

Personal Interests and Official Responsibilities: A Guide for Councillors

Background

The Office of the Queensland Integrity Commissioner (QIC) and the Office of the Independent Assessor (OIA) have developed this framework to assist Councils¹ to make good decisions.

This framework is a step-by-step guide to identifying and managing conflicts of interest and material personal interests at Council meetings and is designed to ensure the primacy of the public interest in Council decision-making.

The purpose of this framework is to provide further guidance in managing personal interests in Council decision-making. It is supported by research outlined in the QIC's research paper, '*Personal Interests and Official Responsibilities: Developing an Interests' Management Framework to Guide Practice at Local Government Level*'.

This framework is used by the QIC in providing advice to councillors about conflicts of interest and by the OIA in resolving complaints about councillors' handling of interest issues, such as complaints about failures to declare conflicts of interest.

What is a personal interest?

The meaning of personal interest is quite broad and is not limited to tangible interests, such as a councillor's financial interests. It can also include intangible interests such as relationships, associations, roles and responsibilities, and even reputational concerns. It is expected that councillors, as active members of their communities, may from time to time, have personal interests which could be associated with matters that come before Council.

It is a well-established principle that the person who may have a personal interest is not best-placed to decide what ought to be done about assessing and managing the interest.

Why are personal interests important?

The primary purpose of having processes to assess and manage personal interests is to ensure transparency and accountability, so that the public will not suffer simply because they are not part of a decision-making process that affects them.

Your responsibility, as an elected representative, is to make decisions in the public interest. If you do not appropriately identify and manage personal interests, you may make, or be perceived as making, decisions in your own interest instead of the public interest. This means that the people who elected you to represent them may suffer the effects of poor and partial decisions, or lose confidence in you and/or Council as a result.

The importance of managing personal interests appropriately is reflected in the increased penalties in the *Local Government Act 2009* (Qld) (the LGA), for failure to declare conflicts of interest and material personal interests.

¹ For the purposes of this framework, the term 'Council' is used to refer to the 'Local Government' as defined in section 8(1) of the *Local Government Act 2009* (Qld), that is the elected body that is responsible for the good rule and local government of a part of Queensland.

Material Personal Interests

The LGA distinguishes between the assessment and management of material personal interests, and other interests that might give rise to a conflict of interest. It does not allow Council to decide whether you have a material personal interest in a matter, and there is no discretion to allow your participation in the meeting.

Material personal interests relate to more tangible interests, such as quantifiable financial interests.

If you, or any of the categories of persons or entities listed in section 175B(1) of the LGA, stand to gain a benefit or suffer a loss because of the outcome of a Council decision (that does not relate to an Ordinary Business Matter), and you will be affected more than other persons in the local government area, you must declare a material personal interest and leave the meeting.

However, from time to time matters may arise, where it is unclear if you have a material personal interest. This is particularly so, if the benefit or loss to you, or your related persons or entities, as a result of the outcome of the Council decision, is one that might be widely shared (for example, by a large group of people).

If you are uncertain, the most appropriate approach would be to at least declare a personal interest in the matter (as opposed to a conflict of interest or a material personal interest) at the Council meeting. This enables the Council to consider the facts and whether you need to leave the meeting. As well, this approach has the benefit of being transparent. Alternatively, you can seek advice from the QIC or a legal advisor.

Under the LGA, the burden of deciding whether you have a material personal interest remains with you. If you are uncertain and you declare a personal interest at the Council meeting, Council's consideration of your interest and decision will be recorded, and you will be able to demonstrate that you took all reasonable steps to declare and manage your interest.

Example 1: Benefit or loss widely shared

Council is considering an application by a national publicly listed telecommunications provider to build a tower in the local government area. You have \$500 worth of shares in the company which has a market value of billions of dollars. The company is a well-known 'blue-chip' company and it is often reported in the media that many 'mum and dad' investors, as well as superannuation funds, also have shares in the company.

You do not think you have a material personal interest or a conflict of interest, because the shares are so commonly held by others. However, you want to be honest and open with Council. You disclose your shareholding to Council and your fellow councillors agree that the decision about the tower is unlikely to benefit you any more than it would benefit other shareholders. It is so common to hold shares of this type that the benefit to you, if any, would be shared by a very large class of persons in the local government area. Satisfied that you do not have a material personal interest or a conflict of interest, you stay and vote on the matter.

Conflicts of Interest

Section 175E of the LGA uses the terms 'real' or 'perceived' to describe the two types of conflicts of interest. For the purposes of this framework, and in providing guidance about best practice standards, the term 'conflict of interest' is used to describe all conflicts including those that arise from very direct interests ('real'), and those that arise from less direct or obvious interests ('perceived').

Having personal interests is not a bad thing and is to be expected. You were likely elected because of the strong personal ties and associations you have within your local community. What is important is that you disclose to Council any circumstances potentially giving rise to a conflict of interest, and that any conflict is managed or resolved in the public interest.

Councillors should not be alarmed if their colleagues disagree about whether or not a particular set of circumstances gives rise to a conflict of interest. It is not unusual for people to come to different views about these matters. The important thing is that councillors work together, in good faith and with the public interest in mind, to resolve these issues. In doing so, Council must develop appropriate standards and apply them consistently. To aid Councils in this, the following process has been developed and is recommended by the QIC and OIA.

Process to follow

The process for identifying and managing conflicts of interest is a simple three-step approach:

- Step 1: Identifying and disclosing a personal interest that might give rise to a conflict of interest
- Step 2: Deciding whether the personal interest gives rise to a conflict of interest
- Step 3: Appropriately managing the conflict of interest

Step 1: Identifying and disclosing a personal interest that might give rise to a conflict of interest

When do I disclose a personal interest?

You do not need to disclose all personal interests at all Council meetings. Councillors only need to disclose personal interests that might give rise to a conflict of interest or a material personal interest. If the matter before Council is an Ordinary Business Matter, or if one of the exceptions in section 175(D)(2) of the LGA applies, a councillor does not have to declare a personal interest. Often councillors are unsure if their personal interest could give rise to a conflict of interest. In fact, individuals are often not best placed to decide if they have a conflict of interest themselves.

If you think that a fair-minded member of the community **might** perceive that you **might** be unable to make a decision in the public interest because of your personal interest, you may have a conflict of interest in the matter and should tell the Council meeting about your personal interest.

Disclosing personal interests allows non-conflicted councillors to decide if you have a conflict of interest, and to set ethically sound and workable standards that are capable of being applied consistently to councillors in similar circumstances.

Transparent practices also increase public confidence in Council decision-making.

The OIA and the QIC recommend that, if in doubt, disclose.

What do I disclose about my personal interest?

Section 175E of the LGA requires councillors who may have a conflict of interest to inform the Council meeting about the 'nature of the interest'. If your personal interest arises because of a relationship with, or a gift from a person, you must disclose the name of the person, the nature of the relationship, the value and date of the gift, and the nature of the other person's interest in the matter. This information also needs to be recorded in the minutes of the relevant Council meeting.

More generally, in disclosing a personal interest, you must provide **enough information** to enable the non-conflicted councillors to make an **informed decision** under the LGA about whether a conflict of interest exists and, if so, how it should be managed.

In some circumstances, you may need to disclose more information about your personal interest and/or you may have a positive duty to act. An example of a situation where you would need to disclose a higher level of information than usual, would be one where the community might suffer a significant financial detriment if you withhold critical information from Council, and Council makes a poorer decision because of this. Under these circumstances, you are advised to seek advice from the QIC or a legal advisor, about your obligations before the meeting.

Example 2: Enhanced disclosure (positive duty to act)

You are aware that a matter is coming before Council to approve a recommendation to award the operation of the local swimming pool to a company which is incorporated under the *Corporations Act 2001 (Cth) (CA)*, following an expression of interest.

You are a Director of the company and are aware that the company is in extreme financial difficulty and you have just found out it is not meeting its obligations in relation to employee entitlements. You know that you have a duty under the CA to act in the best interests of the company, and that as a councillor you have a duty to act in the public interest.

You are concerned about your competing obligations, and that in order to disclose this information to Council in line with your positive duty to act, you may be perceived to be influencing the other councillors in breach of section 175I of the LGA. Therefore, you seek advice from the Integrity Commissioner or a legal advisor on this point.

Step 2: Deciding whether a personal interest gives rise to a conflict of interest

Not every personal interest will give rise to a conflict of interest. For a conflict of interest to exist there must be a link between the personal interest and the potential for the interest to influence how the councillor may vote, which might lead to a decision that is contrary to the public interest. This is subject to exemptions, for instance, under the LGA, **mere** membership of a community group or a political party would not give rise to a conflict of interest.

The QIC and the OIA have developed the following non-exhaustive list of factors which councillors may find useful in considering whether a reasonable member of the community **might** perceive that because of your personal interest you **might** be unable to bring an objective mind to a decision:

a) The value and significance of the personal interest

The interest must be of some substance or value, rather than merely a slight or low value interest.

The benefit or detriment to your personal interest must be significant enough to have the capacity to influence, or be perceived to influence, your vote. [see Example 3]

b) The directness/remoteness or realisability of the benefit or detriment

The outcome of Council's decision must have the potential to bring about a benefit or detriment to your personal interest. [see Example 4]

c) Size and class of persons - who has the interest?

Your interest must be personal. The interest can still be a personal interest if it relates to another person. For example, you have a personal interest, or would be perceived to have a personal interest, in the outcome of a close friend's bid for a Council contract.

However, an interest may not be personal, and may not give rise to a conflict of interest, if it is shared by a wide enough group of people. [see Example 5 and Example 1]

d) Any factors relevant to the local area

With their local knowledge, other non-conflicted councillors are best placed to understand the context surrounding your personal interest and to decide whether, in that context, it gives rise to a conflict of interest. In considering these factors, or applying a framework or standard, there is a need for flexibility because of the variety of functions and roles councillors have. Council should also consider how each situation compares to **factors, standards, or precedents** already set by Council.

Example 3: Value and significance of the personal interest

You recently resigned from the board of a business incorporated under the *Corporations Act 2001* (Cth) (CA). A matter comes before Council involving a grant the business is seeking, and you disclose your past position. The non-conflicted councillors consider this information, along with the fact that under the CA, past board directors still have some legal liability for some years after they resign.

As a reasonable member of the community might perceive that because of your ongoing liability, you might be unable to bring an impartial mind to the application, Council decides that you have a conflict of interest, and that you should leave the room while the grant application is being discussed.

Example 4: Remoteness/realisability of benefit or loss

You are a councillor in a regional town and you also have your own plumbing business. A material change of use application comes before Council for the construction of a new motel. One of your Council colleagues suggests that you should leave the meeting on the basis that, as a plumber who could bid to install the motel's plumbing, you have a conflict of interest or even a material personal interest in the outcome of the application.

The non-conflicted councillors take into account that you have not previously carried out work for the applicant company, and you do not have a commercial relationship or any other connection with the company. Further, if you tender for the work you are not guaranteed to win the tender, and there are several other plumbers in the area who would be well placed to do the work. Based on this, the non-conflicted councillors decide that you do not have a conflict of interest or a material personal interest in the matter, as there is no realisable benefit specific to you, from the outcome of the application. You stay and vote in the matter. However, Council notes that should you successfully bid for work with the company you could be conflicted if matters affecting that company come before Council in future.

Example 5: Size and class of group – who has the interest?

A developer applies to Council for approval to build a controversial nightclub in a residential area that is in your division but not close to your own home. When the controversial application comes before Council a fellow councillor argues that you have a conflict of interest because the development is in your division.

The non-conflicted councillors decide that your personal interest as a resident of the division does not give rise to a conflict of interest because you are not affected by the development any more than other residents in the locality. In deciding this, they consider that the residents of the division comprise a large class of people, unlike those residents who live in the streets directly surrounding the proposed development.

Step 3: Appropriately managing a conflict of interest

Self-management by disclosing councillor

A councillor can disclose a conflict of interest in accordance section 175E(2) of the LGA and elect to voluntarily leave the Council meeting while the matter is discussed and voted upon. However, this should be balanced against the councillor's responsibility to participate in Council meetings and decision-making for the benefit of the local government area.

Management by the remaining (i.e. non-conflicted) councillors

Alternatively, if a councillor does not elect to voluntarily leave the Council meeting after disclosing a personal interest, the non-conflicted councillors are to determine whether the councillor has a conflict of

interest in the matter (see Step 2). Additionally, if the non-conflicted councillors determine that a conflict of interest exists, they then need to decide how the conflict should be managed. Specifically, the non-conflicted councillors can decide whether you must leave, or if you can stay and participate, or even vote, on the matter.

The QIC and OIA recommend that Council consider whether the involvement or exclusion of a conflicted councillor in a meeting is likely to lead to a decision that is contrary to the public interest.

In deciding whether the conflict of interest could lead to a decision that is contrary to the public interest, Councils might find the following questions and non-exhaustive list of factors useful:

- a) Does Council require more information from the councillor to prevent a financially detrimental decision being made? [see Example 2]
- b) Does the councillor have particular expertise in a topic area, and would their exclusion diminish the robustness, soundness, and/or quality of the discussion, leading to a poorer decision? [see Example 6]
- c) Would the exclusion of the councillor be perceived as being undemocratic, in that they are prevented from representing their community on a particular topic of significance to their community? [see Example 7]
- d) Would the councillor's inclusion in the discussion and/or decision be detrimental to maintaining public trust in the Council or local government more generally?
- e) Are there any other local factors that may be relevant to the inclusion or exclusion of the councillor in the discussion and decision?
- f) How does this situation compare to previous situations?

The importance of the public interest in decision-making should be the basis of any decision around whether a councillor stays, participates or votes at a meeting.

Example 6: Expertise and participation

Council is considering a proposal to conduct a feasibility study for a cycleway. You are a keen cyclist and a long-standing member of a very small local triathlon club which has formally lobbied the Council for a cycleway. You have no other personal interest in the matter. You declare a conflict of interest, but request to stay in the meeting on the basis that while you will not vote on the matter, you would like to be involved in discussions about possible routes for a cycleway. The non-conflicted councillors agree that it would be useful to have an experienced cyclist's perspective on the proposal and allow you to stay.

Example 7: Undemocratic exclusion

Prior to your election, a developer applied to build a nightclub in a residential area that is in your division. Acoustic reports show that the controversial proposal is close enough to your home that you may be affected by noise to a mild degree. However, you are not close enough that the development would affect your property value or your amenity in any other way. During your campaign you said that you sympathised with residents in the immediate surrounding streets and questioned whether the development was suitable for the particular location.

When the matter comes before Council with a recommendation for approval, one of your fellow councillors argues that you have a conflict of interest because you will be affected by the noise. The non-conflicted councillors decide that the detriment that you might suffer because of the mild increase in noise is not measurable and significant enough for it to be perceived as giving rise to a conflict. As well, the non-conflicted councillors considered it would be undemocratic in the circumstances to exclude you. They also noted that you could not have participated in the decision if your house was very close to the proposed development or your property value would be affected.

How to document Council's decisions

At each step in the three-step approach, Council is required to record any relevant decisions and the reasons for these decisions to ensure transparency in Council's decision-making process.

In addition to the requirements under section 175J of the LGA, Council should record in the minutes of the meeting:

- the nature and extent of the councillor's personal interest
- its decision regarding whether a conflict of interest exists and its reasons for the decision, and
- its decision regarding how to manage any such conflict and its reasons for the decision.

This will also help Council to set workable standards when deciding if a conflict exists, which can be applied consistently in similar circumstances and is in line with the principles of good administration.

As well, councillors should be mindful of their obligation to update their Register of Interests, and those of all related persons, should there be any change to their financial or non-financial interests.

Other issues

What is meant by influence?

Under the LGA it is an offence for a conflicted councillor to influence, or attempt to influence, Council staff, contractors or other councillors to deal with a matter to be considered by Council in a particular way; except to the extent that their participation in a meeting is authorised by Council under section 175E(4)(b)(ii) of the LGA or the Minister under section 175F of the LGA.

Influence was a factor discussed in the report '*Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government*' primarily within the context of campaign donations. However, the offence under the LGA may apply more broadly as under section 175(3) of the LGA, councillors cannot influence or attempt to influence in a 'particular way'.

In the absence of certainty around the meaning of the term 'influence' or 'particular way', caution must be exercised until the meaning is established in the local government sector. For example, it is unclear whether the offence of influence would apply where the conflicted councillor (or their related parties) may not benefit, or intend to benefit, from the conduct.

Are councillors able to hold strong views about a matter?

Concerns may sometimes arise that councillors are unable to bring an objective mind to an official decision because they have expressed strong views.

Holding a strong view, and expressing it, are not the same as having a personal interest or a material personal interest. It should not be dealt with the same way that personal interests are dealt with.

It is expected that councillors will have strong views, and councillors are not expected to bring a completely objective mind to every decision. In fact, often councillors have been elected because of their strong views about what is good or bad for a community.

If there are concerns about a councillor's views, the correct approach is to consider whether that councillor has 'pre-judged' a matter. That is, are a councillor's opinion and views so entrenched and cemented that they are incapable of changing their mind even in the face of compelling evidence and arguments.

Councillors should also be mindful of their obligations under sections 4 and 12 of the LGA, including the requirement to make decisions in the interests of the current and future residents of the whole of the local government area.

Example 8: Councillors and strong views

A developer applies to build an abattoir in an industrial zone adjoining a semi-rural residential area. You do not live close to the controversial development and will not be personally affected in any way. However, during your campaign you said that while you understood residents' concerns, the area could benefit from the jobs that the abattoir would create. You suggested that residents consider the evidence before forming a view.

When the matter comes before Council for discussion, one of your fellow councillors argues that you have a conflict of interest because of your comments which created a reputational interest in voting for the proposal. The councillor also argues that you would not be able to bring an open mind to any recommendation by local government staff. The majority of the non-conflicted councillors decide that your comments, while indicative of a strongly held view, are not so fixed that your mind cannot be changed in the face of strong evidence. Therefore, they decide you have not pre-judged the matter and do not have a conflict of interest.

Reprisals

Councillors have a duty under the LGA to report other councillors' suspected conflicts of interests and material personal interests, but it is a serious offence to take retaliatory action against another councillor because they have done so.

It is not uncommon for people to disagree, however, it is in the public interest that councillors work together respectfully and in good faith to ensure that good decisions and public confidence in Council is maintained.

This publication has been prepared by the Queensland Integrity Commissioner and the Independent Assessor.
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