

Ref:

From: "MARTENS Conrad" <CMARTENS@goldcoast.qld.gov.>
To: "CMC Complaints (E-mail)" <complaints@cmc.qld.gov.>
Date: Mon, Jul 18, 2005 4:54 pm
Subject: LG449/258/03/09/CF Referral

OP GRAND

EXHIBIT No. 235
CLERK

CONFIDENTIAL

Ms Helen Couper
Chief Officer Complaints Section
Official Misconduct Division
Crime and Misconduct Commission
GPO Box 3123
BRISBANE QLD 4001

CMC CLASSIFICATION	
<input type="checkbox"/>	Highly Protected
<input type="checkbox"/>	Protected
<input type="checkbox"/>	In-Confidence
<input type="checkbox"/>	Unclassified
Initials:.....	
Date:...../...../.....	
Reg No: 0205/11931	

COMMISSION

①

Dear Ms Couper

REFERRAL - CR PETER YOUNG

The following matter is hereby referred to the Commission in accordance with the Crime and Misconduct Act 2001.

PERSON RAISING INITIAL CONCERN

David Power - Councillor for Division 2 and Deputy Mayor initially raised a concern with the Chief Executive - Officer Dale Dickson, about the completeness of Cr Peter Young's register of interests.

DESIRED OUTCOME OF CONCERNED PARTY

Deputy Mayor, Cr Power views that it is a serious matter if the allegations are proven.

person of Interest

Peter Young, Councillor for Division 5
First floor, Nerang Council Chambers
Phone: (07) 5582 8400
Mobile: 0414 180 118
Home phone: (07) 5502 8080

PRÉCIS OF MATTER
Register Of Interests (S247 LGA)

In April, May, July and August 2004 a one-page private advertisement was published in the Local News - identified as an "Advertisement" and entitled "A message from Councillor Peter Young's desk Division 5 - City of Gold Coast" (see Attachment A, copies of Cr Young's Newsletter and Advertisements). The Local News advises that in 2004 the cost of such a one-page advertisement to Council or a Councillor was \$440.

Following are excerpts from the advertisements related to the matter of financial support:

* APRIL 2004 - "... I have decided to pay for this second page each month myself. If you want to offer some financial support for this page to be published please give me a call."

* MAY 2004 - "Welcome to the second edition of the 'other page' - a page I pay for from my own pocket in order to relay to you facts deemed too damning by the Council."

* JULY 2004 - "Last month, regrettably, I could not afford to publish this second non-censored page. Along with the email edition of the newsletter I advised people of this financial constraint, and expressed by hope to be able to reinstate this second page in the future. Within 24 hours I received an email about this. It said "We believe that our Division ought to be informed by information that you provide on the second page and therefore Gardens on Lindfield will sponsor this cost for the next 12 months." Wow - what an offer! I have thought about this long and hard So, what is my decision? You're reading it. I have accepted the offer - graciously I hope."

* AUGUST 2004 - Nil.

The business "The Gardens on Lindfield" is a retirement village situated at 101 Lindfield Road, Helensvale. It is owned by Cater Corporation Pty Ltd (ACN 084 718 552) of which Philip Cater is the Director, Secretary and sole Shareholder.

The advertisements state that Cr Young paid initially at least for the April and May advertisements, but are silent on who paid for the July and August advertisements.

It appears that a 12-month advertising budget would be in the order of \$5280. however, even though the July advertisement stated that a 12-month sponsorship was accepted at least in principle, the fact that the advertisements did not appear beyond August 2004 cast doubt on whether sponsorship was ever received.

On 10 May 2005 Cr Young's Register of Interests did not disclose receipt of any gift from The Gardens on Lindfield, Cater Corporation or Philip Cater (see Attachment B, copy of Cr Young's Register of Interests).

There was no other evidence at hand indicating that another party paid for, or reimbursed Cr Young for expenses associated with, any of the four advertisements, though it was a possibility.

However, Cr Young's email to the Chief Executive Officer - Dale Dickson dated 26 April 2005 (Attachment C) brought a new light on the situation. Referring to the Fraud Prevention & Security Officer's inquiries Cr Young states:

"The matter of the investigation is, according to the journalist, related to me not declaring on my 'Register of Interests' (i.e. not election gift register) a gift in the form of paid advertising. This gift was provided to me by a property owner and developer of a retirement centre in July -August 2004."

In addition, Cr Young's memorandum to the Chief Executive Officer - Dale Dickson dated 6 May 2005 and received 10/5/05 (included in Attachment D Electoral Gifts Return) has attached an email from Cater Corporation confirming stating that Cr Young received gifts to the total value of \$1770 from Cater Corporation Pty Ltd. It states that Cater Corporation paid The Local Newsletter the following sums on Cr Young's behalf - 22/5/04 \$450, 1/7/04 \$440, 23/7/04 \$440 and 25/8/04 \$440.

The above raises the question of Cr Young's knowledge in 2004 of receipt of gifts to the value of \$1770 from Cater Corporation and the failure to properly declare those gifts in his Register of Interests.

The Local Government Act 1993 (section 247 Registers of interests and regulation 17 Financial and non-financial particulars for registers) requires Cr Young to tell the Chief Executive Officer the correct particulars of a relevant interest (in this case a gift over \$500 in value).
Return Of Election Gifts (242, 427 LGA)

Cr Young's memorandum dated 6 May 2005 raised the matter of an error in his Interim and Final Electoral Gift Returns (see Attachment D)..

On 5 April 2004, Councillor Young completed an interim return of electoral gifts disclosing a donation of \$3,000.00 on 2 March 2004 from Cater Corporation.

On 8 April 2004 Councillor Young executed his declaration of office (see Attachment E).

On 20 May 2004, Councillor Young purported to amend this return by changing the amount of the donation from Cater Corporation from \$3,000.00 to \$5,000.00. The date of the donation remained unchanged as 2 March 2004.

On 3 July 2004, Councillor Young completed a final return of electoral gifts disclosing the donation from Cater Corporation as being \$5,000.00 and the date of the donation as being 2 March 2004.

On 10 May 2005, the Chief Executive Officer received from Councillor Young a memo where he admits that the final return of electoral gifts of 3 July 2004 is incorrect because the donation of \$5,000.00 from Cater Corporation was received on 20 February 2004, and not on 2 March 2004 as

previously disclosed.

Councillor Young's interim return of 5 April 2004 discloses not only an incorrect date for the donation (2 March 2004 instead of 20 February 2004) but also an incorrect amount for the donation \$3,000.00 instead of \$5,000.00). That return was lodged by Councillor Young immediately prior to taking his declaration of office, pursuant to section 242(1)(a) of the LGA.

OTHER AGENCIES

Not applicable.

SIGNIFICANT BACKGROUND INFORMATION

There is history between Cr Power and Cr Young.

In his email to the Chief Executive Officer - Dale Dickson, Cr Young raised the concern that on 26/4/05 a print media journalist advised him that he was under investigation in relation to not declaring advertising sponsorship in his Register of Interests. I have no knowledge whatsoever of whether such information has come to the hands of a journalist or how a journalist may have received such information. I keep the fact of an investigation confidential for the purpose of protecting the interests of all parties concerned.

WITNESSES

Not applicable.

PRIORITY ISSUES

Not applicable.

PUBLIC INTEREST DISCLOSURE

Not applicable.

EVIDENTIARY MATTERS

See attachments described above.

ACTION TAKEN TO DATE

The Fraud Prevention & Security Advisor Conrad Martens provided a report on the matter to the Chief Executive Officer.

AGENCY CAPACITY

Capacity known to the Commission.

Please do not hesitate to contact me if I may be of assistance or you require further advice. I will remain Council's contact officer.

Yours faithfully

Conrad Martens
Fraud Prevention & Security Advisor
"Protecting You - Protecting Us"

Ph: (07) 5582 8816 All hours Fax: (07) 5582 8125

City Governance, Gold Coast City Council

Waterside West (level 5) 11 Holden Place, Bundall

P.O. Box 5042 Gold Coast Mail Centre 9729

Link to Council Business Ethics

<http://www.goldcoast.qld.gov.au/t_std2.asp?PID=1460>

Link to Council Code of Conduct

<http://www.goldcoast.qld.gov.au/t_std2.asp?PID=2029>

<<Att A - Cr Young Newsletters.tif>> <<Att B - Cr Young Register of Interests.tif>> <<Att C - Cr Young Email to CEO Dickson.tif>> <<Att D - Cr Young Register of Electoral Gifts.tif>> <<Att E - 2004 Post Election 08Apr2004.doc>>

This email and its contents is confidential to the Gold Coast City Council, and un-authorised use is strictly prohibited.

MARTENS Conrad

From: DICKSON Dale on behalf of DICKSON Dale Private
Sent: Wednesday, 27 April 2005 8:39 AM
To: MARTENS Conrad
Cc: YOUNG Peter
Subject: FW: register of interests

Importance: High

Conrad
 I received a media query yesterday out of the blue, and made no comment. Please contact me re Peter's email.

Peter
 I sincerely believe you need have no concerns re the inappropriate conveying of information to Councillors from this office. This is a clear ethical position which is well understood.

Regards
 Dale

-----Original Message-----

From: MILLS Catherine **On Behalf Of** DICKSON Dale
Sent: Wednesday, 27 April 2005 8:21
To: 'drd@goldcoast.qld.gov.au'
Subject: FW: register of interests
Importance: High

dd -fyi.
 cath

-----Original Message-----

From: YOUNG Peter
Sent: Tuesday, 26 April 2005 7:42 PM
To: DICKSON Dale
Cc: MARTENS Conrad
Subject: RE: register of interests
Importance: High

CEO

I AM ADVISED TODAY BY A PRINT MEDIA JOURNALIST THAT IT HAS BEEN SUGGESTED - BY A COUNCILLOR OR COUNCILLORS - TO "CHECK UP ON PETER YOUNG BECAUSE HE IS UNDER INVESTIGATION."

THE MATTER OF THE INVESTIGATION IS, ACCORDING TO THE JOURNALIST, RELATED TO ME NOT DECLARING ON MY 'REGISTER OF INTERESTS' (I.E. NOT ELECTION GIFT REGISTER) A GIFT IN THE FORM OF PAID ADVERTISING. THIS GIFT WAS PROVIDED TO ME BY A PROPERTY OWNER AND DEVELOPER OF A RETIREMENT CENTRE IN JULY-AUGUST 2004.

I HAVE SEVERAL CONCERNS AND REQUEST YOUR IMMEDIATE ATTENTION.

IN THE FIRST INSTANCE, I AM CONCERNED ABOUT THE LEAKING OF INFORMATION TO THE MEDIA. WHO DID THIS? HOW DID THAT PERSON KNOW OF THE INVESTIGATION? WERE THEY THE INSTIGATORS THEMSELVES? IF THE FRAUD PREVENTION OFFICER CANNOT REVEAL TO ME THE REASON FOR HIS ACCESSING MY REGISTER (SEE EARLIER CORRESPONDENCE BELOW) - ONE WONDERS HOW SUCH INFORMATION BECOMES GENERAL KNOWLEDGE. I NOTE OFFENCE PROVISIONS UNDER SECTION 248 OF THE LOCLA GOVERNMENT ACT THAT CLEARLY SEEK TO PREVENT UNETHICAL USE OF INFORMATION FROM COUNCILLOR'S REGISTERS.

SECONDLY, I REFER TO SECTION 240 OF THE ACT WHICH STATES:

- (1) A person who suspects on reasonable grounds that a register does not contain particulars that should be in the register may inform the chief executive officer of the local government.
- (2) The chief executive officer must immediately inform the councillor concerned.

CAN YOU PLEASE CONFIRM IF ANY SUCH CONCERN HAS BEEN RAISED IN ACORDANCE WITH THIS PROVISION.

IF SO, PLEASE ADVISE WHY I HAVE NOT BEEN INFORMED IMMEDIATELY OF SUCH CONCERNS.

I WOULD APPRECIATE YOUR PROMPT RESPONSE TO MY REQUEST, AND GENUINELY SEEK YOUR COMMITMENT TO UNDERTAKE AN INVESTIGATION OF HOW INFORMATION WAS REVEALED TO THE MEDIA ABOUT AN INVESTIGATION, AND BY WHOM.

FINALLY, I THINK IT WOULD BE GREAT IF THE CONTENTS OF THIS EMAIL DIDN'T FIND THEIR WAY BACK TO COUNCILLOR(S) WHO HAVE CLOSE RELATIONSHIPS WITH OFFICERS EMPLOYED IN THE CEO'S OFFICE.

PETER YOUNG

-----Original Message-----

From: MARTENS Conrad
Sent: Friday, 15 April 2005 18:34
To: YOUNG Peter
Subject: RE: register of interests

Apologies Peter, I am on leave for a few days. Back Tuesday. The current register was viewed. I have not previously been required to advise the Mayor or Councillors why I have viewed a register. Warm regards Conrad

-----Original Message-----

From: YOUNG Peter
Sent: Friday, 15 April 2005 16:58
To: MARTENS Conrad
Subject: FW: register of interests

Conrad

no response from you yet. Can you confirm the register you reviewed is dated 2 July 2004?
thank you

-----Original Message-----

From: YOUNG Peter
Sent: Tuesday, 12 April 2005 14:59
To: MARTENS Conrad
Subject: register of interests

Hello Conrad

I am advised you have recently reviewed my Register Of Interests. Can you advise why?
Thank you.

24

**Memorandum**

To : Dale Dickson, Chief Executive Officer
From : Councillor Peter Young
Subject : 2004 Election Gift Register
Date : 5 May 2005

Please be advised that I have today determined there is an error in my 2004 Election Gift Register. In both my Interim and Final Returns I included an entry for a gift from Cater Corporation and an amount of \$3,000.

In seeking to establish the details of non-election related gifts provided to me by Cater Corporation after the disclosure period (i.e. advertising in the period May-August 2004), I was yesterday advised by Cater Corporation that they had contributed a sum of \$5,000 (see attachment). Believing this to be wrong I last night checked my personal bank files. I have confirmed that the correct amount of the Election Gift from Cater Corporation is in fact \$5,000.

The Election Gift Return was completed by myself. The error is entirely my fault. My bank deposit slip, completed by myself, clearly shows a cheque for \$5,000 from Cater Corporation was deposited by me into my account on 20th February 2004.

In accordance with s432 of the *Local Government Act* I am applying to you to amend my Election Gift Register to reflect the correct details of this Gift.

I accept full responsibility for not completing the Election Gift Register correctly. I can only submit that it was not an intentional error. I was quite assiduous about my Register, even including details of very minor (\$5) gifts. I understand I may be subject to the Offence provisions in s436 of the Act.

Cr Peter Young
Ext: 8400

Received
Dale J
10/5/05 4:30pm



Memorandum

COPY

To : Dale Dickson, Chief Executive Officer

From : Councillor Peter Young

Subject : Amendment to Statement of Interests

Date : 17 May 2005

Amendment to Statement of Interests

I refer to my Statement of Interests dated 2 July 2004 (copy herewith) and seek to make the following amendments:

Section 10. Gifts over \$500

Cater Corporation	\$450	17 June 2004	Advertisements (editorials) in 1 edition of the Division 5 Local Newsletter
Cater Corporation	\$1,320	24 September 2004	Advertisements (editorials) in 3 editions of the Division 5 Local Newsletter

Section 11. Sponsored Hospitality Benefits

Raptis Group	\$120?	23 October 2004	Two tickets to Raptis Ballet Gala
Indy	\$250?	October 2004	Two corporate tickets to Indy
Indy	\$250?	October 2003	Two corporate tickets to Indy
Indy	\$250?	October 2002	Two corporate tickets to Indy
Indy	\$250?	October 2001	Two corporate tickets to Indy
Indy	\$250?	October 2000	Two corporate tickets to Indy
Gold Coast Turf Club	\$200?	May 2004	Two tickets to Prime Minister's Cup and Luncheon
Gold Coast Turf Club	\$200?	May 2002	Two tickets to Prime Minister's Cup and Luncheon
Gold Coast Turf Club	\$200?	May 2001	Two tickets to Prime Minister's Cup and Luncheon

Cr Peter Young
Ext: 8400

Memorandum



21/63

- CONFIDENTIAL -

TO : Cr Peter Young
COPY :
FROM : Chief Executive Officer
ACTION BY :
SUBJECT : Electoral Disclosure Obligations and Register of Interests
DATE : 6 July 2005
FILE NO : LG211/898/05(P3) #17267532

Cr Young

I refer to your memos of 6 and 17 May in relation to electoral gifts and your Register of Interests respectively.

As you are aware, I have sought advice from the City Solicitor as to whether you have failed to comply with your obligations under the Local Government Act. A copy of that advice is attached for your information.

A handwritten signature in black ink, appearing to be 'Dale Dickson', written over a horizontal line.

Dale Dickson
CHIEF EXECUTIVE OFFICER
Ext 6048

enc

Memorandum



TO : Dale Dickson - Chief Executive Officer

FROM : David Montgomery - City Solicitor

SUBJECT : Electoral Disclosure Obligations
Register of Interests

CC : Tony Davis - Manager CEO's Office
Joe McCabe - Director City Governance

DATE : 15 June 2005

FILE NO : LG211/187/CF

You have asked me to consider 3 issues, namely: -

1. Whether the Mayor has failed to comply with the electoral disclosure obligations prescribed by the Local Government Act 1993 ("LGA") in relation to the SMS messaging, radio and newspaper advertising conducted by Jim Bell and/or the "Surfers Paradise Licensed Venues Association" in the week prior to the 2004 elections.
2. Whether Councillor Young has failed to comply with the electoral disclosure obligations prescribed by the LGA in relation to the issues raised by the Fraud Prevention & Security Adviser in his memo to you of 12 May 2005.
3. Whether Councillor Young has failed to comply with his ongoing obligation to advise you of changes to his register of interests, as raised by the Fraud Prevention & Security Adviser in his memo to you of 12 May 2005.

Introductory comments - the obligations imposed upon you by the Crime and Misconduct Act 2001

Although these introductory comments are not directly relevant to the first issue (on the basis that the issue has already been referred to the CMC by others), it is directly relevant to the second and third issues as a consequence of the Fraud Prevention & Security Adviser advising you to refer both matters to the CMC. It also seems timely, given issues external to this advice to review statutory obligations placed upon you.

Under section 38 of the Crime and Misconduct Act 2001 ("CMA") a "public official" has a mandatory duty to notify the CMC about any matter which the official "*suspects involves or may involve*" official misconduct.

The term "*public official*" is defined in Schedule 2 to the Act in terms, which clearly include the CEO of a local government.

That aside, there are two components of this duty that require comment.

Suspicion

The term "suspects" has a well recognised legal meaning, and there is no basis for not applying that well recognised meaning to the term as it is used in section 38 of the CMA. The term refers

to a state of conjecture where there is no belief or actual knowledge about a particular matter, and where proof is lacking, but where there is some relevant fact or circumstance by which, rationally, there is a possibility that the particular matter or circumstance exists.

It will therefore be apparent that, in order to trigger the obligation on the basis that the CEO "suspects" as required by the section, the CEO is not required to have evidence, even prima facie evidence, that official misconduct has occurred, and is not required to carry out investigations or evaluate or weigh evidence in order to determine, to any standard of proof, whether he or she believes that official misconduct has occurred. It is fundamental to the legal nature of a suspicion that there is no proof - merely a possibility, albeit one, which cannot be dismissed as merely frivolous or idle speculation.

The fact that it is not necessary that there be a suspicion that actions (actually) involve official misconduct, and that it is sufficient that there be only a suspicion that the actions "may involve" official misconduct, simply reinforces the very slight nature of the evidence which is required in order to create a legally recognised suspicion, and thus ignite the statutory obligations.

The reason why the mandatory referral obligation is imposed upon such very slight evidence is simply that, once the issue of official misconduct is raised (in circumstances where it can not be dismissed as merely frivolous or idle speculation), the job of assessing the evidence and deciding whether the matter should be further investigated or otherwise be the subject of further action is a job for the CMC.

However the CMC may (under section 44 of the CMA) refer the matter back to the CEO with directions about the way in which the matter should be investigated and further dealt with. This issue is dealt with later in this advice.

Clearly the policy reasons are to ensure that any misconduct, no matter how deeply embedded may show itself slightly in the day to day operations of Council, and should therefore come of the attention of the CMC.

Official misconduct

The term "official misconduct" is defined in sections 14 and 15 of the CMA. In the case of local government councillors, it has two distinct elements (both of which are essential to fall within the definition): -

- The conduct must have some characteristic by which powers conferred on an individual for public purposes have been used dishonestly, with partiality or otherwise for some personal or ulterior purpose other than the public purpose for which the powers were granted; and
- The conduct, if proved, must constitute a criminal offence.

In the context of local government councillors, if circumstances exist which raise a suspicion about breaches of the electoral returns and register of interest disclosure provisions in the LGA, then there is no doubt that those circumstances raise a suspicion of "official misconduct". This is because a breach of those provisions: -

- Involves conduct where there is a conflict between the person's public duties and private interests which, on any view, "could adversely affect" the honest and impartial performance of the statutory duty; and
- Contravening sections 242 and 436 (offences about electoral returns) and 247 (register of interests) of the LGA are criminal offences. (The term "criminal offence" refers to any offence, which is punishable by a specified penalty following a criminal prosecution process. The term is not limited to offences under the Criminal Code, or other more "serious" offences.)

Against that background, what needs to be determined is whether the facts that have been identified to you give rise to a situation where you should "suspect" that conduct of a councillor "may involve" a breach of sections 242, 436 or 247 of the LGA. If so, section 38 of the CMA imposes a mandatory duty to refer the matter to the CMC, without further investigation by you.

SMS messaging, radio and newspaper advertising issue

The crux of this issue is whether the SMS messaging, radio and newspaper advertising conducted by Jim Bell and/or the "Surfers Paradise Licensed Venues Association" in the week prior to the 2004 elections, constituted a "gift" to the Mayor, as that term is used in section 427 of the LGA. The SMS advertising consisted of an alleged message (sent to registered club patrons) advising them not to vote for then Mayor, Gary Baidon. The message allegedly said, "Gary Baidon thinks your vote won't count because you're young and go to nightclubs. He wants you in bed by 3am. Don't let him tell you what to do! Vote him out." The newspaper advertising consisted of an advertisement asking people not to vote for Mayor Gary Baidon and the Association's name was printed at the bottom of the advertisement. The advertisement also contained a suggested voting format, which suggested that voters place Ron Clarke at No.1 on the ballot paper for Mayor (and Susie Douglas at No.1 on the ballot paper for Councillor).

There was no suggestion prior to the election that the Association or its spokesperson, Mr Jim Bell, was providing the advertising as a gift to a specific candidate. The only time this issue was raised was in a newspaper report of 16 May 2005 in the Australian Newspaper in which Mr Bell was alleged to have said, "He accepted \$20,000 worth of support and then he turned on us. If we'd known, we would have stuck with Gary Baidon." In the same article (and elsewhere), the Mayor has denied any prior knowledge of the advertising.

Sub-sections (1) and (2) of section 427 are of most relevance, and are in the following terms: -

"(1) This section applies to gifts received by a candidate for an election during the candidate's disclosure period for the election but not to a gift made in a private capacity to the candidate, for the candidate's personal use, that the candidate has not used, and does not intend to use, solely or substantially for a purpose related to any election.

(2) Each candidate for the election must, within 3 months after the conclusion of the election, give to the chief executive officer of the local government to which the election relates a return, in the approved form, stating--

- (a) whether the candidate received any gifts to which this section applies; and
- (b) if so--
 - (i) the total value of all of the gifts; and
 - (ii) how many persons made the gifts; and
 - (iii) the relevant details for each gift made by a person to the candidate, if the total value of all gifts made by the person to the candidate during the disclosure period is the prescribed amount or more."

The term "gift" is further defined in section 414 of the LGA and essentially means the disposition of property or the provision of a service without consideration or consideration less than full consideration. The term "disposition of property" is further defined in section 414 to mean the conveyance, transfer, assignment, settlement, delivery, payment or other alienation of property. The provision of SMS messaging and advertising was not, in my view, a disposition

of property as defined. The question therefore becomes whether what occurred was the "provision of a service".

The ordinary use of the word "provision" involves there being a provider and a recipient. In my view, it is implicit in section 427 that the recipient of the gift be aware that the gift was being made to him or her. Whilst advertising or provision of funds for advertising of this nature could constitute a gift, none of the material I have examined suggests that it was received by or disposed of on behalf of the Mayor. Further, there is nothing in the material to suggest that the Association or Jim Bell was acting as an agent for the Mayor when providing the advertising.

It is also not clear that the Association or Jim Bell intended to make a gift to either the current Mayor or Councillor Douglas. In fact the newspaper reports prior to the election suggest that the Association's primary objective was to serve their own interest of protesting Mayor Baidon's stance on nightclub closure times. Mr Bell is quoted in the Gold Coast Bulletin of 26 March 2004 as saying "This Council is not capable of running the town. At least if we might get a new Council we might get someone who will take our business seriously." This strongly suggests that the removal of Gary Baidon from the office of Mayor was the prime motivation for the advertising (rather than providing support to the current Mayor or Councillor Douglas).

Finally, if what occurred did amount to a gift for the purposes of section 427, the Mayor could not have complied with section 427(2) in any meaningful way because, at the relevant time, he did not have any knowledge of the matters listed in sub-paragraphs (i), (ii) and (iii) of section 427(2)(b).

This confirms in my mind a basic notion, even outside legal theory, that the recipient needs to have knowledge that the gift was made and intended for the recipient. Otherwise, the situation could arise where a group supports a candidate, whose platform is closest to the interests of the group, however the candidate does not endorse, support or want to be associated with the group i.e. Neo-Nazi supporters. It needs to be noted however, that an assertive act, in my view, is not necessarily required by the candidate to constitute a gift being given, however examination of that issue is not required for the purposes of this advice.

For these reasons, it is my conclusion that what occurred did not amount to a gift for the purposes of section 427 of the LGA.

However, from my perusal of the relevant newspaper articles, it appears that the entity known as the "Surfers Paradise Licensed Venues Association" paid for the SMS messages allegedly sent to 75,000 "night clubbers", at a reported cost of \$16,000.00. Further, this Association also paid for radio and newspaper advertising (including a double page ad that appeared in The Gold Coast Bulletin on Thursday March 25, 2004). On page 10 of the Gold Coast Bulletin of 26 March 2004, it is reported that: -

"Four major Surfers Paradise club owners pooled funds to pay for the advertising."

The spokesperson for the Association is Mr Jim Bell. At present, and in the absence of any evidence to the contrary, it must be assumed that Mr Jim Bell was the person responsible for raising the funds from the 4 nightclubs to conduct this particular advertising campaign.

On the present material, it is my opinion that Mr Jim Bell is obliged to provide a return pursuant to section 430(2) in relation to any contribution he received from other nightclub owners which exceeded the prescribed amount of \$1,000.00.

Councillor Young's Electoral Return

The relevant issues here are: -

1. On 5 April 2004, Councillor Young completed an interim return of electoral gifts disclosing a donation of \$3,000.00 on 2 March 2004 from Cater Corporation.

2. On 20 May 2004, Councillor Young purported to amend this return by changing the amount of the donation from Cater Corporation from \$3,000.00 to \$5,000.00. The date of the donation remained unchanged as 2 March 2004.
3. On 3 July 2004, Councillor Young completed a final return of electoral gifts disclosing the donation from Cater Corporation as being \$5,000.00 and the date of the donation as being 2 March 2004.
4. On 10 May 2005, you received from Councillor Young a memo where he admits that the final return of electoral gifts of 3 July 2004 is incorrect because the donation of \$5,000.00 from Cater Corporation was received on 20 February 2004, and not on 2 March 2004 as previously disclosed.
5. In his memo to you of 12 May 2005, the Fraud Prevention & Security Adviser advises that Councillor Young be reported to the CMC for having incorrectly completed his final return of electoral gifts (in that he provided an incorrect date of receipt for the \$5,000.00 donation).

Section 436 of the LGA contains the major offence provisions in relation to electoral gift returns. Section 436(2) provides: -

"(2) A person must not give a return the person is required to give under division 3 containing particulars that are, to the knowledge of the person, false or misleading in a material particular.

Maximum penalty—

- (a) if the person is required to give the return as a candidate—100 penalty units;
- (b) if paragraph (a) does not apply—50 penalty units."

In the present case, I do not think Councillor Young's error in recording the wrong date for the donation constitutes an offence because the minor error in relation to the date of receipt in the electoral return is not "false or misleading in a material particular".

That, however, is not the end of the matter.

Councillor Young's interim return of 5 April 2004 discloses not only an incorrect date for the donation (2 March 2004 instead of 20 February 2004) but also an incorrect amount for the donation \$3,000.00 instead of \$5,000.00). That return was lodged by Councillor Young immediately prior to taking his declaration of office, pursuant to section 242(1)(a) of the LGA. Section 242(8) of the LGA provides: -

"The person must not give a return, under subsection (1)(a), containing particulars that are, to the knowledge of the person, false or misleading in a material particular.

Maximum penalty for subsection (8)—100 penalty units."

Councillor Young appears to have lodged an interim return in contravention of section 242(8) in relation to the error in the amount of the donation. I accordingly agree given the test that applies, that you are obliged to report the matter to the CMC.

How the CMC (and, possibly, Council) subsequently deals with this matter is discussed later.

Councillor Young's Register of Interests

The relevant issues are adequately canvassed in the Fraud Prevention & Security Adviser's memo to you of 12 May 2005.

I am not so certain whether the paid advertising constitutes a gift as contemplated by section 17(1)(j) of the Local Government Regulation 1994 ("the Regulation"), because section 17(1)(j) refers to gifts (of cash or in kind) actually received by a councillor, which is not what occurred here. In any event, further consideration of this question is not required because section 17(1)(o) of the Regulation contains a "catch-all" provision requiring disclosure of: -

"particulars sufficiently detailed to identify each other financial or non-financial interest of the councillor or related person—

- (i) of which the councillor is aware; and
- (ii) that raises, appears to raise, or could foreseeably raise, a conflict between the councillor's duty as a councillor and the holder of the interest."

It is my opinion that the paid for advertising falls within this provision and for that reason I agree that the matter must be referred to the CMC, on the basis that: -

1. Councillor Young has an ongoing obligation to inform you of changes in his register of interests (section 247(3)).
2. Councillor Young is obliged to inform you of such changes within 3 months of the change occurring (see section 18(2) of the Regulation).
3. Failure to inform you of such changes within 3 months constitutes an offence as evidenced by the existence of a penalty provisions at the end of section 247(3).

How the CMC is likely to handle the matters

Since the commencement of the CMA in 2002, the CMC has been empowered to refer complaints made to it, back to be dealt with by the CEO who made the initial notification (see section 46(2)(b) of the CMA).

In my opinion the two possible offences are of a relatively minor nature and one would expect that the CMC will refer the matters back to you, to be dealt with by you.

The CMA provides little further guidance as to how you should deal with the matter, with the exception of section 44(3) which states: -

"If the public official is satisfied that—

(a) a complaint—

- (i) is frivolous or vexatious; or
- (ii) lacks substance or credibility; or

(b) dealing with the complaint would be an unjustifiable use of resources;

the public official may take no action or discontinue action taken to deal with the complaint."

In the present cases, section 44(3)(b) is the only provision of relevance.

Although you have been delegated the power to make prosecution decisions, I would expect that, as the issue is one relating to the conduct of a Councillor, you would ultimately refer the matter to Council for the decision as to whether to prosecute.

When reporting the matter to the Council, I would recommend that my following comments be brought to the Council's attention in relation to these particular matters.

Every prosecution decision is a matter for discretionary judgement having regard to a range of factors which are easy to express in general terms, but often difficult to apply to particular fact situations. Those factors are: -

- The seriousness of the offence.
- The strength (or otherwise) of the evidence to support the prosecution.
- The costs likely to be incurred and the extent to which, assuming a successful outcome, those costs are likely to be recovered from the defendant.
- Whether the defendant has acknowledged the contravention and expressed remorse for it (or whether, by contrast, the defendant continues to defiantly assert that he or she did not breach the relevant law).
- The public interest desirability of taking a prosecution to act as a deterrent to others having regard to: -
 - the likely level of penalty;
 - whether offences of the relevant kind are prevalent, or might be encouraged by a lack of decisive action on the particular matter in question.

In order to provide some guidance to you, I make the following comments in relation to Councillor Young's breaches: -

1. In relation to the issue of seriousness of the offence, it is self-evident that neither offence constitutes a serious or grave contravention of the relevant provisions.
2. In relation to the strength of the case, there would appear to be little doubt that we have the evidence to prove that Councillor Young committed the offences.
3. In relation to legal costs to be incurred in prosecuting the matter, those costs cannot objectively be considered to be excessive or to constitute a very significant impost on the resources of a Council the size of ours.
4. In relation to acknowledgment and remorse, it is apparent Councillor Young has fully co-operated in relation to the investigations in relation to the matter and, in relation to the electoral returns matter does not deny that he may have breached the LGA. If there is co-operation with investigative processes, an acknowledgment of wrongdoing, an apology or a statement of remorse (i.e. there is no attitude of defiance of the law), such actions are factors, which militate against commencing prosecution proceedings.
5. Both sections 242 and 247 are laws designed to protect the public from misuse of the privileges that are attached to being elected to public office. They are not "minor" or "peripheral" laws. For the most part, councillors' actions are a matter of self-regulation within the bounds of non-prescriptive and non-criminal obligations imposed by the LGA and the general law. The few specific criminal offences, which are provided in the LGA, are therefore to be seen as specific decision by Parliament about more serious legal treatment for matters, which are fundamentally important to the legal framework of the LGA. That means that any breach of those provisions should always be considered a candidate for prosecution.

On the other hand, having regard to the fact that there has been no attempt by Councillor Young to conceal the offences and to the fact that his breaches have not harmed any third parties (as far as we know), there is no great strength in any argument that it is necessary to prosecute in order to ensure that a grave breach of the legislation

does not go unpunished. This links back to the issues about the seriousness of the offence discussed above.

Similarly, there appear to be no factors surrounding these two breaches that provide a basis for asserting that it is necessary to prosecute in this case in order to act as a deterrent to other councillors who may possibly commit similar offences, or that failure to prosecute him will encourage him (and other councillors) to commit similar offences.

Turning to likely penalty, section 242 prescribes a maximum penalty of 100 penalty units, which equates to \$7,500.00 and section 247 prescribes a maximum penalty of 85 penalty units, which equates to \$6,375.00. The penalty actually imposed will certainly be significantly lower than the maximum. I can say with high confidence that it will be no more than one third of the maximum, which is often applied as an unwritten rule of thumb for a non-trivial first offence.

Moreover, having regard to a number of factors we have already mentioned a well structured plea in mitigation by the defendant coupled with a statement of remorse could get the penalty down much further.

Offences against section 242 or 247 of the LGA are offences identified as being subject to section 222 (Disqualification and vacation of office for certain offences). If Councillor Young were to be convicted of either offence, by virtue of section 222(2) he will be deemed to have vacated his office, unless the Magistrate makes an order pursuant to section 222(3) that section 222(2) should not apply.

In this regard, you are referred to the prosecution against former Councillor Sciacca, where Mr Kilner SM (who is still one of the Southport Magistrates) made an order under section 222(3) in Councillor Sciacca's favour, in relation to breaches of section 247 that were, in my opinion, clearly far more serious than Councillor Young's breaches.

In summary, on the issue of penalty and deterrence, it is my view that the likely penalty will be low, no conviction will be recorded and it is extremely likely that an order pursuant to section 222(3) would be made, allowing Councillor Young to remain a Gold Coast City Councillor.

Balancing all the above factors, it is my view assuming the CMC refers the matter to you without directions, that it is against Council's overall interests to expend further time and resources on taking prosecution proceedings, and, that there is no detriment to the good public benefit principles in the prosecution proceedings not being instigated. On any objective view of the matter, Council would have no difficulty in properly and responsibly justifying a decision not to prosecute.

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