors, local government employees and councillor advisors*' and gives rise to a '*breach of the trust placed in the councillor, either knowingly or recklessly*'.
19. The Tribunal struggled to understand what each party's case was. For example, initially in Annexure C – The Respondent's Response to the Section 150AA Notice, the Respondent did not dispute that he engaged in the conduct, that parts of the conduct were inconsistent with the **local government principle** in section 4(2)(e) of the Act and that that constituted a breach of the trust placed in him as a Councillor:

- [...] The Mayor does not dispute that: [...]*
 - (b) *On or about 25 April 2021 at 6:20pm he forwarded the Email to Councillor [EDC] [...]*
 - (d) *On 27 April 2021 at 5:04pm, in response to the email received from [QAZ] at*

²¹ This person's name has been removed to comply with section 150AS(7)(c) of the Act.

²² This person's name has been removed to comply with section 150AS(7)(c) of the Act.

4:40pm he emailed [QAZ] stating that “I admit to opening it very briefly and the minute the first line had sunk in, I was closing, deleting and deleting again”.

- (e) He did not disclose to [QAZ] that he had forwarded the Email onto Cr [EDC] on 25 April 2021.
- (f) His response to [QAZ] on 27 April 2021 at 5:04pm was false and/or misleading in that he had forwarded the Email to Cr [EDC] prior to deleting it and he did not inform [QAZ] of this.
- (g) He forwarded [QAZ’s] email of 27 April 2021 (5:04pm) to Cr [EDC] at 5:50pm the same day.
- (h) He omitted from his statement dated 23 November 2021 (the “**Statement**”) that he had forwarded the Email to Cr [EDC] prior to deleting it. However, the Mayor states that this omission was inadvertent and that his statement reflected his recollection of events at the time. [...]
- (i) The conduct set out in paragraphs 1 (d), (e), (f) was not consistent with section 4(2)(e) of the **Local Government Act 2009** and as such was a breach of the trust placed in him as a councillor.

However, in contradiction of the above, the Respondent in written submissions filed 22 March 2024 submitted:

[...] [I]t is the Respondent’s submission that, in all of the circumstances:

- (a) The Respondent’s conduct was not unlawful.
- (b) The Respondent’s conduct was not unethical or unreasonable.
- (c) The Respondent did not breach the local government principles of legal and ethical behaviour.
- (d) The Respondent did not knowingly contravene a legal or ethical obligation, nor was he recklessly indifferent to his conduct being, or uncaring as to whether his conduct was, unlawful or unethical.
- (e) The Respondent’s conduct was not of a nature that would undermine the public confidence in the integrity of the Respondent or his role as a councillor.²³

20. Similarly, the Tribunal struggled to understand the Applicant’s case. The Respondent submitted that the Applicant sought ‘to introduce further allegations’²⁴ in its written submissions and that the ‘Applicant’s Submissions are the first time the Applicant has raised the Additional Allegations. The Respondent accordingly objects to the Applicant raising the Additional Allegations and applies for the Tribunal to strike them out.’²⁵ In submissions in reply, the Applicant disputed this and contended that ‘there is one misconduct allegation the subject of this matter and that this was put forward in the application to the Tribunal [...], along with the numerous particulars which detail the alleged conduct that could amount to misconduct.’²⁶
21. The Tribunal takes issue with the Applicant’s submission that it did not introduce any new allegations in its written submissions. By way of example, the Applicant throughout its written submissions suggested that the Respondent breached the Complainant’s privacy, which gave rise to unlawful behaviour and was inconsistent with the **local government principle** in section 4(2)(e) of the Act. However, from what the Tribunal can see, this was not something raised in the allegation and particulars of the Applicant’s application – the only reference to breach of the Complainant’s privacy in the application was in particular (i) and this was regarding QAZ breaching the Complainant’s privacy.
22. As a result of the Applicant alleging a ‘breach of privacy’ in its written submissions, the

²³ Respondent’s submissions [74].

²⁴ Respondent’s submissions [4].

²⁵ Respondent’s submissions [6].

²⁶ Applicant’s submissions in reply [6].

Respondent canvassed the *Information Privacy Act 2009* (Qld) and Information Privacy Principles extensively in its written submissions.²⁷ Then in submissions in reply, the Applicant stated:

*The Applicant has not, nor does it, submit that the Respondent committed a privacy breach in contravention of the Information Privacy Act 2009 or otherwise. It is clear on the facts that the Respondent was the unintended recipient of highly confidential personal information of the Complainant and that in being disclosed this information, that was entirely unrelated to council business and the disclosure of which was not authorised by the Complainant, was a plain breach of [the Complainant's] privacy. [...]*²⁸

23. The Applicant fails to explain what is a '*plain breach of [the Complainant's] privacy*': is it a breach of a person's right to privacy under the *Human Rights Act 2019* (Qld), some sort of common law right or action regarding '*breach of privacy*' or a '*breach of privacy*' in the ordinary meaning of the phrase?
24. Ultimately, the Tribunal formed the view that to consider anything regarding '*breach of privacy*' would be unfair to the Respondent without adequate particularisation by the Applicant. Consequently, the Tribunal did not consider whether the Respondent's behaviour was unlawful. The Tribunal understood the Applicant's case to be that the Respondent's '*behaviour was at a minimum unethical*.'²⁹ The Applicant confirms in its submissions in reply that '*the Respondent's conduct the subject of this matter was unethical*.'³⁰ In the Tribunal's view, simply demonstrating that the Respondent's behaviour was unethical on the balance of probabilities would be sufficient to find the Respondent's conduct was inconsistent with the **local government principle** in section 4(2)(e) of the Act, as that subsection requires a Councillor's behaviour to be both ethical **AND** legal.
25. The Tribunal also noted that the Applicant in its application at particular (o) alleged that the Respondent provided a response and information that was '*false AND/OR misleading*' [emphasis added]. The Applicant used '*false*' and '*misleading*' interchangeably in its written submissions,³¹ but in the Tribunal's view, the two are different.
26. Considering the issues identified above, the Tribunal had to form its own view about how to deal with the matter. The Tribunal focussed on the wording of the allegation and particulars in the application as well as the evidence. In the Tribunal's view, there are two central issues in the matter:
 - (a) Was the Respondent's conduct inconsistent with the **local government principle** of '*ethical and legal behaviour of councillors, local government employees and councillor advisors*'?

And if so:

 - (b) Did this result in '*a breach of the trust placed in the councillor, either knowingly or recklessly*'?

²⁷ Respondent's submissions [47]-[57]

²⁸ Applicant's submissions in reply [23].

²⁹ Applicant's submissions [48].

³⁰ Applicant's submissions in reply [25]. This was repeated in the Applicant's submissions in reply at [27].

³¹ For example, the Applicant's submissions at [43] refer to the Respondent's 23 November 2021 statement as '*misleading*' but at [54], that same statement is referred to as '*false*'.

Was the Respondent's conduct inconsistent with the local government principle of 'ethical and legal behaviour of councillors, local government employees and councillor advisors'?

Preliminary

27. For the reasons already indicated, the Tribunal has limited its consideration of this issue to whether the Respondent's behaviour was ethical.
28. From the Explanatory Notes to the Local Government Bill 2009 (Qld), it is clear that the legislature intended the **local government principles** (which 'ensure'³² a relevant purpose of the Act, being 'a system of local government in Queensland that is accountable, effective, efficient and sustainable'³³) to be treated as principles and not as strict legal requirements:

4 Local government principles underpin this Bill

This Bill provides a principles-based framework for decision making and governance. It gives local governments flexibility to decide processes that suit their size, location and administrative circumstances, as long as the processes are rational, justifiable and transparent. Anyone performing a responsibility under this Bill must consider the application of the local government principles. The principles apply to the processes carried out under the Bill as well as the results of those processes.

Principles-based legislation allows practitioners to focus on outcomes and develop their own operational procedures and processes. It does not mean that the Bill will be less enforceable. Principles-based legislation achieves higher levels of compliance. By requiring entities to comply with the spirit rather than the letter of the law, they must come to terms with the reasons behind the law.

Principles replace detailed prescription of roles and responsibilities and make a mandated separate code of conduct for councillors redundant.

The principles highlight the absolute essentials of excellently performing local governments which citizens expect and deserve. The principles are at one and the same time, aspirational, inspirational, practical and demanding.³⁴

29. The Tribunal notes the words 'ethical', and 'behaviour' are not defined in the Act. Therefore, in the Tribunal's view, the ordinary meaning of relevant words can be used to assist in their interpretation. The online *Cambridge Dictionary* relevantly defines 'ethical' as 'relating to beliefs about what is morally right and wrong' and 'behaviour' as 'the way that someone or something behaves in a particular situation'.³⁵
30. In the Tribunal's view, the application at particular (o) alleges that the Respondent engaged in a course of conduct that was inconsistent with the **local government principle** in section 4(2)(e) of the Act because it was unethical behaviour. Allegedly, that course of conduct consists of the following particular events:
- (i) The Respondent forwarded an email sent to him in error onto Councillor EDC;
 - (ii) The Respondent provided a false and/or misleading response to QAZ; and
 - (iii) The Respondent provided false and/or misleading information in a signed statement dated 23 November 2021.³⁶

³² Section 4(1) of the Act.

³³ Section 3(b) of the Act.

³⁴ Explanatory Notes, Local Government Bill 2009 (Qld) pages 8-9.

³⁵ *Cambridge Dictionary* accessible at <https://dictionary.cambridge.org/>.

³⁶ The Applicant's application, particular (o).

The Tribunal will examine each particular event.

Forwarding the email to Councillor EDC

31. The evidence indicates WSX sent the email to QAZ at 11:13am on Friday 23 April 2021.³⁷ QAZ then forwarded the email to the Respondent at 11:35am on Friday 23 April 2021.³⁸ The Respondent then forwarded this email to Councillor EDC at 6:21pm on Sunday 25 April 2021.³⁹ The Respondent's evidence on this point is as follows:

I do not specifically recall forwarding the Email on to Cr [EDC] on that day but I suspect that this was an automatic response due to a practice that I, as Mayor, and Cr [EDC], have developed over the years in relation to Council matters. We have a practice of keeping each other informed of matters relevant or related to our roles as councillors to cover for any emergency situations, such as accident or injury to either of us, and to cover any other situation where each other's assistance is required.⁴⁰

32. Additionally, the Respondent submits in its written submissions:

If one is tempted to apply the sterility of hindsight, one may (not necessarily would or should) deduce that it might be best practice for a councillor to examine in detail and vet every email that appears in his or her inbox amongst the multitude of emails demanding their attention, before forwarding internally and to give detailed responses to simple administrative requests. However, being equipped with the knowledge of practical reality, the volume of emails and matters that must find their way into a Mayor's inbox [...] it is the Respondent's submission that based on the detailed submissions above, the Respondent's conduct was not inappropriate or unreasonable.⁴¹

33. In the Applicant's submissions in reply:

The Applicant submits there was no reasonable justification for onforwarding the Email by the Respondent and reiterates that it was still incumbent upon the Respondent to understand the nature of the Email and to not disseminate the Email further. This is especially so noting the confidential and personal information of the Complainant contained within.⁴²

34. While it is prudent of the Respondent to have a practice in place to cover for any emergency situations, in the Tribunal's view the email had nothing to do with the Council's business and contained the confidential medical information of the Complainant. The Respondent did not need to 'examine in detail and vet' the email. If he had simply taken a few seconds to examine the email before forwarding it on, he would have realised what it was, that it should be deleted and that it should not be forwarded to anyone. In the Tribunal's view, Councillors need to take care when distributing electronic content and cannot rely on excuses like those the Respondent relies on.

Providing a false and/or misleading response to QAZ and false and/or misleading information to the insurer

35. The evidence indicates that QAZ sent the Respondent an email at 4:40pm on Tuesday 27 April 2021 stating 'Hi Andrew, It looks like I may have inadvertently sent you an

³⁷ Annexure D – Brief of Evidence, Document 2.1, page 11.

³⁸ Annexure D – Brief of Evidence, Document 2.1, page 33.

³⁹ Annexure D – Brief of Evidence, Document 2.1, page 33.

⁴⁰ Respondent's affidavit [8].

⁴¹ Respondent's submissions [72].

⁴² Applicant's submissions in reply [16].

attachment that I will need to ask you to delete. Sorry about that. Thanking you kindly'.⁴³
The Respondent replied to QAZ at 5:04pm on Tuesday 27 April 2021 stating:

Already done [QAZ], and I admit to opening it very briefly and the minute the first line had sunk in, I was closing, deleting and deleting again.

*As usual, if you think I can help in any way on any other issue please don't hesitate to ask.*⁴⁴

36. The Respondent's evidence on this point is as follows:

*I acknowledge and accept that I did not inform [QAZ] that I had forwarded the Email onto [Councillor EDC] and in so doing, it was possibly false and misleading. However, I did not deliberately try, and would not have, deliberately tried, to mislead [QAZ] or give [QAZ] false information. I cannot offer any explanation other than I just must not have thought I needed to provide those details as according to the records I did later forward [QAZ's] email of 27 April 2021 on to [Councillor EDC], which was at 5.05pm later that same day.*⁴⁵

37. The evidence indicates that the insurer obtained the email chain between the Respondent and QAZ from 27 April 2021 described above.⁴⁶ In that email chain obtained by the insurer, there is also an email from the Respondent at 5:05pm on Tuesday 27 April 2021 to Councillor EDC, '**Subject: Fwd: [Complainant]**' and no text in the body of the email.⁴⁷ Finally, there is an additional email in the chain from the Respondent to QAZ at 8:29am on Friday 19 November 2021, '**Subject: FW: [Complainant]**' with the text in the body of the email '*As discussed.*'⁴⁸

38. The Respondent also provided a document titled '*Statement of Andrew Martin*' to the insurer regarding the Complainant's insurance claim.⁴⁹ That statement is signed by the Respondent, witnessed and dated 23 November 2021.⁵⁰ Similarly to the Respondent's email to QAZ on 27 April 2021, the Respondent makes no mention in the statement that he forwarded the email to Councillor EDC. The Respondent's evidence on this point is as follows:

[...] I provided the Statement following a request from the lawyers of [QAZ] in response to a complaint made by [the Complainant] to the [relevant government department] in relation to [QAZ] erroneously forwarding the Email to me. I acknowledge that I did not include in the Statement the fact that I had sent the Email on to Cr [EDC]. I did not deliberately leave out that information, nor did I deliberately seek to make a false or misleading statement. The Statement reflected my recollection of events at the time.

It was not until I received the notification of the complaint, the subject of these proceedings, from the Applicant's office by letter dated 7 January 2022 and saw the details of the allegation (which included the fact that I had sent the Email on to the [Councillor EDC]) that I remembered I had forwarded the Email to the [Councillor EDC].

I honestly and genuinely say that it was certainly not my intention to give a false or misleading Statement. There was simply no reason why I would deliberately withhold from the Statement or [QAZ], or wish to hide, the fact that I had forwarded the Email to the [Councillor EDC] in circumstances where I thought it was Council business. My

⁴³ Annexure D – Brief of Evidence, Document 2.1, page 20.

⁴⁴ Annexure D – Brief of Evidence, Document 2.1, pages 19-20.

⁴⁵ Respondent's affidavit [12].

⁴⁶ Annexure D – Brief of Evidence, Document 2.1, pages 19-21.

⁴⁷ Annexure D – Brief of Evidence, Document 2.1, pages 19.

⁴⁸ Annexure D – Brief of Evidence, Document 2.1, pages 19.

⁴⁹ Annexure D – Brief of Evidence, Document 2.1, pages 25-26.

⁵⁰ Annexure D – Brief of Evidence, Document 2.1, page 26.

only explanation or reason I can think of is that the brain fog that I experienced from the fall earlier that year, detailed below, caused me to forget this event.⁵¹

39. In the Applicant's written submissions:

The Applicant disputes that the Respondent had no recollection of onforwarding the email, particularly at the time the emails were sent in late April 2021. The Respondent, within seconds of responding to [QAZ's] second email requesting deletion, onforwarded Councillor [EDC] his response to [QAZ's] second email. The Applicant submits there would be no logical reason for the Respondent to, within seconds of sending his response to [QAZ], then onforward his response to the request for deletion of [QAZ's] initial email to Councillor [EDC] with no context, unless the Respondent did actually recall at that time that he had sent it to Councillor [EDC] and thus it warranted sending to [Councillor EDC] to also delete [Councillor EDC's] copy of the email. There was no emergency conveyed or council related business contained within the email onforwarded to Councillor [EDC].⁵²

40. In the Applicant's submissions in reply, the Applicant goes further and submits that regarding the Respondent's email to QAZ, 'it is clear on the evidence that the Respondent did deliberately withhold the information and/or sought to hide the fact that he had onforwarded the Email to Councillor [EDC]',⁵³ and that:

[T]here would be no logical reason for the Respondent to have onforwarded the reply email to [QAZ] on 27 April 2021, unless the Respondent at that time recalled having sent the original email to Councillor [EDC]. This evidence the Applicant submits, infers that the Respondent knew he had onforwarded the Email to Councillor [EDC] and chose to withhold/hide this information from [QAZ].⁵⁴

41. Regarding the Respondent's statement to the insurer, the Applicant submits:

The Respondent in his statement of 23 November 2021 stated at paragraph 6 that his 'Council email account records an exchange of emails between [QAZ] and himself', though failed to mention any email records of the onforwarded emails to Councillor [EDC] by himself. This is despite an email chain being sent to [QAZ] from the Respondent on 19 November 2021 at 8:29AM with the content of the body only stating 'As discussed', though including the Respondent's email to Councillor [EDC] on 27 April 2021 at 5:05PM, being the onforwarded email response to [QAZ] on 27 April 2021 at 5:04PM.

The Respondent's statement on 23 November 2021 failed to include information concerning his onforwarding of the original email to Councillor [EDC]. The Applicant submits that the Respondent's statement is therefore misleading.

The Respondent did, at least four days prior to the signing of his statement, search his email account to find the email he onforwarded to Councillor [EDC] and sent this to [QAZ] with the email stating 'As discussed'. This action demonstrated he recently had actual knowledge of the fact he had forwarded the second email to Councillor [EDC] to request deletion of the original email. Yet his statement failed to deal with this action. The Applicant contends that in his statement he misrepresents the facts, despite having discussed the matter with [QAZ], then reviewed his emails and onforwarded to [QAZ] only days prior, the second email to Councillor [EDC] on 27 April 2021.⁵⁵

42. Regarding the Respondent's email to QAZ on 27 April 2021, the Tribunal is persuaded by

⁵¹ Respondent's affidavit [13]-[15]. The Tribunal deals with the 'brain fog' issue in its consideration of breach of trust.

⁵² Applicant's submissions [36].

⁵³ Applicant's submissions in reply [19].

⁵⁴ Applicant's submissions in reply [22].

⁵⁵ Applicant's submissions [42]-[44].

the Applicant's submission that replying to QAZ at 5:04pm and then forwarding QAZ's request to delete at 5:05pm objectively indicates that the Respondent had awareness and recollection that he had previously forwarded the confidential email to Councillor EDC and needed Councillor EDC to delete it.

43. While the Tribunal accepts that the Respondent did the right thing in the end by forwarding on QAZ's email requesting deletion to Councillor EDC, in the Tribunal's view the ethical behaviour expected of the Respondent in the given circumstances would have been to make a full and frank disclosure to QAZ that he had forwarded the confidential email on to Councillor EDC and that the Respondent would be requesting Councillor EDC to delete the email as well.⁵⁶ Unfortunately, this did not occur. Consequently, the Tribunal finds that the Respondent's email to QAZ at 5:04pm on 27 April 2021 was misleading.
44. Regarding the Respondent's statement to the insurer on 23 November 2021, the Respondent failed to mention that in April 2021, he forwarded on the confidential email to Councillor EDC. Given that the events from April 2021 were now the subject of an insurance claim, the ethical behaviour expected of the Respondent in the circumstances would have been to provide full and frank disclosure about the confidential email to the insurer. This was information that the Respondent would have reviewed on 19 November 2021 when he forwarded the email chain between him and Councillor EDC to QAZ. The Tribunal finds that the Respondent's statement to the insurer was misleading.
45. Ultimately, the Tribunal finds that on the balance of probabilities, the Respondent's conduct described above was inconsistent with the **local government principle** in section 4(2)(e) of the Act because the Respondent's behaviour during the alleged course of conduct was unethical.

Did the conduct result in a 'breach of the trust placed in the councillor, either knowingly or recklessly'?

Breach of the trust

46. The phrase '*breach of the trust*' is not defined in the Act. The Tribunal is assisted by *Flori v Winter & Ors* [2019] QCA 281, where at paragraph 59 the Queensland Court of Appeal relevantly stated:

For present purposes it is sufficient to observe that a serious criminal offence committed by a police officer that is apt to undermine public confidence in the integrity of that police officer is appropriately described as "a breach of the trust placed in" that person as a member of the police force.

Accordingly, by analogy, the critical question for the Tribunal regarding whether there was a breach of the trust placed in a Councillor is whether a Councillor's conduct '*is apt to undermine public confidence in the integrity*' of that Councillor. For example, in *Independent Assessor v Councillor Jason O'Pray, Sunshine Coast Regional Council*, 10 November 2021, CCT reference F20/2743 at page 8 of the publicly available decision summary, the Tribunal stated:

The concept of 'trust in a councillor' is embodied in the principles of the Act and is viewed broadly, in relation to the trust that the community has in the elected position of councillor. As elected representatives in responsible positions with significant powers, councillors have great discretion and are entrusted to use their powers to undertake negotiations and to make policy and decisions,

⁵⁶ The Applicant makes a similar submission at [34] of its submissions in reply: '[...] The Respondent was ethically bound to convey to [QAZ] that a further copy of the Email had been onforwarded and also required deletion. The Respondent should have held himself to an honest and transparent standard and proffered the information to [QAZ].'

appropriately, impartially and in the public interest and in compliance with the provisions of the legislation. Any breach of this trust can have a corrosive effect on the community and its confidence in local government.

47. However, in *Independent Assessor v Councillor, Cairns Regional Council*, 13 April 2021, CCT reference F20/1794, the Tribunal (citing *Independent Assessor v Councillor Glenn Tozer, Gold Coast City Council*, 14 December 2019, CCT reference F19/6005) said at page 5 of the publicly available decision summary:⁵⁷

[...] “not every breach of a provision of the Act will be considered serious enough to amount to misconduct, having regard to the circumstances and any exculpatory considerations” [...] There is no hard and fast ruling on what this Tribunal considers an “exculpatory consideration”. However, by reference to the local government principles, misconduct must involve “undermining public confidence in the integrity of the person”.

48. The Tribunal considered the parties’ submissions on breach of trust. Generally, in relation to breach of trust, the Applicant submits that the Respondents course of conduct:

[...] calls into question the honesty and integrity of the Respondent, which is central to the issue of trust.

It is expected of councillors, and even more so of the Mayor, that they act in accordance with the local government principles, and would ensure they act diligently and ethically in maintaining the highest standards, including keeping confidential information confidential and being accountable for their actions.

The Applicant submits that the Respondent’s conduct is therefore capable of ‘the undermining of public confidence in the integrity of the person, in the role they are occupying’, and thus is a breach of trust placed in the councillor.⁵⁸

49. In relation to breach of trust, the Respondent made numerous submissions at paragraphs 60 to 63 of its written submissions and the Tribunal considered them. The Respondent made submissions such as:

- (a) *‘All of the cases referred to in the Applicant’s Submissions’ and in the Respondent’s written submissions regarding breach of trust ‘relate to conduct the subject of which concerns the exercise of a power or authority in the capacity of a councillor and/or in the discharge of the statutory duties of a councillor’ and ‘[t]he conduct the subject of those cases is in contrast and markedly different in nature to the conduct of this matter’;*
- (b) *‘The Respondent did not contravene any identified legal obligation’;*
- (c) *The Respondent ‘was not exercising a power given to or entrusted to him as a councillor’ during the course of conduct;*
- (d) *In terms of the email correspondence, the Respondent ‘was engaging in a task of an administrative nature’ and was not making ‘any substantive decision’;*
- (e) *The Respondent ‘forwarded the Email internal to Council’, to Councillor EDC ‘with whom he had a practice of keeping apprised of what he considered Council business’ and Councillor EDC ‘recalls that after the fall, the Respondent had been very concerned for his health and insisted to Cr [EDC] that “if anything happens to me, you need to know what’s going on”;*
- (f) *The Respondent ‘did not forward the Email externally’;*
- (g) *‘The practice of the Mayor and [Councillor EDC] of keeping each other apprised of matters relating to Council is not inappropriate or unreasonable. Rather, the practice*

⁵⁷ Respondent’s submissions [37].

⁵⁸ Applicant’s submissions [54]-[56].

is of benefit to Council and the community in the discharge of the Councillors' and Council's obligations to the community, rather than to their detriment. The Respondent's conduct in forwarding the Email to [Councillor EDC] in accordance with this practice was not unreasonable or inappropriate, even without reading it in detail prior to forwarding';

- (h) *Councillor EDC 'did not forward the Email to anyone (internally or externally) and did not discuss it with anyone';*
- (i) *In the particular factual circumstances surrounding the matter, '[i]t was not unreasonable for the Respondent to assume upon receipt of the Email, by virtue of its subject heading and without reading it in detail, it was in some way related to Council business [...]';*
- (j) *'In his Response to [QAZ's] specifically articulated request of "I will need to ask you to delete", he directly addressed the request in saying "Already done [QAZ], and I admit to opening it very briefly and the minute the first line sunk in, I was closing, deleting, and deleting again". [QAZ] requested no other action of, or information from, the Respondent';*
- (k) *'Other than the Complainant's own knowledge that the Email was mistakenly sent to the Respondent and forwarded to the [Councillor EDC], there is no evidence that the Complainant suffered any detriment as a result of the Respondent's actions';*
- (l) *The Respondent 'did not intentionally omit the information that he had forwarded the Email on to Cr [EDC] from his Response and his Statement. Nor did he intentionally seek to misrepresent or deceive [QAZ] or anyone else. He cannot proffer an explanation as to why and states "[t]here was simply no reason why I would deliberately withhold from the Statement or [QAZ], or wish to hide, the fact that I had forwarded the Email to the [Councillor EDC] in circumstances where I thought it was Council business". Instead, the Respondent personally speculates that "only explanation or reason I can think of is that the brain fog that I experienced from the fall earlier that year...caused me to forget this event";*
- (m) *'[W]hilst it is the Respondent's submission that he in fact had no such legal or ethical obligation, there is no evidence to suggest that the Respondent, in any event, was aware of or wilfully blind to having an obligation (legal or ethical) to:'*
 - (i) *'read the Email in detail to ascertain its nature, confidential or otherwise, before forwarding on to the [Councillor EDC] for [Councillor EDC's] information;'*
 - (ii) *'to not forward the Email to the [Councillor EDC];'*
 - (iii) *'to carry out diligent searches of Council records prior to providing his Response to [QAZ] or the Statement, rather than rely on his memory of the event.'*
- (n) *'[T]here is no evidence to suggest that the Respondent was aware, knowingly or recklessly, that his conduct constituted, or might constitute, a contravention of the Act.'*

50. The Respondent's evidence and submissions raise a potential '*exculpatory consideration*' relevant to breach of trust: that he '*fell approximately four metres from a ladder*' and suffered injuries, including a head injury, in March 2021.⁵⁹ Critically, the Tribunal notes the following evidence from the Respondent regarding this point:

I did not consult a medical practitioner at the time because I did not think that I had suffered any serious physical injuries. Additionally, Blackall Hospital was severely understaffed in all areas at the time, particularly with respect to doctors, and a doctor would have required at least an hour's drive. After a prolonged round of prodding and investigating, including a two hour bedrest, I concluded I did not need medical assistance. However, after the fall I began to experience unusual tiredness, loss of full use of my right leg for a week and I sustained a lump just above the knee (which

⁵⁹ Respondent's affidavit [16].

remains to this day). I also suffered what I can only describe as "brain fog", which caused me to forget things from time to time.⁶⁰

The affidavit of RFV also makes some concerning observations about the Respondent:

*He was certainly shaken up and not thinking clearly. He was in a state of shock to be honest. He was in an incredible amount of pain for some time after, days at least. Following the fall, I recall him being irrational with lots of random thoughts. He was in a general disarray. Given the seriousness of the fall, he was not capable of thinking clearly for a week or so. He was not thinking clearly for some time. It really shook him up. It took him several weeks to really come good and he was really out of sorts during this time. He was extremely shaken up, in pain and in a state of shock.*⁶¹

51. In the Applicant's written submissions:

*The Applicant submits that had the Respondent been as impaired as stated, and in particular his memory, he would not have recalled the need within seconds of sending his reply email to [QAZ] on 27 April 2021 to onforward onto Councillor [EDC], apprising [Councillor EDC] of the need to delete the initial email.*⁶²

52. The Tribunal considered the Respondent's 'brain fog' as a potential 'exculpatory consideration' relevant to breach of trust. One Panel Member expressed the view that the 'brain fog' could amount to an 'exculpatory consideration' for the Respondent's April 2021 conduct but not for the Respondent's November 2021 conduct. While the majority of the Panel accepts that in April 2021, the Respondent may have been suffering from 'brain fog' due to the head injury, which could potentially explain his conduct around that time, this is ultimately speculative as there is no medical evidence (mainly because the Respondent refused to consult a doctor despite requests from people who were concerned about him⁶³). However more importantly, the majority of the Panel has great difficulty in accepting that the Respondent's 'brain fog' impacted on his ability to remember when seconds after replying to QAZ in April 2021, he forwarded the email chain requesting deletion to Councillor EDC. The Tribunal notes that in November 2021, when making the statement to the insurer, the Respondent made the same key omission he made in April 2021. The majority of the Panel also took the view that regarding issues of breach of trust, the conduct should be viewed as a course of conduct and not as isolated pieces of conduct.
53. Ultimately on the evidence before it, the Tribunal does not accept the Respondent's 'brain fog' as an exculpatory consideration for breach of trust. On balance, the Tribunal is not persuaded by the Respondent's submissions regarding breach of trust and prefers the Applicant's submissions.
54. The Tribunal finds on the balance of probabilities that the Respondent's conduct is apt to undermine the public confidence in him as a Councillor and therefore that he breached the trust placed in him as a Councillor.

Knowingly or recklessly

55. The Tribunal must also determine whether the Respondent breached the trust placed in him as a Councillor 'knowingly or recklessly'. The Applicant's case is 'that the Respondent's conduct was at least reckless.'⁶⁴ There are various interpretations provided by the parties

⁶⁰ Respondent's affidavit [18].

⁶¹ RFV's affidavit [6].

⁶² Applicant's submissions [40].

⁶³ Affidavits of RFV and YHN.

⁶⁴ Applicant's submissions [59].

as to what ‘recklessly’ means. The Applicant cites *Banditt v R* (2005) 224 CLR 262 that ‘in its ordinary use, “reckless” may indicate conduct which is negligent or careless, as well as that which is rash or incautious as to consequences [...]’. Both parties also cited *Independent Assessor v Councillor, Maranoa Regional Council*, 6 May 2022, CCT reference F21/2591, a matter in which the meaning of ‘recklessly’ was canvassed by the Tribunal. In that matter, the Tribunal referred to *Zaitman v Law Institute of Victoria* [1994] VICSC 778 and adopted the test from that case of ‘reckless indifference, not caring whether what he does, or fails or omits to do (as the case may be) is a contravention of the Act, the rules or regulations.’⁶⁵ Additionally, the Respondent referred to *Independent Assessor v Councillor Vic Pennisi, Southern Downs Regional Council*, 16 January 2023, CCT reference F21/2597, where the Tribunal set out a three-stage test for ‘recklessly’. The Tribunal also notes the ordinary meaning of ‘recklessly’ from a dictionary is ‘in a way that is dangerous and shows that you are not thinking about the risks and possible results of your behaviour’.⁶⁶

56. Regarding ‘knowingly or recklessly’, the majority view of the Panel was also that it is important to look at the Respondent’s conduct as a whole and not as isolated pieces of conduct. Even if the Tribunal accepted that the Respondent had ‘brain fog’ in April 2021, which caused him to forget to disclose to QAZ that he forwarded the confidential email to Councillor EDC, the Respondent failed to disclose the exact same thing in November 2021 in his statement to the insurer. The Applicant submits:

*[T]he Respondent misrepresented the facts, despite having unfettered access to his emails at all times. He resorted to relying on his memory, although purportedly suffering from memory impairment due to a fall in March 2021, rather than carrying out diligent searches in response to [QAZ’s] second email on 27 April 2021 and before providing his written statement on 23 November 2021.*⁶⁷

57. The Tribunal is persuaded by the Applicant’s submission above and does not accept the Respondent’s explanations for his failures to disclose to QAZ (by majority) and in the statement to the insurer (unanimously). Ultimately, the Tribunal infers from the evidence that the Respondent was trying to withhold that he forwarded the confidential email to Councillor EDC. Therefore, in the Tribunal’s opinion, the Respondent’s breach of trust goes further than any definition of ‘recklessly’ discussed above and the Tribunal has formed the unanimous view that the Respondent has breached the trust placed in him as a Councillor, knowingly.
58. Ultimately, the Tribunal finds that the Respondent’s conduct was inconsistent with the **local government principle** in section 4(2)(e) of the Act being ‘ethical and legal behaviour of councillors, local government employees and councillor advisors’ and consequently, that the Respondent has breached the trust placed in him as a Councillor, knowingly.

Conclusion

59. Considering all the evidence and material received in the matter, the Tribunal has determined that on the balance of probabilities, Allegation One **has been sustained**.

Discussion on orders/recommendations to be made:

60. Having sustained the allegation of misconduct against the Respondent, the Tribunal then considered the appropriate orders/recommendations to be made under section 150AR of the Act.

⁶⁵ *Zaitman v Law Institute of Victoria* [1994] VICSC 778. *Zaitman* was referred to in *Victorian Bar Incorporated v Molyneux (Legal Practice)* [2006] VCAT 1417.

⁶⁶ *Cambridge Dictionary* accessible at <https://dictionary.cambridge.org/>.

⁶⁷ Applicant’s submissions [77(4)].

61. The Tribunal noted the parties' submissions about mitigating and aggravating factors regarding disciplinary action but did not agree with all of the factors as submitted by the parties. The Tribunal formed its own view as to what were the relevant mitigating and aggravating factors regarding disciplinary action in this matter.
62. The Tribunal noted that in deciding what action to take to discipline the Respondent, the Tribunal may consider:
- (a) *any previous misconduct of the councillor; and*
 - (b) *if the application relates to a conduct breach [formerly 'inappropriate conduct']—any previous conduct breach of the councillor; and*
 - (c) *any allegation made in the hearing that—*
 - (i) *was admitted, or not challenged; and*
 - (ii) *the conduct tribunal is reasonably satisfied is true.*⁶⁸
63. To his credit, the Respondent has no previous findings of misconduct against him. While he does have a previous finding of inappropriate conduct, the Tribunal did not attach any significant weight to it as it concerned different conduct. In terms of any allegation made in the hearing that was admitted, or not challenged and the Tribunal is reasonably satisfied is true, the Respondent admitted to the conduct and did not contest the facts. The Tribunal considered these to be mitigating factors.
64. Regarding aggravating factors, the Tribunal was of the view that the Respondent underwent significant Councillor training since he commenced as Mayor in 2016. Almost all of the training predated the conduct the subject of this matter. Further, at the time of the conduct, the Respondent was in his second term as the Mayor of the Council and had experience in the role. The Tribunal accepts that Mayors are held to higher standards of conduct than Councillors. Finally, while the Respondent admitted to the conduct, he seemed to deny that this was misconduct, although as already discussed, this only became apparent in the Respondent's written submissions.
65. Regarding disciplinary action, the Applicant submitted '*that the Tribunal should order that:*'⁶⁹
- (a) *the Respondent make a public admission that he has engaged in misconduct, pursuant to section 150AR(1)(b)(i); and*
 - (b) *the Respondent undertake training in relation to his obligations, including lawful and ethical behaviour of the councillor, pursuant to section 150AR(1)(b)(iii).*⁷⁰
66. Regarding disciplinary action, the Respondent submitted that:
- [A] finding of misconduct alone, should the Tribunal make such a finding, coupled with the public exposure of publication of the Tribunal's decision in accordance with the requirements of the Act, would achieve the appropriate protective purpose of the disciplinary proceedings.*⁷¹
67. While the Tribunal attaches weight to the fact that the Respondent has no previous findings of misconduct against him, the Tribunal is concerned that at the time of this misconduct, the Respondent occupied the position of Mayor of the Council, was in his second term as Mayor and had received significant amounts of Councillor training. As a result, the Tribunal strongly considered ordering the Respondent to pay an amount to the

⁶⁸ Section 150AQ(2) of the Act.

⁶⁹ Applicant's submissions [89].

⁷⁰ Applicant's submissions [89].

⁷¹ Respondent's submissions [78].

local government and to undertake further training but ultimately decided against making such orders. Regarding a monetary order, the Tribunal considered this would be tokenistic in the circumstances. Regarding an order requiring further training, the Tribunal questioned what utility this would have, given that the Respondent had undertaken significant amounts of Councillor training in the past.

68. Balancing the mitigating and aggravating factors in the matter, and bearing in mind *'that the purpose of disciplinary proceedings and orders are protective rather than punitive'*,⁷² the Tribunal concluded that the key ways in which to deal with the Respondent's misconduct and appropriately resolve the matter are firstly, to make a finding that the Respondent has engaged in misconduct and secondly, to order the Respondent to make a public apology for the conduct at an upcoming general meeting of the Council that is open to the public.
69. The Tribunal notes that at the time of the Respondent's conduct, section 150AR(1)(b)(i) of the Act stated *'an order that the councillor make a public admission that the councillor has engaged in misconduct or inappropriate conduct (or both)'*. Currently, section 150AR(1)(b)(i) of the Act states *'an order that the councillor make a public apology, in the way decided by the conduct tribunal, for the conduct'*. In terms of disciplinary action, the Tribunal considers the applicable section to be the one in force when the Tribunal makes its orders. The Tribunal also considers that a *'public admission'* and *'public apology'* are orders that are substantially the same, so there is no injustice to the Respondent in making an order using the wording of the section in the current Act. While not applicable in this matter, the Tribunal considers this approach is consistent with the approach described in section 322(2) of the Act, which requires the Tribunal when *'deciding how to deal with [pre-3 December 2018] conduct'* in the present, to *'only make an order that is substantially the same as an order that could have been made under former section 180'*.
70. In light of the above, the Tribunal made the order as set out in the **Orders and/or recommendations** section on page 5 of this document.

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

Preliminary

71. The Tribunal considered its obligations to protect the Respondent's human rights under the HRA.
72. In relation to any misconduct application made by the Applicant under section 150AJ(1)(a) of the Act, the Tribunal *'must conduct a hearing about the application'* under section 150AL(1) of the Act. The Act does not provide the Tribunal with any discretion regarding the hearing of the application. This is relevant to section 58 of the HRA. Section 58(1) of the HRA states that *'[i]t is unlawful for a public entity [...] to act or make a decision in a way that is not compatible with human rights; or [...] in making a decision, to fail to give proper consideration to a human right relevant to the decision.'* Section 58(2) of the HRA provides an exemption to the Tribunal as a public entity from complying with section 58(1) of the HRA *'if the entity could not reasonably have acted differently or made a different decision because of a statutory provision.'*

⁷² Applicant's submissions [87]. The Respondent agreed with this principle at [77] of its submissions. For this proposition, the Applicant cited *Walter v Council of the Queensland Law Society Incorporated* (1988) 77 ALR 228 (which was applied in *Legal Services Commissioner v Madden (No 2)* [2009] 1 Qd R 149) as well as *Harvey v Law Society of New South Wales* (1975) 7 ALR 227.

The right to a fair hearing (section 31 of the HRA)

73. The Tribunal considered that the right to a fair hearing was engaged by the hearing of the misconduct application regarding the Respondent.
74. Section 213 of the Act requires the decision-maker when it conducts a hearing (in this case, the Tribunal) to *'observe natural justice'* and *'act as quickly and informally as is consistent with a fair and proper consideration of the issues raised in the hearing.'* The hearing was conducted on the documents, which is permitted by section 150AP(2) of the Act. The Respondent sought and received legal advice and did not dispute the hearing being conducted on the documents. The Tribunal considered it appropriate in the circumstances to direct that the hearing of the application be conducted in private under section 298 of the Regulation, which in the Tribunal's view is consistent with section 31(2) of the HRA. The Tribunal considered it complied with all the hearing requirements of the Act and provided the Respondent with natural justice and a fair hearing. This decision and reasons/publication notice will be made publicly available as required by section 150AS(2)(c) of the Act, which the Tribunal considers is consistent with section 31(3) of the HRA. Therefore, the Tribunal considered the Respondent's human right to a fair hearing under section 31 of the HRA was engaged but was not limited by the hearing process.

Freedom of expression (section 21 of the HRA)

75. The Tribunal formed the view that the Respondent's freedom of expression was engaged and limited by this decision and reasons/publication notice. This is because the Tribunal found that the Respondent's conduct in forwarding and then not disclosing on two occasions that he forwarded the confidential email to Councillor EDC was inconsistent with the ***local government principle*** in section 4(2)(e) of the Act and constituted a breach of the trust placed in the Respondent as a Councillor, knowingly. However, any limitations imposed by the Tribunal on the Respondent's freedom of expression are justified because while the Respondent has *'the freedom to seek, receive and impart information and ideas of all kinds [...] in writing'*, the context in which he did so was within his role as a Councillor, which carries many proscriptive obligations under the Act due to the nature of such a role. Further, ordering the Councillor to make a public apology regarding his misconduct is a limitation of his right to freedom of expression. However, given that the Tribunal has found the Respondent engaged in misconduct, such an order is warranted, and the Tribunal considered this was the most appropriate manner in which to deal with the Respondent's misconduct. Therefore, the Tribunal considered that the limitations on the Respondent's freedom of expression in this decision and reasons/publication notice are justified.

The right to not have one's privacy unlawfully or arbitrarily interfered with (section 25(a) of the HRA)

76. The Tribunal noted that this right extended to *'not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with'*. The Tribunal considered that it has not unlawfully or arbitrarily interfered with the Respondent's privacy, family, home or correspondence because at all times the Tribunal was acting in accordance with and performing its functions under the Act. Therefore, the Tribunal formed the view that this right was not engaged or limited.

The right to not have one's reputation unlawfully attacked (section 25(b) of the HRA)

77. In the Tribunal's view, the right to not have the Respondent's reputation unlawfully attacked was not engaged or limited by this decision and reasons/publication notice because there was no unlawful attack on the Respondent's reputation. The Tribunal has included the Respondent's name in the decision and reasons/publication notice because pursuant to

section 150AS(6) of the Act, it is required to do so if it decides a Councillor has engaged in misconduct. Further, the Tribunal has removed the names of all individuals and their identifying particulars relevant to this matter as required by section 150AS(7) of the Act. In conducting this matter and arriving at its decision and reasons/publication notice, the Tribunal considered it has decided the matter on the evidence before it, has acted lawfully and has complied with the provisions of the Act.

Justification and conclusion

78. In the Tribunal’s view, any limitations on the Respondent’s human rights in this matter are justifiable and are not disproportionate for the following reasons:

- (a) Decisions and orders of the Tribunal are authorised by the Act;
- (b) The Tribunal has a proper purpose which is to maintain public confidence in and ensure the integrity of the system of local government in Queensland;
- (c) The Tribunal holding Councillors to account and setting clear expectations for Councillors helps achieve the proper purpose of the Tribunal;
- (d) The Tribunal considered the range of orders in section 150AR(1)(b) of the Act and made the least restrictive orders it could to appropriately deal with the Respondent’s misconduct, hold the Respondent to account, set clear expectations of Councillors and achieve the proper purpose of the Tribunal. In the Tribunal’s view, any less restrictive orders would not have achieved these goals;
- (e) A fair balance of, on the one hand, any negative impacts on the Respondent while, on the other hand, maintaining public confidence in and ensuring the integrity of the system of local government in Queensland.

79. Ultimately, the Tribunal was satisfied that the disciplinary action it has taken in this matter was reasonable, just, lawful, proportionate and not arbitrary. The disciplinary action ordered by the Tribunal in this matter holds the Respondent to account while maintaining public confidence in and ensuring the integrity of the system of local government in Queensland. In the Tribunal’s view, the balance struck is fair and the consequences for the Respondent are not disproportionate to the nature and gravity of the misconduct.

Notices:

80. Following the finalisation of this decision and reasons/publication notice, the Tribunal will arrange for notices to be sent to relevant parties as required by sections 150AS of the Act.

Gabe Bednarek⁷³	Greg Chemello⁷⁴	Louise Prychidczuk⁷⁵
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⁷³ The Chairperson sent through his authorisation of this document to the Tribunal Registry in an email dated 5 June 2024.

⁷⁴ The Member sent through his authorisation of this document to the Chairperson in an email dated 3 June 2024.

⁷⁵ The Member sent through her authorisation of this document to the Chairperson in an email dated 5 June 2024.