

Local Government Act 1993

**CODE OF CONDUCT PANEL REPORT
DORSET COUNCIL COUNCILLOR CODE OF CONDUCT**

Complaint against Cr Lawrence Archer

Date of Determination: 24 September 2018

Code of Conduct Panel: Lynn Mason (Chairperson), David Sales, Richard Grueber (legal member)

Summary of the Complaint

The complaint was submitted by the General Manager, Mr Tim Watson, and received on 22 June 2018. The complaint related to Cr Archer's sending approximately 13 emails to the General Manager during May and June 2018 requesting information, and his submission of a Right to Information request (RTI) to the council. The section of the Code which the Complainant alleged Cr Archer breached is

Part 7, Clause 1(c) A Councillor must not bully or harass any person; and

Clause 3: A Councillor must not influence or attempt to influence, any council employee or delegate of the council in the exercise of the functions of the employee or delegate.

The Complaint

Part One: TasWater correspondence

On 4 May 2018 Cr Archer requested the General Manager's Assistant to provide any correspondence from Council to TasWater in the previous five years, in which

Council had requested that TasWater address the matter of Bridport water restrictions.

On 7 May the staff member emailed Cr Archer to say she would do it that week.

On 10 May 2018 Cr Archer again emailed the General Manager's Assistant to ask if she had found any correspondence between TasWater and Dorset Council over the previous five years, and telling her that he needed the information as he intended to submit a Notice of Motion for the next council meeting (to be held on 21 May 2018).

On 11 May the General Manager's Assistant provided a list of correspondence to Cr Archer with a summary of the content of the correspondence.

On 12 May Cr Archer submitted a Notice of Motion to the General Manager regarding the possible alleviation of TasWater's water restrictions in Bridport.

On 18 May the General Manager's Assistant emailed Cr Archer advising that the General Manager did not agree to provide copies of the correspondence listed in her email of 11 May 2018, but that the matter would be discussed at a workshop in June.

At the council meeting on 21 May, debate on Cr Archer's motion on notice was deferred by a successful procedural motion which proposed that the matter be discussed at a workshop in June.

On 22 May 2018 Cr Archer requested correspondence between Council and TasWater over the previous five years *which in any way relates to the Bridport water supply*.

On 23 May the General Manager responded that for various reasons, the Mayor would lead a discussion on the matter at a workshop on 5 June 2018. No requested information was provided to Cr Archer. Cr Archer responded to the General Manager on the same day, reiterating his request for information in accordance with s28D of the *Local Government Act 1993* (the Act).

On 31 May the General Manager wrote to Cr Archer, apologising for his delay in responding, and saying that the requested information would be provided in confidence to all councillors at the workshop on 5 June 2018.

On 1 June Cr Archer emailed the General Manager, saying that this was not 'satisfactory', and again requesting that in accordance with the Act, he be provided with the information. He said that he would call into the council chambers to collect the documents at noon on 4 June.

On 4 June the General Manager emailed Cr Archer, again stating that the information would not be available to him that day, but requesting that Cr Archer

meet with himself and the Mayor *over a number of matters concerning your ongoing conduct.*

At 2.07 pm on 4 June Cr Archer emailed the General Manager to say that he had read his email, and that he would come to the General Manager's office on 5 June to collect the requested documents and discuss any matters of concern.

At 4 pm on 5 June, before the workshop which was to commence at 4.30 pm, Cr Archer went to the General Manager's office and asked for the documents. The General Manager declined to give them to him.

On 5 June at 4.30 pm the Mayor and General Manager tabled information regarding TasWater and Dorset Council to all councillors present at the council workshop.

Part 2: Contract with May Shaw

On 5 June 2018 at the council workshop councillors were told that a draft contract between Council and aged care provider May Shaw had been completed, and that council was *in a position to close out the matter with May Shaw.*

On 7 June Cr Archer requested a copy of the draft contract before the General Manager recommenced negotiations with May Shaw. The General Manager refused to provide the draft. Cr Archer reiterated his request, quoting s28(2)(e) of the Act to justify his request. Later the same day, the General Manager again emailed Cr Archer, suggesting that councillors had been briefed on the contract, and that Cr Archer should go back through previous council documents on the council portal to find the information about the contract.

On 8 June Cr Archer again asked for the draft contract and said that if the General Manager refused to provide him with a copy, he would *have no option but to lodge a complaint with the Local Government Division.*

In response, also on 8 June, the General Manager told Cr Archer that he would not provide a copy of this draft of the contract until after he had met representatives of May Shaw and had a final draft of the contract. He intended then to present this to Council at a workshop and at a subsequent council meeting. He said that in accordance with s28A (3)(a) and s28A (3)(d) of the Act he refused to provide the current draft of the contract. He again advised Cr Archer that all councillors had been briefed in detail on the matter on two separate occasions.

On 11 June Cr Archer asked the General Manager for copies of the briefings he referred to.

Part 3: General Manager's Contract of Employment (CoE)

On 9 June 2018 in response to a request from Cr Archer for a copy of the General Manager's CoE, the Mayor told Cr Archer that the request should be directed to the General Manager, and that he did not see why Cr Archer required a copy.

After receiving the email from the Mayor, Cr Archer emailed the General Manager on 9 June, requesting a copy of his CoE in accordance with s28 of the Act.

On 15 June the General Manager responded to Cr Archer, requiring him to articulate why he, as an individual councillor, found it necessary to monitor his performance as General Manager. The CoE was not provided.

Part 4: RTI request

On 16 June Cr Archer sent an RTI request to the Information Officer at Dorset Council, asking for a list of the monthly allowances and expenses incurred by individual Dorset elected members for the period 1 July 2017 to 31 May 2018; and also the credit card statements for cards issued to the Mayor and General Manager for the same period. The request was sent from Cr Archer's personal email address, not his council email address.

Preliminary Procedure

The complaint was referred to the Code of Conduct Panel (the Panel) on 22 June 2018. The Chairperson of the Panel informed Mr Watson and Cr Archer on 4 July 2018 that she had assessed the complaint as a whole, and in accordance with s28ZA (1) (e) of the Act, determined that the complaint was to be investigated and determined by the Code of Conduct Panel for the following reasons:

1. The complaint substantially related to an alleged contravention of the Dorset Council's Code of Conduct; and
2. The complaint did not appear to be frivolous or vexatious in nature.

The Panel met on 27 June 2018 to consider this complaint and one which had come to the Panel on 6 June 2018, also from Mr Watson against Cr Archer. The Panel decided that the complaints would be treated separately, but that it would conduct a hearing into both complaints on the 6 September 2018. This was changed to 7 September to accommodate a request by Cr Archer. Both parties were invited to provide further information should they wish to do so. All information provided by either party was sent to the other.

Neither party chose to call witnesses for the hearing. Mr Watson requested that he be represented at the hearing by an advocate, the Mayor of Dorset Council, Cr Greg Howard. The Panel agreed to this.

On 4 September 2018 the Panel was notified that Cr Archer was hospitalised in Canberra and would be unavailable to attend the hearing on 7 September. A medical certificate was provided to the Panel confirming Cr Archer's illness. The hearing was subsequently deferred to 24 September 2018. The time allowed under s28ZD(1)(a) to determine a Code of Conduct complaint was exceeded due to these unavoidable circumstances.

Determination

The Code of Conduct Panel dismisses the complaint against Cr Archer.

Reasons for the Determination

Neither the complainant nor the respondent disputed the facts as presented.

Part 7, Clause 1(c): A Councillor must not bully or harass any person

The terms *bully* and *harass* are not defined in the Code of Conduct or the Act. There is no reason to find that they have any special meaning in the Code of Conduct. Bullying, particularly in the workplace (which is analogous to the situation of Mr Watson and Cr Archer) can be nuanced and difficult to define. It must be distinguished from a difference of opinion. Mr Watson contended that, if the subject of the impugned behaviour feels bullied, then the behaviour is bullying. This clearly cannot be correct. While the subjective effect of the behaviour is important and there need not be an intention to bully, there must be an objective element of unreasonableness to the conduct (which, for example, is reflected in the definition of *bullied at work* in s789FD of the *Fair Work Act 2009*). Dictionary definitions generally imply an abuse of a power relationship. Conduct or communication which is insulting, offensive, intimidating, degrading, ridiculing or humiliating of another is likely to be bullying. It may be that subtler unreasonable or inappropriate behaviour might constitute bullying, particularly if repeated or by a person in a position of power.

Harassment involves a course of conduct that causes annoyance or upset to a person that is persistent over a period of time. It will be more clearly apparent where it includes aggressive pressure or intimidation. Once again, the subjective effect is important and an intention to harass is not necessary, but there must be an objective element of unreasonableness to the conduct.

Mr Watson told the Panel that he had been 'bombarded' with emails, and that Cr Archer's RTI request for councillor expenses and the Mayor and General Manager's credit card statements was 'the last straw'. The Panel was told that Mr Watson considered that he had been bullied and harassed by Cr Archer because of the number and frequency of the emails regarding TasWater and the May Shaw contract, and the requests for a copy of the CoE, and the tone or language used in some of the emails. When asked to specify language used by Cr Archer which he considered to be aggressive, Mr Watson cited Cr Archer's saying that Mr Watson's response to one of his repeated requests was 'unsatisfactory'; and secondly, he considered that Cr Archer's email of 8 June (regarding the General Manager's CoE) was threatening.

The Panel determines that on the evidence before it, there were no grounds to believe that Cr Archer had bullied or harassed the General Manager. Cr Archer's communications, while persistent, were not unreasonable or inappropriate, let alone insulting, offensive, intimidating, degrading, ridiculing or humiliating. His persistence in requesting information which he considered pertinent to his performance of his duties as a councillor led the General Manager to believe that Cr Archer was making his requests to make life difficult for him, the General Manager; but the Panel considers that the persistence itself was born of Cr Archer's frustration at being unable to get information he considered important to him as a councillor. The Panel determines that Cr Archer was genuine in his attempts to see various council documents, and that his repeated attempts to get those documents were not attempts to bully or harass the General Manager. The Panel does not consider that a reasonable person would consider the tone and language of the emails as unduly aggressive or directory, given the context of the exchanges.

The Panel considers that the number of emails was reflective of the course of requests by Cr Archer rather than harassment of the General Manager. They were not unreasonable so as to constitute harassment. The Panel considers that the TasWater emails were a result of Cr Archer's desire to address the problem of water restrictions in a key holiday township in Dorset; his May Shaw contract

emails were prompted by the General Manager's announcement that he was about to enter final negotiations with May Shaw; the request for the General Manager's CoE could be made by any Councillor at any time, as Council is the employer of the General Manager; and as Cr Archer told the Panel, the RTI request was to obtain information that could be used publicly for the purposes of the approaching local government elections in 2018.

Part 7, Clause 3: A Councillor must not influence or attempt to influence, any Council employee or delegate of the Council in the exercise of the functions of the employee or delegate.

It is necessary to read into Clause 3 that any relevant influence, or attempted influence, is improper. Without that qualification any appropriate or benign request for information or action would constitute a breach. The Panel saw no evidence that Cr Archer influenced, or attempted to influence, the General Manager or any other council employee in the performance of their duties. The General Manager's decision regarding the non-provision of various pieces of information is evidence in itself he was not influenced. The Panel does not consider that Cr Archer's requests for information, or his statements about collection of that information at a time suitable to himself, amount to attempts to influence any council employee, including the General Manager, within the meaning of Clause 3.

Right to Review

Under s28ZJ of the Act, a person aggrieved by the determination of the Panel is entitled to apply to the Magistrates Court (Administrative Appeals Division) for a review of the determination on the ground that the Panel has failed to comply with the rules of natural justice.



Lynn Mason (chairperson)



Richard Grueber (legal)



David Sales