

Local Government Act 1993

KINGBOROUGH COUNCIL CODE OF CONDUCT

Complaint by Mr Malcolm Mars against Mayor Dean Winter

Determination made on 1 May 2019

Code of Conduct Panel:

Jill Taylor (Chairperson), Gretel Chen (Legal Member) and Penny Cocker (Member)

1. Summary of the complaint

On 11 December 2018 Mr Malcolm Mars lodged a Code of Conduct Complaint (the Complaint) against Mayor Dean Winter.

Mr Mars alleged that Mayor Winter had breached the following Parts of the Kingborough Council's Councillor Code of Conduct (the Code).

Part 1 - Decision Making, Sections 1-4

Part 2 - Conflict of Interest, Sections 1-6

Part 6 - Gifts and Benefits, Sections 1-8

Part 7 - Relationship with Community, Councillors and Council employees, Section 1

On 3 January 2019, the Chairperson advised the result of the initial assessment undertaken on the Complaint. The Chairperson dismissed the parts of the Complaint relating to Part 1 – Decision Making and Part 6 – Gifts and Benefits. The Part 1 Complaint was dismissed because nothing in the Complaint demonstrated Mayor Winter's decision making was biased or influenced in any way. The Part 6 Complaint was dismissed because no evidence was presented to indicate that Mayor Winter had not adhered to Council or legal standards or the Code of Conduct in relation to gifts and benefits.

In relation to Part 2 – Conflict of Interest and Part 7 – Relationship with community, councillors and Council employees, the Chairperson determined that the Complaint should be investigated.

A Code of Conduct Panel was formed to investigate the Complaint. Mayor Winter was provided with a copy of the Complaint and invited to provide a response.

Mayor Winter submitted a response to the Complaint and a covering statutory declaration dated 1 February 2019.

2. Investigation

The Panel met on 19 February 2019 and agreed that a hearing should be held.

On 2 April 2019, Mr Mars emailed the Executive Officer advising that he wished the matter to be heard on the papers and did not want to attend a hearing. Mayor Winter was advised of Mr Mars' request and asked if he had any objections to the matter being determined on the papers. He did not.

The Panel therefore considered the Complaint on 10 April 2019 including the following material:

- The Complaint dated 11 December 2018 together with attachments
- Mayor Winter's response dated 1 February 2019
- Kingborough Council Agenda for the meeting scheduled for 26 November 2018
- Kingborough Council Minutes of the meeting held on 26 November 2018

Mr Mars' contended that Mayor Winter had breached Part 2 Conflict of Interest Sections 1 – 6, which state:

PART 2 - Conflict of interests that are not pecuniary

1. *When carrying out his or her public duty, a councillor must not be unduly influenced, nor be seen to be unduly influenced, by personal or private interests that he or she may have.*
2. *A councillor must act openly and honestly in the public interest.*
3. *A councillor must uphold the principles of transparency and honesty and declare actual, potential or perceived conflicts of interest at any meeting of the Council and at any workshop or any meeting of a body to which the councillor is appointed or nominated by the Council.*
4. *A councillor must act in good faith and exercise reasonable judgement to determine whether he or she has an actual, potential or perceived conflict of interest.*
5. *A councillor must avoid, and remove himself or herself from, positions of conflict of interest as far as reasonably possible.*
6. *A councillor who has an actual, potential or perceived conflict of interest in a matter before the Council must –*
 - (a) declare the conflict of interest and the nature of the interest before discussion of the matter begins; and*
 - (b) act in good faith and exercise reasonable judgement to determine whether a reasonable person would consider that the conflict of interest requires the councillor to remove himself or herself physically from any Council discussion and remain out of the room until the matter is decided by the Council.*

The basis of the Complaint was that Mayor Winter had failed to declare a conflict of interest in relation to a matter on the Council Agenda of 26 November 2018 relating to Declared Areas under the *Dog Control Act*. Neither Mr Mars nor Mayor Winter provided the Panel with a copy of the relevant Agenda or the Minutes of the Council meeting of 26 November 2018. The Panel obtained a copy of both documents from Council's website.

An Officer's report, prepared by the Executive Manager, Governance and Community Services and attached to the Agenda, noted that:

At its meeting on 10 September 2018 Council resolved to endorse a Dog Management Policy following an extensive public consultation process.

The Officer's report continued that it was necessary to formally advertise declared areas identified in the policy and allow 15 days for public submissions. The proposed declared areas were advertised, and the Officer noted that in excess of 78 submissions were received. Full copies of each submission were provided to the Councillors for review and consideration.

One of the proposed areas was *Taroona Beach (East of the Boat Ramp)*.

The vast majority of the submissions (77) related to the proposal to declare Taroona Beach east of the boat ramp as an off-lead area. Forty-one (41) submissions were in support of the proposal and thirty-six (36) were opposed.

The Officer's report summarised the submissions made in support and in opposition and specifically noted that:

the opposing viewpoints are well presented in the attached submissions from the Kingborough Dog Walking Association and Safe Beaches Taroona.

The Officer recommended that Council endorse Taroona Beach (East of the Boat Ramp) as an off-lead exercise area pursuant to section 20 of the *Dog Control Act 2000*.

The Council Minutes for the 26 November 2018 record that the following motion was moved by Cr Westwood and seconded by Cr Street:

That having considered the submissions received during the statutory public advertising period, Council endorse the declaration of the following areas within the Dog Management Policy endorsed at Council's 10 September 2018 meeting and advertised on 10 October 2018 in accordance with the provisions of the Dog Control Act 2000, to come into effect via public notice on Friday 30 November 2018, for a period of five years:

a) *Off-lead dog exercise areas pursuant to Section 20 of the Act:*

- *Taroona Apex Park*
- *Taroona Beach (East of the Boat Ramp)*

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FOR

<i>Cr Grace</i>	<i>Cr Street</i>	<i>Cr Wass</i>	<i>Cr Westwood</i>	<i>Cr Winter</i>
<i>Cr Wriedt</i>				

AGAINST

<i>Cr Atkinson</i>	<i>Cr Bastone</i>	<i>Cr Fox</i>	<i>Cr Midgley</i>	
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Carried

In support of the Complaint, Mr Mars attached a copy of a Georgia Clark's Facebook page dated 10 September (presumably 2018) that stated "*The Kingborough Dog Walking Association collaborated with Cr Dean Winter to push some last-minute amendments through*".

In his response, Mayor Winter stated that he had no personal or private interest in Council's dog management policy, the proposed declared areas or the Kingborough Dog Walking Association (the Association). Mayor Winter stated that he had met with the Association and representatives of Taroona Safe Beaches at Taroona Beach, listened to their respective arguments and taken notes. Mayor Winter contended that he was able to assess the issue by having met people with opposing views.

Mayor Winter said that he did not encourage or accept any financial contribution from the Association to his election campaign.

The Panel dismisses the Complaint under Part 2 of the Code. There was no material put to the Panel to evidence that Mayor Winter had any real, perceived or potential conflict of interest in the *Dog Control Act* matter before Council on 26 November 2018. Nor was there evidence of Mayor Winter bringing a closed, prejudiced or biased mind to the matter.

The Panel accepts that Mayor Winter was not unduly influenced by any connection with the Association. The Panel also accepts that some groups or individuals may well publicly claim they have the support of a particular candidate or elected member, but this does not necessarily mean that that is the case.

The Complaint alleges that Mayor Winter had also breached Part 7 Section 1 of the Code which states:

PART 7 - Relationships with community, councillors and Council employees

Section 1

1. A councillor –

(a) must treat all persons fairly; and

(b) must not cause any reasonable person offence or embarrassment; and

(c) must not bully or harass any person.

The basis of this Complaint relates to an email, dated 23 November 2018, sent by Mayor Winter to Mr Mars which stated in its concluding paragraph *"I have not enjoyed your correspondence. You have attacked my integrity and that of the Deputy Mayor. Like the Deputy Mayor, I will also not be interacting with you any further."*

Mr Mars complained that he was polite in his emails to Mayor Winter and felt that he should not be excluded from raising valid concerns with the Mayor.

Mayor Winter responded by saying his communication with Mr Mars had been "measured" and stated it was a case of Mr Mars not liking his response.

The email in question reads as follows:

Dear Malcolm

As you have already been advised by the General Manager, I did not receive any gift or donation from any source for my election campaign.

My conduct has and will be in line with the Code of Conduct, which includes going into the debate with an open mind. As you're aware, this included meeting the representatives of Taroona Safe Beaches at Taroona Beach, listening (sic) to the arguments and taking notes. Over the weekend I'll be reading through all the submissions for a second time as I prepare my contribution. During the debate I'll be listening to the arguments of my colleagues before making my final decision, on the basis of the evidence presented, on how to vote.

I have not enjoyed your correspondence. You have attacked my integrity and that of the Deputy Mayor. Like the Deputy Mayor, I will also not be interacting with you any further.

Yours sincerely...

The Panel accepts that the email exchange between Mr Mars and Mayor Winter related entirely to the issue of proposed Declared Areas under the *Dog Control Act*. The matter was clearly a sensitive one for Mr Mars.

The email is titled *Re: Kingborough Council Dog Management Policy*. It was sent in response to a three and a half page email from Mr Mars of the same date in which Mr Mars intimated that the Mayor had a conflict of interest and queried whether the Mayor had complied with his legal obligations in respect to gifts or donations to his election campaign and advertising costs.

The Panel accepts that the Mayor did not have a conflict of interest in relation to the Dog Control Matter. There was also no material put to the Panel to indicate that the Mayor accepted any gifts or donations towards his election campaign or advertising from any other person or body. The Mayor strenuously denied that that was the case and the Panel accepts his evidence.

Intimations of the kind made by Mr Mars in his email to the Mayor are not ones that are ordinarily made lightly. They constituted a significant escalation from making submissions about the issue at hand to making unfounded intimations of impropriety on the Mayor's part. The Panel does not consider Mr Mars' email of 23 November 2018 to have been reasonable.

The Panel is not satisfied that in his email dated 23 November 2018 Mayor Winter failed to treat Mr Mars with courtesy, fairness, dignity and respect. Nor is it satisfied that Mayor Winter's email would

cause a reasonable person offence or embarrassment. Nor is it satisfied that Mayor Winter bullied or harassed Mr Mars. Accordingly, a breach of Part 7 (1) is not made out.

3. Determination

The Panel dismisses the Complaint under Part 2 of the Code.

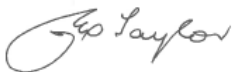
The Panel dismisses the Complaint under Part 7 of the Code.

In conclusion, the Panel notes that Mayor Winter’s email of 23 November 2018 in response to Mr Mars could have been more specific in restricting his refusal to further interact with Mr Mars to issues connected with the declared area for dogs. Section 28 (c) of the *Local Government Act 1993* requires councillors to “facilitate communication by the council with the community”. Whilst the Panel considers it is reasonable to terminate an ongoing communication on a specific issue when a stalemate or similar is reached, it is also reasonable to expect that an elected member be available for communication on other Council-related matters.

The finalisation of this code of conduct complaint has exceeded the statutory 90-day period from the date of the initial assessment. This has occurred because of the other professional commitments and absence of some relevant people during the summer holiday period.

4. Right to Review

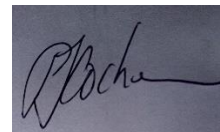
A person aggrieved by the determination of the Code of Conduct Panel is entitled under section 28ZP of the Act to apply to the Magistrates Court (Administrative Appeals Division) for a review of that determination on the grounds that the Code of Conduct Panel has failed to comply with the rules of natural justice.



Jill Taylor
Chairperson



Gretel Chen
Legal Member



Penny Cocker
Member