

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

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

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. Complaint:

CCT Reference	F19/9836
Subject Councillor	Councillor John Kremastos (the former Councillor and Mayor)
Council	Cassowary Coast Regional Council
Complainant	The details of the Complainant have been redacted from this summary(s150AS(5)) of the Local Government Act.

2. Decision (s150AQ):

Date:	26 November 2020
Decision:	<p>Allegation 1</p> <p>The Tribunal determined, on the balance of probabilities, that the allegation that on 7 December 2017 Councillor John Kremastos , the Mayor and a Councillor of the Cassowary Coast Regional Council, engaged in misconduct as defined in <i>section 176(3)(b)(ii) of the Local Government Act 2009</i> (the Act), in that his conduct involved a breach of trust placed in him as a councillor, in that it was inconsistent with local government principles 4(2)(a), <i>‘transparent and effective processes and decision-making in the public interest’</i> and/or 4(2)(e), <i>‘ethical and legal behavior of councilors and local government employees’</i>, in that Councillor John Kremastos did not deal with a real</p>

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or perceived conflict of interest in a transparent and accountable way as required by section 173(4) of the Act,

has been sustained.

The Particulars of the conduct provided by the Applicant are that:

- a. On 7 December 2017, a general Council meeting was held
- b. The matter was not an ordinary business matter.
- c. Councillor Kremastos attended the general Council meeting and was the Chair person.
- d. Item 13.5 listed two recommendations for consideration namely:
 - i. That pursuant to section 9 of the Local Government Act 2009, Council resolves to indemnify Mr James Gott, Chief Executive Officer in the matter of D169 of 2017 District Court, and Cr Rick Taylor's immediate family in respect of criminal matter QPS Occurrence #: QP1701075677 being ongoing legal proceedings;
 - ii. Council's brief to its lawyers to appear on behalf of the Chief Executive and other Council officers and Councillors and their direct families as necessary as determined by the Chief Executive Officer at the trial of criminal proceeding QPS Occurrence QP1701075677 and for the limited purpose of ensuring that the proceedings are not used to examine the Councillors, Officers and immediate families in respect of any other proceedings involving the parties.
- e. Councillor Kremastos failed to inform the meeting of the following interests:
 - i. An interest in defamation matter D169 OF 2017 (proceedings instituted by Mr James Gott against Mr Stephen Paul Toogood and Mrs Julieanne Toogood) from September 2017;
 - ii. An interest in legal representation and appearance by Council's lawyers on behalf of Councillor Kremastos and/or his immediate family in criminal proceedings against Mr Stephen Paul Toogood and Mrs Julieanne Toogood; and
 - iii. An interest due to an association with Mr James Gott during the 2016 Local Government election campaign;
 - iv. An interest in a closely related Queensland Civil Administrative matter QCL 052-17 which was commenced by Mr Stephen Paul Toogood against the Cassowary Coast Regional Council in relation to a breach of the privacy principles under the *Information Privacy Act 2009*.

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	<p>f. Councillor Kremastos' personal interests in the matter did not arise merely because of the circumstances specified in section 173(3)(a) of the Act.</p>
<p>Reasons:</p>	<p>1. The parties did not agree in totality on the facts of this matter and Councillor Kremastos notified the Independent Assessor of his intention to dispute the allegation.</p> <p>The Tribunal in such circumstances must be satisfied there is sufficient evidence and facts before it to establish the allegation is made out and that the conduct amounts to Misconduct.</p> <p>The legislation:</p> <p>2. Section 173 of the Local Government Act (2009) states so far as is relevant to this matter that if:</p> <p>(1)(a) A matter is to be discussed at a meeting of a local government or any of its committees; and</p> <p>(c) <i>a councillor at the meeting –</i></p> <p>(i) <i>has a conflict of interest in the matter (the real conflict of interest); or</i></p> <p>(ii) <i>could reasonably be taken to have a conflict of interest in the matter (the perceived conflict of interest) ;</i></p> <p>Section 173(4) states <i>“The councillor must deal with the real conflict of interest or perceived conflict of interest in a transparent and accountable way.</i></p> <p>Section 173(5) states <i>the councilor must inform the meeting of –</i></p> <p>(a) <i>the Councillor’s personal interest in the matter; and</i></p> <p>(b) <i>if the councilor participates in the meeting in relation to the matter, how the councilor intends to deal with the real or perceived conflict of interest.</i></p> <p>3. On the basis of the evidence filed by the Independent Assessor and by the Councillor, and having regard to the provisions of the Act the Tribunal accepted that on 7 December 2017, Councillor Kremastos attended and participated in a general Council meeting of the Cassowary Coast Regional Council , and was the Chairperson of the meeting.</p> <p>4. The meeting was not an ordinary Council meeting and the Tribunal found that the Councillor had a personal interest in accordance with section 173(1)(a) of the Act in relation to two resolutions where Council resolved to;</p> <p>a. <i>“...indemnify Mr James Gott, CEO, in the District Court in matter D 169 of 2017 “{a defamation matter commenced by the CEO on 15 July 2017 against Mr & Mrs Toogood}</i></p>

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and to

b. Extend Council's brief to its lawyers to appear on behalf of the Chief Executive Officer and other Council Officers and Councillors and their direct families as necessary as determined by the Chief Executive Officer at the trial of the criminal proceeding ...and for the limited purpose of ensuring that the proceedings are not used to examine Councillors Officers' and immediate families in respect of any other proceedings involving the parties..” {This resolution related to a stalking charge brought by the Queensland Police service on 21 June 2017 against residents of the CCRC, Mr & Mrs Toogood ¹in the District Court}

5. The Tribunal noted that at the Council meeting held on 7 December 2017 that Councillor Kremastos participated in the discussions and voted in support of the two resolutions and that he failed to declare and deal with this personal interest as the particular interest represented an actual or perceived conflict of interest pursuant to section 173(4) of the Act.

6. The Tribunal found that the relevant personal interest, required to be declared by the Councillor to the Council meeting arose in relation to:

- a. *The defamation proceedings*, when on 7 September 2017 the Toogoods filed a defence and counterclaim in the District Court that added Councillor Kremastos as the Fifth defendant to proceedings commenced by Mr J Gott, CEO. The Tribunal noted that on 12 September 2017 Legal representatives were engaged to represent Councillor Kremastos in relation to the counter-claim and that on 24 November 2017 Councillor Kremastos met with these legal representatives and discussed the defamation litigation; and
- b. The Queensland Police Service criminal proceedings involving a stalking allegation made against the Toogood's on 21 June 2017. The Councillors interest in these proceedings related to the provision of a witness statement to the QPS by him on 14 October 2017. Councillor Kremastos did not declare this interest to the Council meeting prior to the discussion and the resolution being adopted. The relevant resolution authorized legal representation by Council's lawyers on the Councillor's behalf and that of his immediate family concerning these criminal proceedings; and

¹ Evidence, Independent Assessor –Statement of Facts at [22]

c. An interest in a closely related Queensland Civil Administrative matter (QCAT) which was commenced by Mr Stephen Paul Toogood against Cassowary Coast Regional Council on 3 August 2017. On 6 December 2017 Councillor Kremastos provided a statement which outlined his involvement in this matter. Councillor Kremastos failed to declare this interest to the Council meeting prior to the resolution being adopted.

7. The Councillor submitted that he did not consider that he held an interest that was required to be declared as “there could not have possibly been any benefit to his family or himself, other than to offer an opportunity to defend themselves from the ongoing behavior of the Toogoods.

8. The Tribunal noted that the Council had been subjected to adverse interactions that involved legal proceedings with the Toogoods for at least three years, between 2014 to 2016. The initial interaction appears to have commenced in 2014 when the Council initiated legal recovery and enforcement proceedings relating to unpaid Council rates.

9. The Councillor submitted that many of the counterclaims brought by the Toogoods against Council had been the subject of proceedings in the Supreme Court, and the Tribunal noted that the Supreme Court described the actions of the Toogoods to be “futile” and “ill-considered” and contained arguments that were spurious, without substance and generally without legal basis²

10. Having considered the history of the legal proceedings filed against the Council and commenced by the Council, the Tribunal formed the view that Councillor Kremastos had a personal interest in relation to the discussions held on 7 December at the council meeting for the following reasons:

- i. The Councillor had a significant involvement and influence in the institution of defamation proceedings and was a Defendant in the counterclaim filed by the Toogoods on 12 September 2017.
- ii. At the time of the Council meeting held on 7 December 2017 he was jointly and severally liable from both Mr Gott and the Council in the counterclaim filed by the Toogoods³. In such circumstances damages could have been attributed to the Respondent personally as principal had the court found Mr Gott to have acted as his agent or alternately had found the Councillor had not acted in good faith.

² Toogood & Anor v Cassowary Coast Regional Council [2019] QSC 90 at p13-15

³ Egger v The Viscount Chelmsford (1965) 1QB 248

	<p>iii. The Tribunal noted that during 2018 the counterclaim by the Toogood’s was dismissed by the District Court. However at the relevant time of the Council meeting , 7 December 2017, the Councillor had a personal interest that created the perception of a conflict of interest and as such he was required under section 173(4) and 173(5) of the Local Government Act to manage this interest in a transparent and accountable manner.</p> <p>11. The Tribunal formed the view that the fair minded lay observer appraised of the relevant facts might conclude that the Councillor might not bring an impartial mind to the resolution to be discussed and voted upon by the Council concerning the legal indemnity of the Councillor/s and their direct families.</p> <p>12. Accordingly the Tribunal finds, despite the multiple legal proceedings that involved the Council and the inevitable confusion this may have caused to the Councillor , that the Councillor failed to deal with a real or perceived conflict of interest in an accountable and transparent way , by simply informing the Council meeting of this conflict of interest as required by section 173(4) and section 173(5) of the Act. The Respondent, in remaining silent on his significant interests in respect of the legal proceedings, did not act in accordance with his obligations.</p> <p>13. In this context the Tribunal is satisfied to the requisite standard of proof that the Councillor contravened the Act, when he participated in discussions and voted on two resolutions at the December 2017 Council meeting.</p> <p>14. The Tribunal determined that the Councillor’s personal “interest “could raise a perception of a conflict of interest between his public duties as a councillor and his personal interests. Accordingly the Tribunal finds on the balance of probabilities that the Councillor’s conduct contravened the section 173 of the Local Government Act 2009.</p> <p style="text-align: center;">Breach of Trust</p> <p>15. The Tribunal considered whether such conduct is sufficient to amount to a breach of trust for the purpose of the application of the principles that underpin the Act being “transparent and effective processes and decision–making in the public interest” and/or the “ethical and legal behavior of councillors” (section 4(2)(a)&(e)).</p>
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	<p>16. 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 position of councillor. As elected representatives in responsible positions with significant powers, councillors have great discretion and are entrusted to use their powers to make policy and decisions appropriately and in the public interest.</p> <p>Although the term breach of trust is not defined in the Act , the Tribunal has considered the concept articulated by the Court of Appeal in <i>Fiori v Winter & Ors</i>⁴ where the court confirmed that a breach of trust does not need to be directly related to the official’s role or involve an abuse of power reposed in the official. Instead the test involves whether the conduct has the potential to undermine public confidence in the integrity of the person, in the role they are occupying⁵</p> <p>Any breach of this trust can have a corrosive effect on the community and undermine its confidence in local government in Queensland.</p> <p>17. In the circumstances of this case, and having regard to the above principles and those outlined in section 4 of the Act and the Councillor’s failure to comply with the provisions of section 173 and 176(3)(b)(ii) of the former Act, the Tribunal is satisfied that the conduct constituted a breach of trust placed in the Councillor and accordingly the allegation of misconduct is sustained.</p>
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1. Orders and/or recommendations (s150AR - disciplinary action):

Date of orders:	December 2020
Order/s and/or recommendations:	<p>Allegation 1:</p> <p>The Tribunal orders that:</p> <p>Pursuant to section 150AR(1)(a) of the Act (being an order substantially the same as an order that could have been made under the former section 180 and 180(4) of the Act , that no action be taken against the against the Respondent councillor.</p>

⁴ *Fiori v Winter* [2019] QCA 281 at[59]

⁵ *Ibid* at [57]

<p>Reasons:</p>	<ol style="list-style-type: none"> 1. The Tribunal considered the relevant factors contained in the brief of evidence and also sought and considered submissions from the parties. 2. The Applicant submitted that although the Respondent has previous disciplinary history that those matters pre –date this allegation and conduct ⁶. <i>“The Respondent has therefore not had the benefit of an order at a time when it may have operated as a deterrent to future conduct”</i> ⁷ 3. The Respondent submitted that <i>“his prior disciplinary history was minor and his motivation was to act in the best interests of council and the Cassowary coast ratepayers and he believed in making those decisions he was acting in the public interest”</i>⁸. 4. The Tribunal considers that a substantial number of mitigating factors operated in this case that included: <ol style="list-style-type: none"> a. The confusion and frustration that Council inevitably experienced regarding the series of actions and legal proceedings taken by the Toogoods, and the evidence before the Tribunal to suggest the Toogoods were vexatious litigants; b. The view formed by the Council that engaging in defamation proceedings may limit litigation costs to the Council and therefore its ratepayers; c. The fact that the Respondent was one of several Councillors named in the counterclaim by the Toogoods and the fact that the Counterclaim was ultimately struck out in 2018; d. Orders made by the Tribunal took account of the relevant factors outlined in the statement of facts including that: <ul style="list-style-type: none"> • The Councillor has no previous disciplinary history that pre- dates the conduct the subject of this application; • The Councillor was in his first term as a councillor at the time the conduct occurred. • The Respondent is no longer a Mayor or Councillor of the CCRC 5. The Tribunal’s jurisdiction is primarily considered to be protective and the Tribunal was of the view that the conduct in this case, although found to be Misconduct, sits at the lower end of the scale. The Tribunal considers its jurisdiction permits an opportunity to educate councillors regarding misconduct should they find themselves in a similar conflict situation as Councillor Kremastos. Had the Councillor taken action at the commencement of the
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⁶ Applicant’s submission 6 August 2020 at [75]

⁷ ibid

⁸ Respondent’s submissions 15 September 2020 at[123]-[135]

	<p>relevant agenda item and notified other councillors that he believed a perceived conflict of interest could arise due to his involvement with the Toogoods litigation, and that the conflict was not sufficiently significant to prevent him from participating and voting on the resolution; the Tribunal would not have been required to hear this matter.</p> <p>The matter involved conduct that occurred prior to 3 December 2018, and the Tribunal's orders are made pursuant to section 150AR(1) of the Act being orders that are substantially the same orders that could have been made under the former section 180(4) of the pre-amended Act.⁹</p> <p>Accordingly it is determined that no orders be made in relation this matter pursuant to section 150AR(1)(a).</p>
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⁹ Section 322(2)(c)