

CODE OF CONDUCT PANEL

GEORGE TOWN COUNCIL CODE OF CONDUCT

Determination made 9 November 2016

Local Government Act 1993

Complaint against Councillor Heather Barwick

Code of Conduct Panel: Jill Taylor (Chairperson), Gretel Chen (Legal Representative), David Sales (Local Government experience).

I. Summary of the complaint

A Code of Conduct complaint was submitted by Mayor Bridget Archer to the General Manager of the George Town Council on 22 August 2016 (the complaint).

The complaint alleges that on 6 August 2016, Councillor (Cr) Heather Barwick breached Part 5 – Use of Information, of the George Town Council Code of Conduct, adopted 18 May 2016 (the Code of Conduct).

Mayor Archer alleges that Cr Barwick breached Part 5 of the Code of Conduct, by providing information obtained in a Closed Council meeting held on 18 July 2016, to the Hon Ivan Dean, MLC. It was further alleged that the Hon Ivan Dean used this information as the basis of a Right to Information (RTI) request to Council on behalf of Cr Barwick.

Local Government (Meetings Procedures) Regulations 2015 Part 2 Division 1, 15(9) state "Subject to to the [Right to Information Act 2009](#), any discussions, decisions, reports or documents relating to a closed meeting are to be kept confidential unless the council or council committee, after considering privacy and confidentiality issues, authorises their release to the public".

2. Investigation

In accordance with section 28ZE of the *Local Government Act 1993* (the Act), the Code of Conduct Panel investigated the complaint.

The Chairperson of the Code of Conduct Panel (the Chair) conducted an initial assessment of the complaint and determined on 1 September 2016 that it was to be investigated by a Code of Conduct Panel (the Panel) in accordance with section 28ZA(1)(e) of the Act.

The Panel received and considered the following documents:

- The complaint – comprising completed complaint form dated 12 August 2016, emails between Cr Barwick and John Martin, General Manager dated 31 July 2016 and 6 August 2016 and one undated;
- George Town Council Meeting 15 October 2014 Agenda p125;
- George Town Council Meeting 15 October 2014 Unconfirmed Minutes p34;

- George Town Council Meeting 18 July 2016 Agenda pp127-128;
- George Town Council Meeting 18 July 2016 Unconfirmed Minutes pp140-145;
- Agenda for Closed Council held on 18 July 2016;
- George Town Council Meeting 18 July 2016 Confirmed Minutes;
- Email dated 6 August 2016 from Cr Barwick to Hon Ivan Dean;
- Letter from Kim Barker, Director Corporate Services, dated 23 August 2016 to Hon Ivan Dean refusing his RTI application;
- Open letter from Hon Ivan Dean dated 26 September 2016;
- Statutory Declaration by Cr Barwick declared 4 October 2016;
- Statutory Declaration by Cr John Glisson declared 1 November 2016.

Mayor Archer and Cr Barwick were invited to call witnesses. Mayor Archer called George Town Council General Manager, Mr John Martin and Director of Corporate Services, Mr Kim Barker. The Panel determined that Mr Barker's role in deciding of the RTI request by Hon Ivan Dean was not directly related to the complaint and consequently did not have him called. Cr Barwick called Cr John Glisson.

3. Summary of Hearing

The Hearing was convened in George Town at LINC, Regent Square, George Town, on 9 November 2016. Both Mayor Archer and Cr Barwick were present throughout the hearing. Mr Martin and Cr Glisson gave evidence and were questioned by the Panel, Mayor Archer and Cr Barwick.

In opening the hearing, the Chair advised the parties of the purpose of the hearing, the procedures to be followed and the options available to the Panel in its determination. All parties gave evidence on oath.

Mayor Archer stated that on 16 August 2016 she had become aware of an RTI request submitted by the Hon Ivan Dean on 12 August 2016, on behalf of Cr Barwick. She stated that an attached email from Cr Barwick, dated 6 August 2016, to Hon Ivan Dean disclosed information directly obtained from a Closed Council meeting held on 18 July 2016. The email provided as follows:

*"Dear Ivan,
I Heather Jean Barwick JP Councillor on the George Town Council hereby authorize you Mr. Ivan Dean APM. MLC Independent member for Windermere on my behalf obtain the following records inclusive of all mails, letters, documentation of any source for the purpose of information relative to Legal Fees incurred by the George Town council and reported in the council agenda dated 18th July 2016 under Closed Session, Agenda Item number 17.3 Legal Expenditure.*

*Enforcement Proceedings – Memorial Hall \$1,895.00
Misc. Local Govt. – Legal Advice Elected members - \$6,314.00.
Public Question Time \$5,311.00.*

I have copied and pasted for your perusal the email that I forwarded to the General Manager requesting this information and his response to refuse my request below as I cannot for some reason forward the council document to my desk top?

Thank you

In anticipation

Kind regards,

Cr Heather Barwick, JP"

Mayor Archer said that she had felt obliged to make the Code of Conduct complaint as the issue of confidentiality of elected members had been an ongoing problem for the George Town Council. Mayor Archer pointed out that whilst the Hon Ivan Dean might be a Parliamentarian this did not give him privilege to receive confidential Council information. Mayor Archer explained that if Cr Barwick was concerned about expenditure on legal matters or any other items, she could have submitted an RTI request, pursued a political process within Council or used other mechanisms provided under section 28 of the Act. When questioned by the Panel whether she had made attempts to advise Cr Barwick of these options, Mayor Archer replied that at the time of making the complaint she "thought the horse had bolted".

The right to information request made to Council by the Hon Ivan Dean was refused on the basis that the information sought was exempt under section 31 of the *Right to Information Act 2009*. Section 31 provides that information is exempt from production if it is of such a nature that the information would be privileged from production in legal proceedings on the ground of legal professional privilege. Because of the section 31 exemption, attempts to obtain information about legal matters via the *Right to Information Act 2009* are likely to be met with refusal, as occurred here.

When questioned by the Panel about whether there had been any attempts by Council to educate elected members and address previous alleged breaches of confidentiality, Mayor Archer stated that there had been an "ongoing" conversation with the Integrity Commission, visits from the Local Government Association of Tasmania (LGAT) and the Director of Local Government Division. These things had been directed, inter alia, at informing elected members as to their confidentiality obligations.

The Panel questioned Mayor Archer as to why all items of a legal nature were heard in Closed Council. Mayor Archer referred the Panel to a motion initiated by Cr Barwick and passed by Council at a meeting held on 14 October 2014 which provided that legal matters should be heard in Committee. The motion provides as follows:

"That Council be provided within the "In Committee" section of the agenda each month, the details of any legal expenditure, the subject matter, the amount and the reason as to why the expenditure was incurred".

The 14 October 2014 motion has not been amended or rescinded.

Regulation 15(2)(i) of the *Local Government (Meeting Procedures) Regulations 2015* relevantly provides:

A part of a meeting may be closed to the public when any one or more of the following matters are being, or are to be, discussed at the meeting:

...

- (i) matters relating to actual or possible litigation taken, or to be taken, by or involving the council or an employee of the council;

The Panel questioned Mayor Archer about whether the three items of expenditure listed in Cr Barwick's email to Hon Ivan Dean dated 6 August 2016 met the requirements of regulation 15(2)(i) and should have been heard in Closed Council. Mayor Archer responded that all three items related to actual litigation taken by or involving Council. Specifically, the enforcement proceeding referred to was an ongoing matter; the miscellaneous local government matter partially involved actual enforcement proceedings; and the public question time matter also related to actual enforcement proceedings.

Cr Barwick denies that she has breached Part 5 of the Code of Conduct. She stated that she did not pass anything confidential to Hon Ivan Dean. She also stated that she had tried to get details of Council's legal costs from the General Manager, Mr Martin by way of her email dated 31 July 2016, but was refused. It was only after the General Manager had refused her request that Cr Barwick approached Hon Ivan Dean.

Cr Barwick admitted that she sent the email to Hon Ivan Dean dated 6 August 2016. She went on to say, however, that the Memorial Hall enforcement matter was public knowledge and "everybody" in George Town knew about it. She also said that she had had a telephone discussion with the General Manager about one of the matters prior to the 18 July 2016 meeting and the terms of that conversation had not been confidential.

Cr Barwick said that it was not unusual for the General Manager to refuse her requests for information on the basis that the information was "confidential or operational".

Cr Barwick's view was that when a legal opinion was sought by Council, Councillors had the right to be advised of the content of that legal advice.

Cr Barwick stated that she considered it part of her role as a Councillor to ensure that ratepayers' money is spent wisely and accordingly she needs to know the full facts of the expenditure. She expressed the opinion that the General Manager resorted to seeking legal advice far too frequently. She said she sought the information in her 6 August 2016 email to Hon Ivan Dean based on her concern about spiralling Council legal costs.

When asked why she did not use other means to obtain the information that were available to her under the Act, Cr Barwick said she was unaware of the section 28(A) provisions but was aware that she could ask to view documents under section 28(D) of the Act.

Cr Barwick stated that she has never passed confidential information on to any other person.

Council's General Manager, Mr John Martin said that it was standard practice to place legal matters on the closed agenda in accordance with the motion of 14 October 2014. He said

that if Councillors had any questions about legal items he would usually provide verbal information. When asked by the Panel if he considered all legal matters individually before listing them on the Closed Council agenda, Mr Martin said he did not. Mr Martin expressed the view that all legal matters fell within *Local Government (Meetings Procedures) Regulations 2015*, reg. 15(2)(i). The Panel's view is that the practice of automatically placing all legal expenditure items within the closed session of Council, without addressing the matters that need to be considered under regulation 15(2)(i) may amount to a breach of the Regulations. The Panel recommends that a review of this practice be undertaken.

In response to a request from the Panel, Mr Martin undertook to provide a copy of the agenda for the Closed Council meeting held on 18 July 2016.

Cr Glisson was called by Cr Barwick and stated that there seemed to be confusion in Council about what is and is not confidential and what should be dealt with in Closed Council.

In summing up Mayor Archer, said it was clear that the matters referred to in Cr Barwick's email to Hon Ivan Dean on 6 August 2016 were the subject of the Closed Council meeting held on 18 July 2016 and that Cr Barwick could not have accessed the financial details elsewhere. She said that by passing on that information to a third person, albeit an elected representative whom she trusted, Cr Barwick had lost control of it.

In closing, Cr Barwick denied that she had divulged confidential information to Hon Ivan Dean, and expressed her belief that the amount paid for legal expenses was not confidential. She also expressed the view that as a Parliamentarian Hon Ivan Dean was an appropriate person to assist her in her efforts to obtain the information. She stated that she was seeking the information as it was necessary in order to fulfil her role as an elected member.

4. Determination

In accordance with section 28Z1 of the Act, the Panel determines that the complaint is upheld.

5. Reasons for determination

The Code of Conduct Panel considered the information provided by Mayor Archer, Cr Barwick and the evidence presented by the other witnesses. It also considered the contents of the documents referred to above.

The relevant provisions of the Code of Conduct identified in the complaint are:

Part 5: Use of Information

- 1. A Councillor must protect confidential information in his or her possession or knowledge and only release it if he or she has the authority to do so.*
- 2. A Councillor must only access Council information needed to perform his or her role and not for personal reasons or non-official purposes.*
- 3. A Councillor must not use Council information for personal reasons or non-official purposes.*

4. *A Councillor must only release Council information in accordance with established Council policies and procedures and in compliance with relevant legislation.*

The Panel determines that Parts 5.1 and 5.4 are made out.

Cr Barwick admits sending the email dated 6 August 2016 to Hon Ivan Dean. The email refers to the following matters that the Panel considers were confidential:

- a) The three identified legal matters;
- b) The costs incurred for each of those three matters;
- c) The fact that the three matters were considered in closed council.

The fact that some of the confidential information could have, and according to Cr Barwick did, come to her knowledge outside of the closed meeting does not in the Panel's view change the confidential nature of the information discussed at the closed meeting. The Panel finds that the three items fall within the description set out at regulation 15(2)(i) of the *Local Government (Meeting Procedures) Regulations 2015* and related to actual litigation taken by Council or involving Council. It accordingly finds that Cr Barwick had an obligation to keep the information confidential.

The Panel finds further that even if information relating to the legal matters was in the public domain, the fact that the matters were to be discussed in closed session was in itself confidential. There would be numerous reasons why Council may want to keep its consideration of legal matters confidential even when details of those matters have been made public. For example, Council may need to confidentially discuss related insurance questions, legal strategy, settlement offers and negotiations, or the like.

Accordingly, the Panel finds that in sending the email to Hon Ivan Dean on 6 August 2016, Cr Barwick failed to protect confidential Council information and released it without the authority to do so in breach of Part 5.1 of the Code of Conduct.

The Panel further finds that in sending the email to Ivan Dean on 6 August 2016 Cr Barwick released information seen or heard by her at a meeting of Council that was closed to the public contrary to section 338A of the of the Act and thereby breached Part 5.4 of the Code of Conduct.

6. Sanctions

Cr Barwick was advised by letter dated 25 November 2016 that the Panel had decided to uphold the complaint. She was invited to make submissions on sanction. Cr Barwick responded on 2 December 2016 that she considered a caution to be the appropriate sanction. She otherwise placed no information before the Panel in relation to sanction.

The Panel has decided to impose the following sanctions:

1. It issues a caution to Cr Barwick, under s28Z1(2)(a); and
2. It requires under s28Z1(2)(d) that within three months of this Determination, Cr Barwick is to attend training in relation to her confidentiality obligations as a Councillor. Cr Barwick is to liaise with the General Manager and in turn the Local Government Association of Tasmania (LGAT) and the Local Government Division to have suitable training arranged.

Within 7 days after Cr Barwick has fully complied with the above sanction by completing the necessary training, she is to notify the General Manager that she has done so as required under s28ZM.

If Cr Barwick does not comply with the above sanction within three months of this determination, a penalty may be imposed of a fine not exceeding 50 penalty units, as under s28ZM of the Act.

In light of the evidence received during the course of the hearing, the Panel observes that all of the Councillors at George Town Council may benefit from training in relation to their confidentiality obligations.

7. 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 ground that the Code of Conduct Panel has failed to comply with the rules of natural justice.



Jill Taylor
Chairperson



Gretel Chen
Member



David Sales
Member