

Councillor Conduct Tribunal: Expedited Misconduct Application Summary of Decision and Reasons.

Local Government Act 2009: Sections 150DV, Practice Direction #1 of 2022 and section 150AS(2)(c) and 150AS(5).

1. Misconduct Application: filed 21 October 2022

Tribunal Reference	F22/31011
Subject councillor:	Councillor Dan Stewart (the Councillor)
Council	Gympie Regional Council (the Council)

2. “The Agreement” for the Expedited hearing:

The Expedited hearing took place on the basis of the Councillor’s acceptance of the application by the Independent Assessor (IA) including the alleged conduct, facts and circumstances. The Councillor’s acceptance was recorded by the following documents (Annexure A to this report):

- a. The email from Councillor Stewart to the Independent Assessor - 13 October 2022.
- b. The Statutory Declaration of Councillor Stewart dated 10 November 2022.
- c. The Joint Agreement between the Councillor and the Independent Assessor - 24 November 2022.

3. Decision (section 150AQ *Local Government Act 2009*)

Date:	12 December 2022
Decision:	The Tribunal determined on the balance of probabilities, that on 7 January 2022, Councillor Dan Stewart, a Councillor of the Gympie Regional Council, engaged in misconduct as defined in section 150L(1)(c)(iv) of the <i>Local Government Act 2009</i> , in that his conduct, contravened section 171(3) of that Act, as it involved the release of information confidential to the Local Government, by a post on his social media page, that the Councillor knew, or should have reasonably known, was information confidential to the local government, has been sustained.

<p>Particulars:</p>	<p>The Particulars of the conduct provided by the Independent Assessor are:</p> <ul style="list-style-type: none"> a. Councillor Dan Stewart was at all material times a councillor of Gympie Regional Council ('council'). b. On 7 January 2022, a Special Meeting of council was held ('the meeting'). c. Councillor Stewart was present at the meeting. d. Prior to discussing agenda item 3.1 'Staff Employment Matters', council resolved at 9:01am to close the meeting to the public in accordance with regulation 254J(3)(a) of the <i>Local Government Regulation 2012</i> as the agenda item required discussion of the appointment, discipline, or dismissal of the [staff member]¹. e. As part of the resolution to close the meeting, council further resolved that 'all matters and all documents (whether in hard copy, electronic, optical, visual or magnetic form) discussed, raised, tabled and/or considered whilst the meeting is closed and "in committee", are confidential to the Council and the Council wishes to keep them confidential". f. While the meeting was closed, council and the [staff member] ... agreed to enter a Settlement Deed in relation to the [staff member's] resignation. g. The Settlement Deed contained clauses relating to confidentiality, including that both the existence and the terms of the Settlement Deed were to remain confidential to the parties. h. Council resolved at 1.56pm to re-open the meeting to the public. i. After re-opening the meeting, council relevantly resolved, at agenda item 3.1 'Staff Employment Matters', to 'accept the resignation of the [staff member] on the terms as detailed during councils in committee session' and to appoint Mr David Lewis as the Acting [staff member]. j. On 7 January 2022, after the meeting, Councillor Stewart made a post on his public Facebook page 'Dan 4 Gympie', in which he noted that council had accepted the [staff member's] resignation and that Mr David Lewis would commence acting in the [staff member's] position. The text of this post did not contain information that was confidential to council. k. On or about 7 January 2022, a Facebook user by the name of 'Leigh Burt' commented on Councillor Stewart's post, writing 'Why is the [staff member] gone? Surely the public are entitled to know?'
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¹ The name and role of the [staff member] is de-identified by the Tribunal throughout this report.

	<p>l. On or about 7 January 2022, Councillor Stewart replied to Leigh Burt, which reply included the following relevant information: 'There is a confidentiality clause as part of the voluntary separation agreement'.</p> <p>m. Councillor Stewart knew, or should reasonably have known, that the existence of a formal agreement between the [staff member] and council contained a confidentiality clause and was information that was confidential to council because:</p> <p>i. council had resolved, prior to discussing the [staff member's] resignation, that: <i>'all matters and all documents (whether in hard copy, electronic, optical, visual or magnetic form) discussed, raised, tabled and/or considered whilst that meeting is closed and "in committee", are confidential to the Council and the Council wishes to keep them confidential'</i>; and</p> <p>ii. the wording of the public resolution did not disclose the existence of the Settlement Deed or the confidentiality clause.</p> <p>n. The release of this information was contrary to the proposed Settlement Deed and it occurred after Council and the [staff member] had agreed to it, but before it was signed.</p> <p>o. By disclosing, on his public Facebook page, the existence of a formal agreement between the [staff member] and council and that the agreement contained a confidentiality clause, Councillor Stewart released information that he knew, or should reasonably have known, was information that was confidential to the local government, which is a contravention of section 171(3) of the <i>Local Government Act 2009</i> (Qld) ('the Act').</p>
Reasons:	<p>1. The decision of the Councillor not to contest the matter or the facts and circumstances (see Particulars above) and to proceed by way of an expedited hearing establishes the Councillor accepts that the allegation of misconduct is made out. (see agreements Annexure "A")</p> <p>2. Notwithstanding this admission by the Councillor, the Tribunal has reviewed the allegation, facts and evidence filed by the Independent Assessor together with the agreements and explanation for the conduct provided by the Councillor.</p> <p>3. The section of the legislation that formed the basis of the misconduct related to a contravention of section 171(3) of the <i>Local Government Act 2009</i> that provides – "Use of information by councillors</p>

	<p>...</p> <p>(3) <i>A councillor must not release information that the councillor knows, or should reasonably know, is information that is confidential to the local government</i>".</p> <p>4. The evidence established that on 7 January 2022 the Councillor contravened section 171(3) when responding to a query on Facebook he revealed the existence of a confidential agreement that had been made during a closed Council "in committee meeting" between the Council and the [staff member]. The Facebook post was made by the Councillor in reply to a query by a member of the public seeking reasons for the resignation of "the [staff member]". The release of this information was in contravention of the Council resolution of 7 January 2020 that provided:</p> <p><i>"all matters and all documents...raised tabled or considered whilst the meeting is closed and 'in committee', are confidential to the Council and the Council wishes to keep them confidential;"</i>. (Particular: m.i and m.ii above).</p> <p>5. The information released by the Councillor was also contrary to the terms included in the Settlement Deed, that had been verbally advised to all councillors during the meeting. Clause 6.1 of the Deed provided: <i>"the existence and the terms of this Deed are confidential"</i>.</p> <p>The Expedited Hearing – 28 November 2022.</p> <p>6. The hearing was conducted on the papers and all evidence and submissions provided by the Applicant and the Councillor was considered by the Tribunal.</p> <p>7. Although the conduct was not disputed by the Councillor the Tribunal in reaching its decision and findings must be satisfied there is sufficient evidence before it to establish the allegation is made out to the required civil standard of proof, being the balance of probabilities.</p> <p>8. The Tribunal was satisfied it has discharged its obligation to observe and protect the Councillor's human rights by conducting a procedurally fair hearing pursuant to the provisions of the Act.² As an administrative Tribunal the provisions of the Human Rights Act 2019 (Qld)(HRA) are acknowledged, considered and applied to the decision- making process by the Tribunal.</p>
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² Section 213(1) and 213 (3) of the Act; section 213 of the Local Government Regulation 2012 permits a decision-maker to direct the matter be heard in private.

	<p>Tribunal findings</p> <p>9. Section 171(3) of the Act only requires the Applicant (the IA) to prove on the balance of probabilities from the evidence that the Councillor did release information that “he knew or should have reasonably known” was deemed confidential to Council.</p> <p>10. The Tribunal determined from the evidence and the Councillor’s admission that he disclosed confidential Council information to a member of the public, after he attended the Council meeting and the confidential closed “in-committee” meeting. Accordingly it was determined the Councillor “knew or should have reasonably known” the information was confidential and should not be disclosed.</p> <p>11. The explanation by the Councillor for the breach of the obligation of confidentiality was that it was an inadvertent error as he believed at the time he was “defending the need for confidentiality”. The Councillor considered his Facebook comments to be “ ... defending Council and staff in such situations rather than being belligerent”.³</p> <p>12. The explanations provided for the breach of the confidentiality obligation are not sufficient to exculpate the Councillor’s conduct that was noted to have taken place soon after the closure of the Council meeting and the confidential ‘in committee’ discussions.</p> <p>13. The Tribunal consequently concluded the Councillor engaged in misconduct when he released the confidential information in contravention of section 171(3) of the Act.</p>
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4. Sanctions/Disciplinary Orders and/or recommendations (s150AR):

Reasons for orders:	<p>14. Having sustained the allegation of misconduct the Tribunal by section 150AQ of the Act must consider appropriate orders to be made (pursuant to section 150AR).</p> <p>15. In determining the orders the Tribunal accepts the purpose of local government disciplinary proceedings is generally not punitive, but protective.⁴ However the sanctions made must also reflect the expectations of the community and, when considered appropriate, may also be directed to deterrence or be compensatory.</p> <p>16. The Tribunal considered the factors identified in the statement of facts agreed between the parties together with the submissions sought from the parties regarding the proposed sanctions and orders.</p>
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³ Email Councillor Stewart to S Thompson OIA 13 October 2022.

⁴ *Legal Services Commissioner v Madden*[2009]1Qld R 149 at [82].

	<p>17. The mitigating and aggravating factors considered in making the orders included:</p> <ul style="list-style-type: none"> a. The Councillor's acknowledgement of his error and co-operation with the investigation process from an early stage in the proceedings; b. The Councillor's election to participate in the expedited hearing process thereby reducing the resources required by the investigation process⁵ and the misconduct hearing process; c. The Agreements reached between the Applicant and the Councillor regarding the alleged conduct, facts and circumstances; d. The Councillor's previous disciplinary history in relation to two previous misconduct findings in 2016 and 2020 that occurred in similar circumstances where confidential Council information was released by Facebook posts. e. The Councillor was experienced in his role having been elected in 2016 and had received in-service training in 2021 relevant to councillor obligations and social media posts.⁶ <p>18. The Tribunal in considering the appropriate orders to make was cognisant of the protective nature of the jurisdiction and the local government principle (s4(1)(b)(ii) that provides:</p> <p><i>... 'any action that is taken under this Act to be taken in a way that –</i></p> <p><i>(ii) provides results that are consistent with the local government principles , in as far as the results are within the control of the person who is taking the action."</i></p> <p>19. In the circumstances of this matter a deficiency has been demonstrated in relation to the Councillor's attention to the detail and the meaning and the implementation of a Council confidentiality clause and resolution adopted on 7 January 2022. The Tribunal considers that when a serious deficiency has been demonstrated such as in this matter further education and training should be undertaken. The Tribunal formed the view from the evidence that both the Councillor and the Council would benefit by the Councillor attending further in- service training to address his conduct that led to the misconduct.</p>
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⁵ Applicant's submissions 16 November 2022.

⁶ Applicants Statement of Facts at [5].

	<p>20. Taking into account all the circumstances, the Tribunal considers it significant that the Councillor disclosed the information on Facebook despite the Council resolution and discussions being categorised as confidential and the discussions being conducted in a confidential ‘closed meeting’.</p> <p>21. The Act provides that a breach of confidentiality is deemed to be misconduct and accordingly the legislature considers that this type of conduct is serious or potentially serious.</p> <p>22. The Tribunal formed the view that sanctions should apply to the conduct and noted the Applicant’s and the Councillor’s submission that the sanctions should be at the lower end of the disciplinary range. The Councillor supported an admission to Council only of the misconduct, while the IA supported orders including a penalty payment, in service -training and a public admission.⁷</p> <p>23. The Tribunal considered the conduct was repetitive and consequently formed the view suitable measures should be implemented to ensure that such conduct is not repeated or inadvertently repeated.</p> <p>24. Accordingly it is determined the Councillor, pay a proportion of the costs of the misconduct proceedings, make an admission to the Council of the misconduct and attend training pursuant to section “including at the expense of the Councillor”, to address the conduct and to receive assistance as to how not to repeat it.</p>
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5. Orders (s150AR – disciplinary action):

Date of orders:	12 December 2022
Order/s and/or recommendations:	<p>The Tribunal orders pursuant to the provisions of the <i>Local Government Act</i> (s150AR(1)(b)) that Councillor Dan Stewart:</p> <ol style="list-style-type: none"> make a public admission at the next Council meeting that he engaged in misconduct (s150AR(1)(b)(i)); and attend training to address the conduct, the training to be directed to Social media and Facebook posts and measures to safeguard confidential Council information, the costs of the training to be at the expense of Councillor and to be undertaken within 120 days from the date of this order (s150AR(b)(iii)); and

⁷ Applicant’s submissions 16 November 2022 at [18].

	<p>c. reimburse the local government for 25% of the costs incurred by the local government' arising from the Councillor's misconduct', pursuant to sections 150AR(1)(b)(v).The payment to be made within 120 days from the date of this order.</p>
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ANNEXURE A

ANNEXURE A: a. 13 October 2022 - email from Councillor

From: [Dan Stewart](#)
To: [Steve Thompson](#)
Subject: OIA REF # C/22/00034
Date: Thursday, 13 October 2022 8:35:42 AM
Attachments: [Support Cr Stewart Facebook Posts 2022 Oct.docx](#)

Dear Steve ,

The draft Statement of Facts is a true reflection of events, including the statement that the original posting did not breach conduct rules, though a response to a resident's comment did.

Naturally I would prefer the matter not be referred to the tribunal. In support of this are the following:

- I acknowledge that my response to the comment on my facebook page was inappropriate.
- I have taken steps to ensure it does not happen again, in particular, Councillor Milne who is very particular on rules, monitors my page and also pre-reads posts (see attached letter from Cr Milne).
- I feel particularly stupid about the matter of this complaint, as the disclosure was something most reasonable people would assume, that there was a confidential agreement between Council and the former CEO.
- I was defending the need for confidentiality, an issue which the respondent raised, and in regard to that issue was defending Council and staff in such situations rather than being belligerent.

Regards,
Dan

Cr Dan Stewart
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Opinions expressed in this e-mail do not necessarily reflect those of Gympie Regional Council

ANNEXURE A: b. 13 November 2022 - Statutory Declaration Councillor

**Form 1
QUEENSLAND
Oaths Act 1867**

STATUTORY DECLARATION

I, **Daniel Hughes Stewart**, of 165 Penny Rd, East Deep Creek, do solemnly and sincerely declare that:

1. I confirm the agreement reached with the Office of the Independent Assessor which includes my acceptance of the allegation and the Statement of Facts prepared by the Independent Assessor's representative.

and I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the *Oaths Act 1867*.

I declare that the contents of this statutory declaration are true and correct. Where the contents of this declaration are based on information and belief, the contents are true to the best of my knowledge and I have stated the source of that information and grounds for the belief.

I understand that it is a criminal offence to provide a false matter in a declaration, for example, the offence of perjury under section 123 of the Criminal Code.

I state that:

~~A. This declaration was made in the form of an electronic document.*¹~~

~~B. This declaration was electronically signed.*²~~

C. This declaration was made, signed and witnessed under part 6A of the *Oaths Act 1867*.*³

(*delete whichever statements are not applicable)

DECLARED by

Daniel Hughes Stewart

[insert full name of declarant]

[Signature]

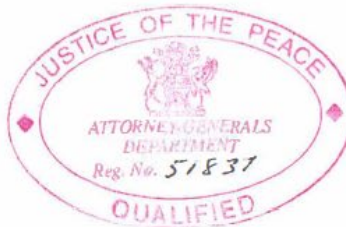
[signature of declarant]

at *Gympie*

[insert place where declarant is located]

10/11/2022

[date]



[Signature]

In the presence of:

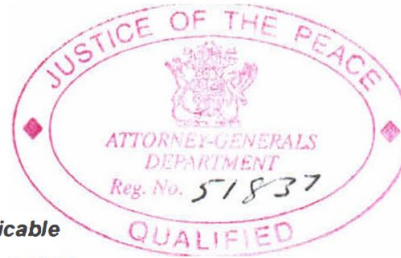
RUDOLF KARK
[insert full name of witness]

[signature]
[signature of witness]

T. P. Qual
[insert type of witness]⁴

10.11.2022
[date]

CHIEF CLERK
[insert name of law practice / witness's
place of employment]⁵
*delete if not applicable



For special witnesses to complete – Tick as applicable

- ☐ I am a **special witness** under the Oaths Act 1867.
(see section 12 of the Oaths Act 1867)
- ☐ This document was made in the form of an electronic document.⁶
- ☐ I electronically signed this document.⁷
- ☐ This statutory declaration was made, signed and witnessed under part 6A of the Oaths Act 1867 – I understand the requirements for witnessing a document by audio visual link and have complied with those requirements.⁸

ANNEXURE A: c. 24 November 2022 - Joint agreement Councillor and IA

Office of the **Independent Assessor**



OIA Ref: C/22/00034

Your ref: F22/31011

24 November 2022

Ms June Anstee
President of the Tribunal
Councillor Conduct Tribunal
Department of State Development, Infrastructure, Local Government and Planning
Level 16 - 1 William Street
Brisbane QLD 4000

By email: cct@dlgrma.qld.gov.au

Dear President,

Re: Independent Assessor v Councillor Dan Stewart

We refer to the matter of Independent Assessor v Councillor Dan Stewart (F22/31011) and your correspondence dated 22 November 2022.

The Parties have discussed the paragraphs of the Applicant's submissions filed on 16 November 2022 that were raised in the Respondent's email to the Registry on 21 November 2022.

Following those discussions, the Parties have come to an agreement and are no longer in dispute in relation to the issues raised. Accordingly, the Parties wish to make a joint clarification about the relevant paragraphs and issues.

Paragraph 23 of the Applicant's submissions

The Parties jointly say that:

1. The relevant comment must have been visible on the Respondent's Facebook page on 1 June 2022 in order for the Applicant's Investigator to take a screenshot of the comment;
2. The Respondent has removed the comment from his Facebook page;
3. It is unknown when the comment was removed from the Respondent's Facebook page;
4. The timing of the comment's removal does not form part of the allegation and was not mentioned in the Agreed Statement of Facts; and
5. The Parties make no submission as to the relevance of when the comment in question was removed from the Respondent's Facebook page.

Paragraph 24 of the Applicant's submissions

The Parties jointly say that:



1. The Respondent has at all times accepted that the comment was not appropriate; and
2. There is no evidence that the Respondent's comment attracted any media attention.

On the basis of the above, the Parties are agreed as to the facts, circumstances, and allegation and agree that the matter can proceed by way of the Expedited Process outlined in the Tribunal's Practice Direction #1 of 2022.

Sincerely,

Signature:

Councillor Dan Stewart (Respondent)

Gympie Regional Council

Dated: 24/11/2022

Signature:

Kathleen Florian (Applicant)

Independent Assessor

Dated: 24 November 2022