

ARBITRATION PURSUANT TO DIVISION 5 OF PART 6 OF THE

LOCAL GOVERNMENT ACT 2020

Internal Arbitration Process

Wyndham City Council IAP 2022-10

Applicant: Councillor Peter Maynard (Mayor)

Respondent: Councillor Josh Gilligan

Arbiter: Ms Sarah Fowler

Date: 19 August 2022

DETERMINATION

The Arbiter has determined there is no breach of the relevant standards of conduct, and therefore no findings of misconduct have been made.

The Application is dismissed.

REASONS FOR DECISION

The Application

1. The Application, dated 21 April 2022, alleges the Respondent breached Clauses 1 and 4 of the Standards of Conduct in Schedule 1 of the *Local Government (Governance and Integrity Regulations 2020)* (the “Standards of Conduct”) and seeks a finding of misconduct against the Respondent.
2. The Application listed the following alleged misconduct.
 - a. *Bringing NoM to the chamber and inferring there had been an internal investigation, where in fact it was the CRM request from Cr Gilligan.*
 - b. *Implying there was an actual budget deficit of \$35.7M and that I was adding to this by changing the days which including and [sic] additional cost. In fact, the actual budget prior to depreciation and amortisation was \$73.5M.*
 - c. *Called me a liar in public using his FaceBook page*
 - d. *Casting Aspersions and bringing the position of Mayor and me personally into disrepute*
 - e. *Email 11th February alleging misuse of position and mayoral powers*
 - f. *Email 25th March to several staff and councillors saying I have lied and that I again lied on 3AW*
 - g. *Email on 13th February alleging abuse by me when in fact I was abused by him, witnessed by a council officer Mark Ward*
3. The Application included a number of attachments, including email exchanges between the Respondent and Applicant, a Notice of Motion for the Council Meeting dated 22 March 2022 and extracts from media and social media. Rather than list these here, these documents are referenced in the background to the allegations provided in paragraphs 5 to 18 below.
4. On review of the Application and attachments, the Applicant’s allegations can be broadly categorised as a series of events resulting from a decision to change the dates on the citizenship ceremony schedule for 2022 (the “Citizenship Ceremony Schedule allegations”) and an email exchange and alleged interaction between the Applicant and the Respondent at the Wolf on Watton café on 13 February 2022 relating to an upcoming briefing by a special interest group (the “Special Interest Group allegations”).

Background to the allegations

The Special Interest Group Allegations

5. On 11 February 2022, the Respondent emailed the Applicant (copying in all Councillors) with questions regarding a presentation “by a lobbyist” (iCAN) listed as an agenda item in the papers. The subject-line of the email was “Urgent: Strategic Agenda Briefing”. The Applicant replied to the email, however the Respondent did not consider the Applicant had adequately addressed his queries and reverted with a follow-up email restating his initial questions.

6. On 13 February 2022, the Respondent emailed all Councillors alleging the Applicant had approached him at the Wolf on Watton café that morning and engaged in “threatening and intimidating behaviour” towards him “presumably in response to concerns I raised about how a special interest group was placed on the agenda”.
7. The Applicant responded to the email the same day, denying the Respondent’s allegation, and stating that the Respondent had behaved inappropriately by “berating” him outside the café.

The Citizenship Ceremony Schedule Allegations

8. On 28 January 2022, the Applicant emailed all Councillors to advise as follows:

At my request some changes have been made to the citizenship ceremony plan for 2022 to involve Councillors in these events more...

The rescheduling included moving some ceremonies to Sundays.

9. That same day, the Respondent submitted a request for information (referred to in the Application as a “CRM Request”) to Council staff seeking confirmation that the Applicant had “determined that he is unavailable on Saturdays until September” and asking for an estimate of the “expenditure” associated with changing some of the ceremony dates to a Sunday. It should be noted that this document was not attached to the Application but was provided by the Respondent with his written response, at the request of the Arbiter during the Directions Hearing.
10. A response to the CRM Request was embedded in an email exchange between the Applicant and Respondent on 25 March 2022 (see below). It is unclear when it was actioned, but presumably sometime in late January, or early February 2022. It stated (in part):

The Mayor of the day is usually consulted when officers are finalising the Citizenship Ceremony schedule for the upcoming year.

Cr Maynard did request that ceremonies not be held on Saturdays, to allow him to attend local sporting events as the portfolio holder. There are a large number of sporting clubs that play predominantly on Saturdays throughout Wyndham...

11. On or around 15 March 2022, the Respondent put forward the following Notice of Motion titled “Citizenship Ceremonies” for the Council meeting on 22 March 2022.

1. *That Council notes*

- a) *Sundays are typically reserved for family and or religious gatherings (as well as a rest day for working people);*
- b) *that the Mayor personally intervened in the 2022 citizenship ceremonies schedule by to [sic] stop citizenship ceremonies occurring on Saturdays so he could go to footy matches;*
- c) *that the responsibilities of the Deputy Mayor including officiating citizenship ceremonies where the Mayor is unavailable; and*

2. *Directs the Chief Executive Officer (CEO) to re-schedule all citizenship ceremonies in 2022 to occur on Saturdays instead of Sundays to avoid the additional ratepayer expenses*
12. On or around the 22 March 2022, the Applicant either submitted or verbally made “a few comments in relation to [the above] item” at the Council meeting. A document listing a series of dot points was included in the attachments to the Application, however it is unclear whether this document was submitted to the Council or contained notes for the Applicant to speak to. The dots points included as follows.
- *It is common practice for staff to check with the Mayor of the Day as to what suits them when booking in Citizenship ceremonies.*
 - *This wasn't at my request – so any suggestion that this is something out of the ordinary is misleading.*
 - *As the sports portfolio holder I have regular commitments on a Saturday, which is why some – not all Citizenship ceremonies are on a Sunday...*
 - *I would like to highlight that there was no 'investigation' into this matter – albeit that information was requested by a Councillor.*
13. The Respondent's Notice of Motion was defeated at the Council meeting on 22 March 2022.
14. On 25 March 2022, an article titled “Citizenship plans get bounced” by Liam Beatty appeared in the Herald Sun. The article referred to the Notice of Motion (above) – including noting that it had been defeated. It included quotes from the Respondent, including:
- Imagine a \$5000 bill the ratepayers are being asked to pay so that the Mayor can attend football.*
- The article also included quotes from the Applicant noting that it is “common practice for the staff to check with the mayor of the day as to what suits them when booking in citizenship ceremonies” and noted that “the main reason for his choice of date was to attend local sport”.
15. On the same day, the Applicant appeared on 3AW to discuss the motion. No direct evidence of this media appearance was provided by either party.
16. The Respondent emailed the Applicant that day saying he was “extremely disappointed that you've chosen to lie, as our Mayor, to the public on 3AW this morning including stating that the motion is “misleading”. Later in that email exchange (all of which occurred on 25 March 2022), the Respondent inserted the response he received from a Council officer to his CRM Request dated 28 January 2022 (see paragraph 10 above) and an extract from the email from the Applicant to all Councillors of the same date (referred to in paragraph 8) and stated that these were “evidence” that the Applicant was “telling porkies”.
17. The Respondent also posted the following to his Facebook account that day.
- The motion wasn't misleading. The Mayor is simply a liar. In late January, the Mayor informed councillors in an email that “at his request, some changes have been made*

to the citizenship ceremony plan for 2022". He told us that a "new process" would be implemented.

After an internal investigation, it was found that it was so he could go to the footy at a cost of \$4,689.43 to ratepayers.

The Mayor needs to tell the truth and not hide behind the spin.

18. That same day, the Respondent submitted another CRM Request requesting information regarding the number of citizenship ceremonies held on Saturdays during the years 2016 to 2020.

Arbitration Process

19. The parties attended a Directions Hearing on 11 July 2022. At the Directions Hearing, the above clustering of the allegations was discussed and agreed by the Applicant as appropriate. The parties were advised that the Application could be determined on the papers if the Respondent provided a written response, and the Applicant provided some minor clarifications. While the Respondent was open to a determination on the papers, the Applicant indicated a preference for a hearing.
20. An online hearing was initially scheduled for 20 July 2022. The parties were directed to advise whether they intended to call any witnesses for the hearing by the following day, and provide the written response and clarifying comments by the end of the week of the 11 July 2022.
21. The Applicant was unwell the following week, so the hearing was rescheduled to 11 August 2022. Neither party nominated any witnesses. The hearing was conducted online.

Evidence of the Applicant

22. At the hearing, the Applicant clarified that he considers the Respondent to have breached sub-clauses (c) and (d) of Clause 1 and Clause 4(2) of the Standards of Conduct. These clauses are as follows.
 1. *A Councillor must, in performing the role of a Councillor, treat other Councillors, members of Council staff, the municipal community and members of the public with dignity, fairness, objectivity, courtesy and respect, including by ensuring that the Councillor –*
 - (c) *does not engage in abusive, obscene or threatening behaviour in their dealings with members of the public, Council staff and Councillors; and*
 - (d) *in considering the diversity of interests and needs of the municipal community, treats all persons with respect and has due regard for their opinions, beliefs, rights and responsibilities.*
 - 4(2). *In performing the role of Councillor, a Councillor must not deliberately mislead the Council or the public about any matter related to the performance of their public duties.*

23. Regarding the *Special Interest Group* allegations, the Applicant alleges the Respondent breached Clause 1 by “casting aspersions” and querying his motives in inviting the special interest group to brief Council.
24. Regarding the *Citizenship Ceremonies Schedule* allegations, the Applicant says the Respondent breached Clause 1 of the Standards of Conduct by referring to him as a “liar” in the Facebook post dated 25 March 2022 and inferring dishonesty and wrongdoing by him in the Notice of Motion dated 22 March 2022 and the Herald Sun article.
25. He further alleges the Responding “deliberately misled” both Council and the public (in breach of Clause 4(2)) by stating that:
 - a. the Applicant “requested” the change of dates on the schedule;
 - b. the Applicant requested the change to “attend footy matches”; and
 - c. there had been an “internal investigation” which “found that the driver for the request was to enable the Mayor to attend footy matches” (as alleged in the Notice of Motion).
26. The Applicant says the above representations are misleading because:
 - a. he was approached by Council staff and asked about his availability for the citizenship ceremonies, as per existing protocol; he did not “personally intervene” as alleged in the Notice of Motion;
 - b. to the extent he “requested” the change it was “to involve Councillors in [citizenship ceremonies] more” (as he had indicated in his email to all Councillors on 28 January 2022) and to honour a commitment in his *Mayoral Plan 2020-21* to “visit all sporting clubs in Wyndham...in recognition of the way these clubs have survived extended Covid-19 lockdowns” and most local sporting events occur on a Saturday;
 - c. there had not been any “internal investigation”, rather the Respondent requested some information from Council staff which was provided to him; and
 - d. the terminology “internal investigation” infers wrongdoing on the Applicant’s behalf and that the alleged wrongdoing was investigated through an official organisational process.
27. The Applicant accepted that the changes to the citizenship ceremony schedule incurred an additional cost of \$4,689.43.
28. The Applicant denies he lied to Council or the public and rejects any inference of dishonesty.

Evidence of the Respondent

29. In a detailed written response, the Respondent denied his conduct breached the Standards of Conduct. He submitted that clause 5 of the Standards of Conduct which

establishes that the Standards of Conduct are not designed “to limit, restrict or detract from robust public debate” should apply here.

30. Regarding the *Special Interest Group* allegations, the Respondent expressed his concern regarding the process through which the special interest group came to be invited to present to Council and stated: “it is my right as a decision-maker to query and critique such a process based on the obvious red flags it raises”. The Respondent did not submit any further evidence regarding the alleged incident at the Wolf on Watton café, beyond what he stated in the email to all Councillors dated 13 February 2022.
31. Regarding the *Citizenship Ceremonies Schedule* allegations, the Respondent maintained that the Applicant “lied” about his role in the decision to move some of the dates on the citizenship ceremonies schedule to Sundays. He pointed to the Applicant’s email which includes the words “at my request” and the response to the Respondent’s CRM Request on 28 February which says the Applicant “did request that ceremonies not be held on Saturdays, to allow him to attend local sporting events”.
32. The Respondent submitted that he had used appropriate mechanisms to raise his concerns regarding the revised schedule, including the CRM Request and Notice of Motion.
33. The Respondent contended that the Applicant’s “insistence” in an interview on 3AW on 25 March 2022 that “he had no involvement in the decision to alter the ceremony dates impugned that [the Respondent] was a liar and [the Applicant] was being unfairly criticised” which left the Respondent, he says, with “no recourse other than to make [his] own public statement through [his] Facebook page”. At the hearing, he said that Facebook was the only forum available to him to correct information the Applicant had put into the public domain through his interview on 3AW.
34. Also at the hearing, the Respondent defended his use of the terminology “internal investigation” by quoting the *dictionary.com* definition which he said is “to undertake a search for facts, especially those that are hidden or need to be sorted out in a complex situation”. He contended that the CRM Request was “exactly the definition of an investigation” as he was seeking facts “to inform a complex situation”.
35. The Respondent further alleged that the Applicant had a “clear pattern” of seeking to schedule citizenship ceremonies on days other than Saturday, as he had made a similar request in 2018 when he was last Mayor (on that occasion to move ceremonies to Mondays) and stated that in 2018, the reason was solely to attend the football matches of his local football team.

Arbiter’s Findings and Reasons

36. The Application is dismissed as neither the *Special Interest Group* allegations nor the *Citizenship Ceremony Schedule* allegations breach the relevant Standards of Conduct.

Special Interest Group allegations

37. The email exchange dated 11 February 2022 which was the genesis of the *Special Interest Group* allegations was appropriate and reasonable. While the Respondent was at times forceful in how he put forward his concerns, there was nothing abusive, obscene or threatening in that exchange, and it was largely respectful.
38. The Respondent's email to all Councillors regarding the alleged interaction between the Applicant and the Respondent at the Wolf on Watton café was potentially ill-advised, but it does not breach the Standards of Conduct. It was not abusive or obscene and while it did signal an intention by the Respondent to "pursue this matter to the fullest extent possible", it was not overtly threatening. The email was certainly critical of the Applicant and made allegations of inappropriate behaviour, but it does not breach Clause 1 of the Standards of Conduct. Notwithstanding this finding, the Respondent is encouraged to consider more constructive ways of airing his grievances or alleging inappropriate behaviour in the future other than emailing all Councillors.
39. The Application did not directly include the Respondent's alleged "berating" of the Applicant outside the Wolf on Watton as an allegation of misconduct therefore I have not addressed this in my decision. Even if it had, there would be insufficient evidence to make a finding on whether this "berating" occurred as no witnesses were called, and the accounts of the Respondent and the Applicant varied so significantly.

The Citizenship Ceremony Schedule allegations

40. The interactions between the Respondent and the Applicant regarding the citizenship ceremony schedule constitute robust public debate. The Respondent was entitled to query the process for changing the schedule, and the associated expenditure, and employed appropriate mechanisms, including the CRM Request and Notice of Motion to pursue this. His choice of language may have been unnecessarily incendiary, but it does not breach Clause 1 of the Standards of Conduct.
41. The Notice of Motion also did not breach Clause 4(2) as the content was not "deliberately misleading". The Respondent presented the information he had ascertained through the CRM Request and other means to make his case and while some of the content may have been inaccurate and the language hyperbolic, it was not intended to deliberately mislead Council.
42. Further, the Respondent's comments in the Herald Sun and on Facebook were not "deliberately misleading" (and therefore in breach of Clause 4(2)) as he genuinely believed the Applicant was being dishonest. I want to be clear that I do not consider the Applicant was being dishonest. My view is that the Respondent and Applicant have different interpretations of the motivations and communications regarding this matter, possibly fuelled by some underlying and long-standing interpersonal conflict. However, it is apparent from the email exchange on 25 March 2022 that the Respondent believed strongly that the Applicant had requested the change. The Applicant's view (as noted above) is that he was asked about his availability by Council staff, and he provided it; that he did not initiate the request.

43. The parties have locked horns on which of them is “lying” and appear to have lost sight of the issue at the core of the dispute. The Applicant accepts that the change in the citizenship ceremony schedule incurred an additional cost of \$4,689.43. At the hearing, he stated he would have suggested the change even if he had been aware that it incurred this additional cost. There was no suggestion that the additional expenditure was inappropriately initiated or authorised. The Respondent only expressed frustration that the additional expense was incurred because the Applicant wanted to “attend footy matches”.
44. At the hearing, the Respondent acknowledged there is potential to misinterpret his statements that the Applicant was “attending footy matches” and was the subject of an “internal investigation”. He acknowledged the former statement could imply that the Applicant was attending in a personal rather than his Mayoral or sports portfolio holder capacity. He further acknowledged that the term “internal investigation” could imply a formal disciplinary process to some readers and “could have been reworded”. He agreed at the hearing to clarify these points with Council – in particular to clarify that:
 - a. the Applicant requested the change of dates to attend local sporting events in an official capacity; and
 - b. by “internal investigation”, the Respondent meant he had made an enquiry regarding the changes to the citizenship ceremony schedule.

While I have no authority to order this, I encourage the Respondent to honour this undertaking and make these clarifications with Council and suggest that these clarifications be minuted for the public’s awareness.