

Operation Impala: Misuse of Information Inquiry

Office of the Independent Assessor submission – 9 October 2019

The Office of the Independent Assessor welcomes the opportunity to make this submission to the Crime and Corruption Commission in relation to the Operation Impala: Misuse of Information Inquiry.

Key points

- The risks associated with the inappropriate release or misuse of local government information by local government councillors are significant due to; the high volume, high frequency and high value decision-making undertaken by councillors. Councillors routinely deal with commercially and legally sensitive information in relation to communities to which they are closely linked – creating both push and pull factors for the release of information.
- There is a comprehensive regulatory framework in place to deal with local government councillors who engage in the inappropriate release or misuse of information involving both disciplinary options and statutory offences for more serious conduct.
- The unauthorized access to local government information by councillors is rare for a number of contextual reasons, that are further explored in the submission.
- The incidence of inappropriate release and misuse of local government information is not statistically significant, as a proportion of total complaints received by the Office of the Independent Assessor, but the consequences of any unauthorised release of information confidential to local government can be significant both reputationally and financially.
- In an environment where there is the potential for a high turnover of councillors following each election cycle the induction, training and where necessary, effective and transparent enforcement of regulation; is essential to developing the awareness of councillors in dealing with local government information.

The Office of the Independent Assessor

The Office of the Independent Assessor (OIA) commenced on 3 December 2018 to deal with local government councillor conduct complaints, with the exception of Brisbane City Council.

The OIA:

- Receives and assesses complaints about inappropriate conduct and misconduct.
- Refers inappropriate conduct to local government to deal with.
- Where appropriate investigates allegations of misconduct; or corrupt conduct, if referred by the Crime and Corruption Commission (CCC).





- Refers misconduct to CCT to be dealt with on a disciplinary basis.
- Prosecutes conduct offences against the Local Government Act 2009 in the Magistrates Court.
- Engages in prevention activities to inform and educate councillors around the councillor conduct framework and key misconduct risks.

The Independent Assessor's functions/roles are set out in more detail in sections 150CU, 150AN, 150AY, 150AZ and in a written direction provided to the Independent Assessor (IA) by the Minister for Local Government, Racing and Multicultural Affairs on 21 November 2018.

As at 30 September 2019, the OIA has received 1,034 complaints or referrals. Of these, 74 have been referred to CCC as possible corrupt conduct, and 29 have been referred to local government to be dealt with as inappropriate conduct.

The OIA has 161 active investigations and has completed 209 investigations including 65 matters which are either in the process of being referred to the Councillor Conduct Tribunal (CCT) (24 with legal) are with the CCT (17 matters) or have been decided by the CCT (24 matters). The OIA has dismissed or indicated No Further Action (NFA) on a total of 630 complaints either at assessment or after investigation.

Misuse of Information the Local Government Regulatory Context

The Local Government Act 2009 refers to four different categories of councillor conduct:

Unsuitable Meeting conduct – under section 150H, any conduct by a councillor that is contrary to the standards of behaviour in the Code of Conduct for Councillors in Queensland that occurs within a meeting of council and is dealt with by the Mayor or Chair of a council meeting.

Inappropriate conduct - Under section 150K of the Act inappropriate conduct is conduct by a councillor which is contrary to the standards of behaviour in the Code of Conduct or a policy, procedure or resolution of a council, and is not misconduct or corrupt conduct. Inappropriate conduct is assessed by the OIA, but returned to local government for investigation and to be dealt with if it raises a reasonable suspicion of inappropriate conduct.

It is possible that breaches of information management related policies, procedures or resolutions of council may be dealt with as inappropriate conduct if they do not raise a reasonable suspicion of being misconduct or corrupt conduct.

Misconduct is defined in section 150L of the Act and, relevant to this inquiry, expressly includes,

- A misuse of information or material acquired in, or in connection with, the performance of the councillor's functions, whether the misuse is for the benefit of the councillor or for the benefit, or to the detriment, of another person (section 150L (1) (b) (ii))
- A breach of section 171 (3) the release of information that a councillor knows or should reasonably know, is information that is confidential to local government (section 150L (1) (c)(iv)).

What is information which is confidential to council?

Information that is confidential to local government is not defined in the Act, but as part of their induction¹, councillors are advised the following information is considered confidential to local government:

- Commercial in confidence information — including where the release of information would affect a third party's competitive advantage; this is particularly relevant in a competitive tender situation.
- Information derived from government departments or ministers that has been classified as confidential.
- Information of a personal nature or about personal affairs, for example the personal details of councillors or council staff.
- Information relating to a property disposal or acquisition process where release of the information may prejudice council.
- Financial and legal analysis where the disclosure of that information may compromise council or someone else.
- Information that could result in action being taken against council for defamation.
- Information involving legal advice to council or a legal issue or a matter before the courts.
- Information that is expressly given to councillors in confidence.
- Information examined or discussed at councillor briefing sessions, unless the CEO declares that such information (or part thereof) is not confidential.
- Information about the appointment, dismissal or discipline of employees, or industrial matters affecting employees
- The council's budget and rating concessions
- Contracts proposed to be made by council
- Starting or defending legal proceedings involving council
- Any action to be taken by the local government under the *Sustainable Planning Act 2009*, including deciding applications made to it under that Act.

— Misconduct also includes a breach of the trust placed in the councillor, either knowingly or recklessly. In section 150L(1)(b)(i), a breach of trust must be linked to an obligation or responsibility of a councillor either under section 4 of the Act which sets out the local government principles or having regard to the responsibilities of councillors and Mayors set out in section 12 of the Act. The local government principles include good governance of, and by, local government section 4 (2) (d) and ethical and legal behaviour of councillors section 4 (2)(e).

¹ LGAQ Councillor Handbook and Good Governance Guide 5th Edition February 2016



Potentially Corrupt Conduct

The Act also relevantly creates the following statutory offences:

Section 171(1) **Use of Information by Councillors**

A person who is, or has been a councillor, must not use information that was acquired as a councillor to,

- (a) gain, directly or indirectly, a financial advantage for the person or someone else; or
- (b) cause a detriment to the local government.

Maximum penalty – 100 penalty units or 2 years imprisonment.

Section 171A **Prohibited conduct by councillor in possession of inside information**

- (1) This section applies to a person (the insider) who is, or has been a councillor if the insider,
 - (a) acquires inside information as a councillor; and
 - (b) knows or ought reasonably to know that the inside information is not generally available to the public.
- (2) The insider must not cause the purchase or sale of an asset if knowledge of the inside information would be likely to influence a reasonable person in deciding whether or not to buy or sell the asset.

Maximum penalty – 1,000 penalty units or 2 years imprisonment.

- (3) The insider must not cause the inside information to be provided to another person the insider knows or ought reasonably to know may use the information in deciding whether or not to buy or sell an asset.

Maximum penalty – 1,000 penalty units or 2 years imprisonment.

For the purposes of this section the word **cause** is broadly defined and **'inside information'** in relation to local government is defined to include information related to budget, policy, procurement financial and legal matters as well as council and committee decisions or proposed decisions more broadly. There are no specific statutory offences or categories of misconduct relating to unauthorised access to council databases, but such matters could be dealt with as a breach of trust.

The OIA prosecution policy

The OIA prosecution policy is that the OIA will generally deal with a breach of a conduct provision (statutory offences) as misconduct on the basis that it is a breach of trust, unless either;

- a) The circumstances of the matter are so serious that it should be dealt with as a statutory offence; or
- b) The councillor has a disciplinary history for like conduct indicating that dealing with matters on a disciplinary basis has not been successful in modifying the councillor's conduct.



Complaints of unauthorised access or attempted access to council databases by councillors are rare.

The incidence of complaints relating to the release and misuse of council information

Since 3 December 2018, the OIA has received 52 complaints about 25 individual councillors involving 59 issues relating to the release, misuse or prohibited use of local government information. The OIA has received only one complaint about unauthorised access or attempted access to council databases by councillor over the same period.

These matters represent 5% of all issues in complaints received by the OIA and is the OIA’s 10th most complained about issue.

Investigations were commenced in relation to 71% of all complaints received relating to the access, release, misuse or prohibited use of local government information with 16% of these matters having been referred to the Councillor Conduct Tribunal to date, for a determination as to whether the councillor has engaged in misconduct.

The OIA has received only one complaint about unauthorised access or attempted access to council databases by councillor over the same period.

Matters relating to the use or misuse of local government information that have been referred to or decided by the Councillor Conduct Tribunal since 1 January 2019

Matters currently before the CCT	Matters decided by the CCT
<p>Four matters involving three councillors are currently before the CCT as follows:</p> <ul style="list-style-type: none"> • Alleged attempt to access unauthorized information x 1 • Alleged disclosure of information confidential to local government x 1 • Alleged misuse of council information x 2 <p>Two of the councillors are contesting the allegations</p>	<p>16/08/19 CCT decision in the matter of councillor from the Redlands City Council Substantiated. Reprimand \$700 fine to be paid within 2 months</p> <p>14/08/19 CCT decision in the matter of councillor from the Moreton Bay Regional Council Substantiated Councillor make public admission Councillor receive counselling</p>

Matters that have been progressed or that are being progressed on a disciplinary basis have included the following scenarios:

- A councillor posted on his personal Facebook page identifying a person who had lodged a right to information application with council.
- A councillor telephoned a community representative and passed on confidential information received in a council workshop about proposed changes to electoral boundaries.
- It is alleged that a councillor communicated sensitive information to an unsuccessful applicant on Facebook regarding confidential council discussions about filling a vacant councillor position.
- It is alleged that a councillor used information, that he was accidentally copied into as a councillor, to purchase decommissioned local government assets for use in his personal business, before those assets became available for purchase by the general public.²
- It is alleged that during a second-round tender process a councillor communicated on Facebook what council was prepared to pay for the contract.³
- It is alleged that a councillor attempted to give his legal representative access to a confidential council database.⁴

It is noted that three, of these six matters, involved the release of alleged confidential to council information on Facebook.

The release and misuse of council information - Induction, training and prevention

Currently, training for potential candidates for council elections has been provided on a voluntary basis by the Department of Local Government, Racing and Multicultural Affairs. This training is not mandatory.

At the time of writing the Local Government Electoral (Implementing Stage 2 of Belcarra) and Other Legislation Amendment Bill 2019, is before Parliament and, if passed, will make it mandatory for anyone seeking election, or re-election, as a councillor to undertake ‘So you want to be a councillor?’ training from the Department. If passed, the new training will be a condition of the candidate’s nomination to ensure all candidates have a strong understanding of their obligations, both during an election campaign and once elected.

Newly elected councillors will also receive induction training from the Department which will provide more detailed information in key areas such as meeting procedures and the management of conflicts of interest.

² Referred to the OIA by the CCC

³ Referred to the OIA by the CCC

⁴ Referred to the OIA by the CCC

Ongoing training is available through the LGAQ relevant to the use and misuse of local government information as follows: Elected Member Updates (EMU) training; Councillor and Mayoral Handbooks and individual training for councils.

Previously, the reasons for disciplinary decisions relating to councillors were not made public or made available to other councillors and senior officers.

The OIA now emails all councillors and CEO's in Queensland with discussions on key decisions and issues that have been considered by the CCT so that councillors and senior officers understand the standards that are being applied by the CCT and can consider how those standards apply to their own circumstances. The purpose of these communications are to build the capacity of councillors to identify and prevent misconduct or potentially corrupt conduct.

As further use/misuse of council information matters progress through the CCT this will expand the guidance and the potential deterrent effect of this material.

The OIA, in collaboration with other key stakeholders, also develops proactive prevention materials in response to recurring or high-risk areas of misconduct. To date, and working with the Queensland Integrity Commissioner, the focus of these materials has been material personal interests and conflicts of interest matters due to the statistical significance of both complaints received and investigations undertaken by the OIA that relate to these matters.

The OIA, working with the LGAQ, has also produced guidelines for councillors around managing their social media presence in a manner which does not involve inappropriate conduct or misconduct.

To date, the OIA has not done any targeted prevention activities around the use and or misuse of council information but depending on the OIA's business intelligence in relation to priority and recurring misconduct risks, this could be an area for future focus.

Operation Impala Terms of Reference

The below terms of reference have been examined in the context of local government mayors and councillors.

Factors which facilitate misuse of information within the Queensland public sector

In the last nine months there has been little evidence that unauthorised access to local government databases is problematic. This is likely because there is no overarching secure database for local government and to the extent that they may exist in individual councils, there is likely to be little need for councillors to access them in the performance of their largely strategic responsibilities. While councillors have access to a broad range of confidential information this information is accessed, analysed and prepared for councillors by council officers as it becomes relevant to council policy setting and decision-making.

The potential for the inappropriate release or misuse of local government information however, is a greater risk due to the extent to which councillors – more than any other layer of government – are involved in high volume, high frequency and high value decision-making. Councils also routinely deal with commercially and legally sensitive information. This type of decision making is also being



undertaken by councillors with long standing interests, associations and relationships in their own communities – creating both push and pull factors.

These risks are likely to be greater where there is a high turnover of councillors and/or senior council staff. It is noted that in the 2016 local government elections it has been reported that there was a 50% turnover of councillors and 53% turnover of Mayors.

Councillors tend, naturally, to be drawn from people in the community who have a long history of commitment and involvement in community issues, often on a voluntary basis. While these networks and learned experiences are invaluable for a councillor to understand and represent their communities of interest, this background may not have prepared a councillor for the high risk decision-making environment of a council. Nor may they be prepared for the level of regulation and oversight that necessarily attaches to that.

This means that induction and training for councillors and the potential for measured, but potentially escalating regulatory responses, is critical.

Features of the legislative, policy and operational environment that may enable corrupt conduct to occur.

The regulatory framework relevant to managing the use and misuse of council information has been set out in detail earlier in this submission. It is submitted that it is adequate for dealing with the use and misuse of information in the local government context.

In particular, the regulatory framework provides scope to either deal with such issues on a disciplinary basis which allows the CCT to make orders which not only operate as a deterrent but allow councillors to develop their capacity and understanding to prevent repetition of the conduct.

Importantly, the scheme also allows councillors to be dealt with in the Magistrates Court where the circumstances are more serious, or the disciplinary approach has not been effective.

Culture as a tool for corruption prevention in the local government environment is problematic as there is no one local government culture, but the unique context and experience of 77 separate councils. From a regulatory perspective this increases the importance of developing and using a range of communication and engagement strategies to develop an overarching integrity culture.

The tools the OIA has to influence this culture include:

- Timely, communicated consequences for substantiated misconduct
- Regular social media content and media releases
- Regular capacity building content emailed directly to councillors
- A quarterly publication including business intelligence tailored to inform councils own prevention responses to misconduct risks
- Personal visits and engagement with individual councils
- More tailored prevention collaborations with stakeholders who are well placed to influence

Reforms to better prevent, detect and deal with corrupt conduct relating to the misuse of information and lessons that can be extrapolated to the broader Queensland public sector.

It is observed that the risks and responses around unauthorised access to, and misuse of, information will differ depending on the agency or sector in which the issue arises.

While these agencies or sectors may differ – the common elements are the need for legislative, regulatory, cultural, induction, education and preventative elements.

A risk analysis of what measures are in place, relative to these elements, across relevant agencies or sectors may be beneficial in identifying gaps or weaknesses and developing targeted recommendations.



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