GOVERNMENT OF
WESTERN AUSTRALIA

Local Government Standards Panel

Complaint Number	SP 2018-100
Legislation	*Local Government Act 1995*
Complainant	**Councillor Jennifer Scott**
Respondent	**Councillor Michael Southwell**
Local Government	**Shire of Capel**
Regulation	Regulation 4 Regulation 6 Regulation 7 of the *Local Government (Rules of Conduct) Regulations 2007*
Panel Members	Mrs Sheryl Siekierka (Presiding Member) Mrs Emma Power (Member) Councillor Paul Kelly (Member)
Heard	5 March 2019 Determined on the documents
Finding	No Breach of Regulation 4 No Breach of Regulation 6 One minor breach of Regulation 7

FINDING AND REASONS FOR FINDING

Delivered 4 April 2019

Summary of the Panel's decision

1. On 5 March 2019, the Panel found that Councillor Michael Southwell a councillor of the Shire of Capel **("the Shire"):**

   a. did not commit a minor breach pursuant to the Local Government Act 1995 (WA) **("the Act")** and regulation 4 and regulation 6 of the Local Government (Rules of Conduct) Regulations 2007 **("the Regulations")**; and

   b. did commit a minor breach in relation to regulation 7 of the Regulations;

   when he made comments in public regarding the payment of funds by the Shire towards legal costs regarding advice given that were published in two articles:

   c. on the Busselton-Dunsborough Mail website on 27 September 2018; and

   d. in the Dunsborough Mail Newspaper on 3 October 2018,

   as set out in paragraph 35 below.

The Panel's Role

2. Under section 5.110(2) of the Act the Panel is required to consider a minor breach complaint and make a finding as to whether the alleged minor breach occurred.

3. The Act provides for the circumstances in which a council member commits a minor breach.[1]

4. The Panel may make a finding that a councillor has committed a minor breach of the Act and Regulations based on evidence from which it may be concluded that it is more likely that the alleged breach occurred than it did not occur.[2]

5. In order to find a breach, it must be established that each element of the relevant Regulation is more likely than not to have been breached or met.

6. In considering whether a minor breach is established the Panel must consider:

   a. all evidence provided and, where there are conflicting circumstances, inferences or evidence, must come to a reasonable conclusion that any circumstance, inference or evidence relied upon is more likely than not to have occurred or be accurate[3]; and

   b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding[4].

7. The Panel does not possess investigative or supervisory powers.[5] The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials published by the relevant local authority's website.

8. It is the responsibility of both complainants and respondents to provide the Panel with all information they wish the Panel to consider when making its determination.

9. The Panel also must have regard to the general interests of local government in Western Australia[6].

[1] Section 5.105 of the Act
[2] Section 5.106 of the Act
[3] Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1
[4] Briginshaw v Briginshaw (1938) 60 CLR 336
[5] Re and Local Government Standards Panel [2015] WASC 51 (at paragraph 24)
[6] Section 8(6) of Schedule 5.1 of the Act

10. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

Regulation 4

11. Regulation 4 reads:

> *"(1) In this regulation —*
>
> ***"local law as to conduct"** means a local law relating to conduct of people at council or committee meetings.*
>
> *(2) The contravention of a local law as to conduct is a minor breach for the purposes of section 5.105(1)(b) of the Act."*

12. Section 5.105(1)(b) of the Act states as follows:

> *"A council member commits a minor breach if he or she contravenes*
>
> *…*
>
> *(b) a local law under this Act, contravention of which the regulations specify to be a minor breach."*

13. In this case it is alleged that Cr Southwell breached clause 7.4(1) of the Shire of Capel Standing Orders Local Law 2016 **("the Standing Orders"):**

> ***"7.4 No adverse reflection on decision***
>
> *(1) A member must not reflect adversely on a decision of the Council or a Committee except on a motion that the decision be revoked or changed. "*

Regulation 6

14. Regulation 6 prevents the disclosure of confidential or restricted information obtained by a councillor and reads as follows:

> *"(1) In this regulation —*
>
> *"**closed meeting**" means a council or committee meeting, or a part of a council or committee meeting, that is closed to members of the public under section 5.23(2) of the Act;*
>
> ***"confidential document"** means a document marked by the CEO to clearly show that the information in the document is not to be disclosed;*
>
> ***"non-confidential document"** means a document that is not a confidential document.*
>
> *(2) A person who is a council member must not disclose —*
>
> *(a) information that the council member derived from a confidential document; or*
>
> *(b) information that the council member acquired at a closed meeting other than information derived from a non-confidential document.*
>
> *(3) Subregulation (2) does not prevent a person who is a council member from disclosing information —*
>
> *(a) at a closed meeting; or*
>
> *(b) to the extent specified by the council and subject to such other conditions as the council determines; or*

(c) that is already in the public domain; or

(d) to an officer of the Department; or

(e) to the Minister; or

(f) to a legal practitioner for the purpose of obtaining legal advice; or

(g) if the disclosure is required or permitted by law."

Regulation 7

15. Regulation 7 prohibits councillors engaging in conduct to either gain an advantage for themselves (or another party) or cause detriment to another party and specifically provides as follows:

"7. Securing personal advantage or disadvantaging others

(1) A person who is a council member must not make improper use of the person's office as a council member —

(a) to gain directly or indirectly an advantage for the person or any other person; or

(b) to cause detriment to the local government or any other person.

(2) Subregulation (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.

16. It is not alleged that Cr Southwell or any other person received any advantage, so the Panel has only considered regulation 7(1)(b) in this Complaint.

Jurisdiction and Procedural Fairness

17. On 16 October 2018 the Panel received an email from Mr Ian McCabe, acting as complaints officer of the Shire **("the Complaints Officer").** The same enclosed a Complaint of Minor Breach Form (with an explanatory letter and attachments) dated 3 October 2018.

18. In her letter of complaint Cr Scott alleges that Cr Southwell has breached:

a. regulation 4 of the Regulations, by breaching Standing Order 7.4(1), although it is not specified how this regulation applies;

b. regulation of 6 the Regulations, however, it is not specified what confidential information was disclosed and how such confidential information was obtained; and

c. regulation 7(1)(b) of the Regulations by causing a detriment to the Council and other councillors by making public comments that were then published in articles by Sophie Elliot:

i. entitled "*Shire of Capel council back legal dispute funding*" dated 27 September 2018 and published on the Busselton Dunsborough Mail; and

ii. entitled *"Capel council to stand by decision"* and published in the Dunsborough Mail Newspaper on 3 October 2018,

as set out in paragraph 35 below.

(together **"the Complaint"**).

19. The Panel convened on 5 March 2018 to consider the Complaint.

20. The Panel notes that this conduct is also the subject of complaint SP 2018-101. Decision SP 2018-101 can be considered the primary decision relating to the matter and conduct in question.

21. The Panel:

    a. accepted the advice of the Department of Local Government, Sport and Cultural Industries **("the Department")** that, based on information published on the Western Australian Electoral Commission's website, Cr Southwell was:

        i. last elected to the Council of the Shire in October 2017 for a term expiring in October 2021;

        ii. a Councillor at the time of the alleged breach; and

        iii. a Councillor when the Panel met on 5 March 2018;

    b. was satisfied the Complaint was made within two years after the alleged breach occurred[7];

    c. was satisfied that the Shire's Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of a minor breach[8];

    d. was satisfied the Department had provided procedural fairness to Cr Southwell; and

    e. found it had jurisdiction to consider the Complaint.

22. A recurrent breach is a minor breach that has occurred after the council member has been found to have committed two or more other minor breaches.[9]

23. The Panel may send the complaint which if found would be a recurrent breach to the Chief Executive Officer of the Department assisting the relevant Minister at the time instead of considering the Complaint itself.[10]

24. Although Cr Southwell had previously be found to have committed more than ten minor breaches, the Panel did not find that the Complaint should be sent to the Chief Executive Officer of the Department as the alleged breaches would not be deemed recurrent breaches as they had not occurred after the Panel had made its earlier findings and provided the Respondent with an opportunity to address their conduct[11].

Background

25. The background of the Complaint is that in 2018 it was alleged that certain members of the public had defamed two of the Shire's officers being the former Chief Executive Officer Paul Sheedy and Shire President Cr Murray Scott.

26. At the Ordinary Council Meeting of the 27 June 2018 **("the June OCM")** part of the meeting was closed to members of the public to consider Item 21.1, being a motion relating to a confidential new business matter of an urgent nature affecting a Shire employee **("the Motion").**

[7] Section 5.107(4) and 5.109(2) of the Act
[8] Section 5.107 and 5.109 of the Act
9 Section 5.105(2) of the Act
[10] Sections 5.110(2)(b), 5.111(1) of the Act.
[11] Sections 5.111 and 5.105(2) of the Act

27. The Minutes of the Council Meeting **("the Minutes")** were posted on the Shire's website on Monday 2 July 2018. The Minutes reflect that all councillors except for Cr Southwell voted in favour of the Motion (also known as Decision OCO626).

28. Subsequent to the June OCM, it came into the public domain that the Motion was for the Shire to provide funds, to a maximum of $6,000.00 combined, to obtain legal advice on behalf of Mr Sheedy and Cr Scott in respect to the defamation dispute.

29. Following the June OCM, a Special Electors' Meeting was called for by a ratepayer's petition and held on 14 September 2018 **("the Electors' Meeting").**

30. At the Electors' Meeting three substantive motions were proposed being:

    a. to revoke the approved funding of any legal action related to the alleged defamation;

    b. that no further rate payers' money be spent on related legal costs; and

    c. that amended sections of policy 1.5 Legal Representation Costs and Indemnification Councillors and Employees be reinstated,

    (together the **"Electors' Motions"**).

31. Before and at the Elector's Meeting certain issues were also clarified by the Chief Executive Officer that:

    a. legal advice had been sought that as the defamation action was connected to the role of the parties as former CEO and Shire President, the Council could indemnify those persons for costs in relation to issue of notices of concern;

    b. the relevant funds were not paid to the former CEO or the Shire President and were not in the nature of a personal expenditure; and

    c. the funds had been paid directly to the legal advisors and therefore the decision of the June OCM had been given full effect.

32. At the next occurring Ordinary Council meeting of 26 September 2018 **("the September OCM")** the Electors' Motions were considered and the CEO provided written notes addressing each of the Electors' Motions.

33. The Electors' Motions were recommended not to be supported at that time and, following debate, amended motions were voted on in the following terms:

    "The Council:

    1. *Receives the motion of the Special Electors' Meeting to revoke Decision OC0626 of 27 June 2018 and recover the funds while noting that the request is not actionable;*

    2. *Not support the motion of the Special Electors' Meeting to expend no further funds on the matter addressed by Decision OC0626 of 27 June 2018; and*

    3. *Support the inclusion of Policy 1.5 Legal Representation in a policy review; that this be done in a timely manner once the matter addressed the Decision OC0626 of 27 June 2018 is concluded; and that the motion of the Special Meeting of Electors addressing clause 7 of the policy be included for consideration in that review. "*

The Specifics of the Complaint

34. The comments the subject of the Complaint were initially published in an article by Sophie Elliot entitled *"Shire of Capel council back legal dispute funding*" dated 27 September 2018 on the Busselton Dunsborough Mail website and then reproduced in the article entitled "Capel council to stand by decision" and published in the Dunsborough Mail Newspaper on 3 October 2018, **("the Articles").**

35. The relevant extracts of the Articles are as follows:

> " *Councillor Michael Southwell, who was the only councillor who did not support the June decision, earned rounds of applause and cheers from ratepayers.*
>
> *He said things had come to light since June that may have changed the decision.*
>
> *"It is flawed decision making," he said.*
>
> *"I did not know at the time $4000 had already been spent, I did not know Cr Scott had not made a written application. I don't think all the information was at hand," he said.*
>
> *"It is an absurd situation for council to pay money to help Cr Scott pay a legal bill, when he hasn't made an application.*
>
> *"So, in essence, the council has agreed to give money to a person who didn't even ask for it.*
>
> *"What disturbs me is that it remained in the June meeting, looking back, it was presented as urgent. Why did we only find out on that night? There was no urgency. It was presented on the hop."* "

("the Article Comments").

36. The Complainant make the following comments:

a. she contacted the President of the Shire following the articles to confirm whether Cr Southwell was given approval to make the comments. The President indicated no approval was given;

b. the comments are in breach of clauses 4 and 5 of the Shire's Media Contact Policy 1.1 **("Media Conduct Policy")** as follows:

> " *4. If a Councillor or employee is approached by the press to answer questions or make a comment on council business or a council decision, the press should be referred to the President or CEO (if authorised) for a response.*
>
> *5. Nothing in this policy shall prevent a Councillor expressing his/her personal opinion to the media. However, as a general principle, Councillors approached by a representative from any form of media to make a statement or private comment on a matter of Council business, should have regard to any resolutions of the Council affecting the matter in question."*

c. a number of statements made by Cr Southwell are incorrect including the statement that "*things had come to light since June that may have changed the decision"*. She can confirm no further information has been presented to the Council since the June OCM;

d. where is the evidence that Cr M Scott did not make application in the correct manner? The statement *"It's an absurd situation for Council to pay money to help Cr Scott to pay a legal bill, when he hasn't made an application"* is derogatory and unsubstantiated;

e. the comment *"..it is flawed decision making."* is in breach of the clause 7.4(1) Standing Orders; and

f. the comments made by Cr Southwell to the newspapers are in breach of the Regulations and an attempt to bring the Shire of Capel and other elected members into disrepute.

37. In the Complaint, the Complainant also provided:

a. a copy of the Motion being Decision OC0626 of 27 June 2018; and

b. a copy each of the Articles.

Respondent's Response

38. By an email dated 29 October 2018 Cr Southwell provided a response to the Complaint.

39. Cr Southwell denies that he has committed any minor breach.

40. Cr Southwell makes the following general comments and arguments in respect to the allegations of Minor Breach:

a. the Complaint is silly, vexatious and another example of the bullying behaviours of several Capel Councillors in an effort to target him with complaints;

b. he urges the Panel to refuse to deal with the Complaint under section 5.110(3A) of the Act because it is frivolous, trivial and vexatious;

c. he was simply keeping ratepayers and residents informed and striving for openness and accountability whilst respecting the rules around confidentiality and speaking to the media;

d. each accusation of a breach should be the subject of a separate complaint form and be dealt with individually. This position is supported due to the reference to the singular in the form itself. It is not intended that the process by used by vexatious people who wish to throw lots of information and assertions at the Panel and let the Panel find a breach if one exists;

e. specifically with respect to the allegations:

i. Regulation 4 – No details are provided in the Complaint;

ii. Regulation 6 – No details are provided. Only an allegation of a breach of standing order 7.4 which does not apply;

iii. Regulation 7 – Cr Scott considers that the comments attempt to bring the Shire and elected Members into disrepute but does not say how the comments caused detriment only that they were incorrect. However, all comments he made were correct or his opinion;

f. the comments were simply a genuine and truthful attempt to help inform the readers and carry out his duty under section 2.10(a), (b) and (c) of the Act;

g. it was clear he was not speaking on behalf of the Council. Before making the comments to members of the press he did refer reporters to the President in line with the Media Policy section 4 and was advised that the President had declined to comment;

h. he draws the Panel's attention to section 5 of the Media Policy;

i. the statement *"things had come to light since June that may have changed the decision"* refers to the information that $4,000 had already been spent by the Shire on legal fees in relation to the issue at the time of the June OCM. This information was given by the CEO during public question time;

j. the new information that no written application had been made for the funding by the President had been given to the Council by himself while speaking during a debate on a related item discussed at Council;

k. there is nothing derogatory in saying that he did not make an application and no criticism of the President was either stated or implied. The point was that it had emerged that the Council was not in possession of all of the information it should have had on which to base its decision;

l. referring to the situation as an *"absurd situation"* is a valid statement of opinion and does not cause a detriment to the Council in any way because he made it clear that the information was not available to Council when it made the decision to approve the payment;

m. this was also the thrust of the statement referring to *"flawed decision making"* that the decision was made without access to all the facts. This is not an adverse reflection on the people who made the decision or the decision itself. On the contrary, a defence of the decision is plain. It is simply a suggestion that the issue should perhaps be revisited in the light of the new information now to hand; and

n. the Complaint is poorly conceived and lacking in substance. It is trivial, vexatious and simply another attempt to cause harm to his reputation.

Panel's Consideration

Regulation 4

41. To make a finding of a minor breach of regulation 4 of the Regulations the Panel must be satisfied, to the required standard, that:

    a. Cr Southwell was a councillor at the time of the alleged breach and the time of the determination;

    b. the conduct occurred during a council or committee meeting; and

    c. Cr Southwell breached a valid provision of the Shire of Capel's Standing Orders Local Law 2016.

Was Cr Southwell a Councillor at the relevant times

42. Cr Southwell was a councillor at the time of the alleged breach and at the date the Panel considered the Complaint.

The conduct occurred at a council or committee meeting

43. This element is not met as the relevant comments were made in the Article and not during a council or committee meeting as is required by the Regulations.

44. There is no allegation that Cr Southwell made any adverse reflection during the June OCM or the September OCM.

45. This element is not met.

Cr Southwell breached a valid provision of the Shire of Capel Standing Orders Local Law 2016

46. As the above element cannot be met, it is not necessary to further consider this element.

Conclusion

47. Given the above, the elements required to find a breach of regulation 4 of the Regulations have not been met.

Regulation 6

48. To make a finding of a minor breach in respect to regulation 6 the Panel must be satisfied that:

    a. Cr Southwell was an elected member at the time of the breach and at the time the matter was determined; and

    b. that it is more likely than not that:

        i. Cr Southwell disclosed information to someone who at the time was not also a Councillor of the same local government; and

        ii. the disclosed information was acquired by Cr Southwell either:

            1. from a confidential document; or

            2. at a council or committee meeting, or a part of a council or committee meeting, that was closed to members of the public under section 5.23(2) of the Act; and

        iii. if the information was acquired at a closed council or committee meeting, Cr Southwell did not derive the disclosed information from a non-confidential document; and

        iv. the disclosed information was not information already in the public domain or the disclosure did not occur in any of the ways identified in regulation 6(3).

Cr Southwell was an elected member at the relevant times

49. Cr Southwell was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.

Cr Southwell disclosed information to someone who at the time was not also a Councillor

50. The information the subject of the Complaint was provided by Cr Southwell to a member of the media and was subsequently released to the public by way of the Articles.

51. This element is met.

The disclosed information was information Cr Southwell acquired:

- from a confidential document; or
- at a council or committee meeting (or part thereof) that was closed to members of the public under section 5.23(2) of the Act

52. Although the Complaint form specifies a breach of regulation 6 and the closed portion of the June OCM is mentioned, the Complaint has not specified what information in the Articles was confidential, or where the same was obtained.

53. As such, the Panel does not have enough evidence to find to the required standard that the Article Comments or the Broadcast Comments were based on information derived either:

    a. at a council or committee meeting, or a part of a council or committee meeting, that was closed to the public; or

    b. from a document marked as confidential in the strict manner required by the Regulations.

54. This element is not met.

Cr Southwell did not derive the disclosed information from a non-confidential document or the disclosure did not occur in any of the ways identified in regulation 6(3)

55. As the Panel cannot make a finding that the relevant information was derived from a confidential meeting or confidential documentation, it also does not have the requisite information to consider this element.

56. This element is not met.

Conclusion

57. Given the above, the elements required to find a breach of regulation 6 of the Regulations have not been met.

Regulation 7

58. To make a finding of a minor breach of regulation 7(1)(b) of the Regulations the Panel must be satisfied to the required standard that:

    a. Cr Southwell was an elected member at the time of the alleged breach and the time of the determination;

    b. Cr Southwell made use of his office as Council member of the Shire;

    c. when viewed objectively, such use was an improper use of Cr Southwell's office in that it:

        i. involved a breach of the standards of conduct that would be expected of a person in the position of councillor by reasonable persons; and

        ii. was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty; and

    d. Cr Southwell engaged in the conduct in the belief that detriment would be suffered by another person.

Cr Southwell was an Elected Member at the relevant times

59. Cr Southwell was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.

Cr Southwell made use of his office as Council Member of the Shire

60. Cr Southwell was expressly referred to as being a councillor in the Article.

61. In addition, the Article Comments directly related to the Shire and matters discussed at the June OCM and September OCM.

62. Given the above, the Panel finds, to the required standard, that any reasonable person would conclude that Cr Southwell made the comments in his capacity as an elected member and therefore made use of his office as a council member.

63. This element is met.

Cr Southwell's use was improper

64. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or a lack of wisdom[12]. It requires an abuse of power or the use of the councillor's position in a manner that such councillor knew (or ought to have known) was not authorised.

65. Impropriety does not depend on a councillor's consciousness of impropriety. It is to be judged objectively and does not involve an element of intent[13].

66. Any decision as to what is "improper" cannot be made in isolation but must be considered in the relevant context including the specifics of the relevant event as well as councillor's formal role and responsibilities.

67. The Complainant alleges that the Article Comments were improper as:

    a. Cr Southwell breached the Media Contact Policy and he was not an authorised spokesperson for the Shire;

    b. certain of the comments were incorrect; and

    c. Cr Southwell adversely reflected on a council decision.

68. In this case as the conduct did not occur during a council or committee meeting, the Standing Orders are not applicable.

69. However, the Panel has considered the Shire of Capel Code of Conduct dated 26 July 2017 and, in particular, Part 2 - Values, principles and behaviour, including the following:

> *" - Respect decisions made by Council.*
>
> *- Refrain from publicly criticising either a Councillor, Committee Member or employee in a way that casts aspersions on their competence or credibility."*

70. The Panel finds that it is more likely than not that the following particular comments by Cr Southwell were in breach of the Shire's Code of Conduct:

    a. "It is flawed decision making."; and

    b. "It is an absurd situation for council to…",

    as the same showed clear disagreement with a decision made by Council as well as clearly implying that that decision was made wrongfully.

71. In addition, Cr Southwell's various comments stating that he considered that the relevant funds could be recovered was clearly in opposition to what the Council's official position was on the matter.

72. Cr Southwell argues that a comment that the decision was not made on the basis of all the facts is not critical or detrimental is not convincing in the circumstances.

73. The decision made at the September OCM expressly affirmed the decision and Motion made previously at the June OCM. This indicates that, irrespective of whether certain information had or had not been provided at the June OCM (which on the

[12] Complaint of Minor Breach No. SP 3 of 2013
[13] *Chew v R* [1992] HCA 18

evidence provided cannot be accurately ascertained), by the September OCM, all the councillors would have been aware of such matters. Cr Southwell also confirms that he in fact brought these matters to the attention of the other councillors at the OCM.

74. The Complainant also alleges that Cr Southwell's actions were in breach of clause 4 and 5 of the Media Contact Policy of the Shire.

75. Cr Southwell asserts that he first referred the media to the President. However, the Panel would note that once the President had noted he had no comment, this did not give Cr Southwell authorisation to speak to the media instead.

76. In addition, although some of the comments made by Cr Southwell can be classified as his opinion, he was critically commenting directly on a decision by Council in a manner which he should have known was not the authorised position of the Shire.

77. The Panel finds that it is more likely than not that in making the Article Comments Cr Southwell was in breach of the Shire's Media Contact Policy as:

    a. upon unsuccessful referral to the President, he chose to speak anyway; and

    b. he did not have regard to the resolutions that had been made by Council.

78. Given the above, the Panel finds that it is more likely than not that Article Comments made by Cr Southwell were improper in that they were:

    a. in breach of the Shire's Code of Conduct and Media Contact Policy;

    b. of such a nature that a reasonable individual would consider the same to be inappropriate and not in keeping with the conduct that would be expected of a councillor; and

    c. deserving of a penalty.

79. This element is met.

<u>Cr Southwell intended detriment to be suffered by another person</u>

80. "Detriment" means loss, damage or injury. It is construed widely and includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage.

81. It is not necessary to find whether any detriment was actually suffered[14], but an intent to cause such detriment must be established.

82. Cr Southwell's assertion that he was simply keeping ratepayers and residents informed and striving for openness and accountability and that his comments were a genuine and truthful attempt to inform readers is not convincing.

83. It is hard to construe Cr Southwell's comments as anything but a direct criticism of the Council's decision regarding the matter and a denigration of the other Councillors who participated in that decision.

84. The decision made at September OCM affirmed the initial decision made at the June OCM. Cr Southwell's implication that the relevant Councillors made their decisions wrongfully in both instances is critical of both the councillors concerned as well as the Shire as a whole.

[14] *Yates and Local Government Standards Panel* [2012] WASAT 59 at [72]

85. The Panel finds that it is more likely than not that the Article Comments were made in an attempt to bring into question the decision making ability of the councillors involved and the quality and accuracy of the information provide by the Shire.

86. Councillors have a duty to support the properly made decisions of the local Council and not to publicly denigrate such decisions. If there is some concern that any decision was not made properly, then there is a suitable internal procedure by which to address such concerns. Making critical public statements is simply not appropriate.

87. As such, the Panel finds that it is more likely than not that the Article Comments by Cr Southwell was intended to cause damage or detriment to the Shire and the Councillors of the Shire.

88. This element is met.

Conclusion

89. Given the above, the elements required to find a breach of regulation 7(1)(b) of the Regulations have been met.

Panel's Findings

90. Cr Southwell did not breach Regulation 4 of the Regulations and therefore did not commit a minor breach.

91. Cr Southwell did not breach Regulation 6 of the Regulations and therefore did not commit a minor breach.

92. Cr Southwell did breach Regulation 7(1)(b) of the Regulations and therefore did commit a minor breach.

S. Siekierka

Sheryl Siekierka (Presiding Member)

Emma Power (Member)

Paul Kelly (Member)

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WESTERN AUSTRALIA

Local Government Standards Panel

Complaint Number	SP 2018-100
Legislation	*Local Government Act 1995* (WA)
Complainant	**Councillor Jennifer Scott**
Respondent	**Councillor Michael Southwell**
Local Government	**Shire of Capel**
Regulation	Regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA)
Panel Members	Ms S Rizk (Presiding Member) Ms E Rowe (Deputy Member) Ms R Aubrey (Deputy Member)
Heard	23 May 2019 Determined on the documents
Outcome	Public apology

DECISION AND REASONS FOR DECISION

Published 16 July 2019

Introduction

1. At its meeting on 5 March 2019, the Panel found that Councillor Michael Southwell ("Cr Southwell"), a council member of the Shire of Capel ("the Shire") committed one breach of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) ("the Regulations**"**) when he made comments in public regarding the payment of funds by the Shire towards legal costs.

2. On 4 April 2019 the Panel published its Finding and Reasons for Finding ("Findings") that Cr Southwell had breached regulation 7(1)(b). The Panel reviewed all the evidence presented to it and said:

"70. The Panel finds that it is more likely than not that the following particular comments by Cr Southwell were in breach of the Shire's Code of Conduct:

a. "It is flawed decision making."; and

b. It is an absurd situation for Council to…",

as the same showed clear disagreement with a decision made by Council as well as clearly implying that that decision was made wrongfully.

71. In addition, Cr Southwell's various comments stating that he considered that the relevant funds could be recovered was clearly in opposition to what the Council's official position was on the matter.

72. Cr Southwell argues that a comment that the decision was not made on the basis of all the facts is not critical or detrimental is not convincing in the circumstances.

…….

75. Cr Southwell asserts that he first referred the media to the President. However, the Panel would note that once the President had noted he had no comment, this did not give Cr Southwell authorisation to speak to the media instead.

76. In addition, although some of the comments made by Cr Southwelll can be classified as his opinion, he was critically commenting directly on a decision by Council in a manner which he should have known was not the authorised position of the Shire.

77. The Panel finds that it is more likely than not that in making the Article Comments Cr Southwell was in breach of the Shire's Media Contact Policy as:

a. upon unsuccessful referral to the President, he chose to speak anyway; and

b. he did not have regard to the resolutions that had been made by Council.

…….

82. Cr Southwell's assertion that he was simply keeping ratepayers and residents informed and striving for openness and accountability and that his comments were a genuine and truthful attempt to inform readers is not convincing.

83. It is hard to construe Cr Southwell's comments as anything but a direct criticism of the Council's decision regarding the matter and a denigration of the other Councillors who participated in that decision.

84. The decision made at September OCM affirmed the initial decision made at the June OCM. Cr Southwell's implication that the relevant Councillors made their decisions wrongfully in both instances is critical of both the councillors concerned as well as the Shire as a whole.

85. The Panel finds that it is more likely than not that the Article Comments were made in an attempt to bring into question the decision making ability of the councillors involved and the quality and accuracy of the information provided by the Shire.

86. Councillors have a duty to support the properly made decisions of the local Council and not to publicly denigrate such decisions. If there is some concern that any decision was not made properly, then there is a suitable internal procedure by which to address such concerns. Making critical public statements is simply not appropriate."

Jurisdiction

3. The Panel convened on 23 May 2019 to consider how it should deal with the Minor Breach. The Panel accepted the advice of the Department of Local Government, Sport and Cultural Industries that on this date there was no available information to indicate that Cr Southwell had ceased to be or was disqualified from being a councillor.

Possible Sanctions

4. Section 5.110(6) of the *Local Government Act 1995* (WA) ("the Act") provides that the Panel is to deal with a minor breach by:

   (a) *dismissing the complaint;*

   (b) *ordering that —*

   (i) the person against whom the complaint was made be publicly censured as specified in the order;

   (ii) the person against whom the complaint was made apologise publicly as specified in the order; or

   (iii) the person against whom the complaint was made undertake training as specified in the order;

   or

   (c) *ordering 2 or more of the sanctions described in paragraph (b)*.

5. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach. The Panel may dismiss a complaint under section 5.110(6)(a), not to reverse the Panel's finding of a breach but to indicate that in all the circumstances the councillor should not be penalised and the breach should not be recorded against the councillor's name.

Councillor Southwell's Submissions

6. If the Panel finds that a councillor has committed a minor breach, it must give the councillor an opportunity to make submissions to the Panel about how it should deal with the breach under section 5.110(6).[1]

[1] *Local Government Act 1995* (WA), s 5.110(5).

7. In a letter dated 4 April 2019, the Department notified Cr Southwell of the Panel's findings, providing him with a copy of its Findings published on 4 April 2019 and inviting him to make submissions on how the Panel should deal with the breach under section 5.110(6).

8. In an emailed letter dated 15 April 2019, the Panel received submissions from Cr Southwell stating that the Finding was unfair and asking that the Complaint be dismissed on the following basis:

    a. The Complaint was defective because it was an "*omnibus complaint*" and each grievance should be the subject of a single complaint that can be fairly argued and judged on its own merits.

    b. There is a lack of natural justice and procedural fairness in putting aside his objections and hearing all the complaints together, as each could have "*infected*" and prejudiced the fair hearing of another.

    c. He does not believe that an ordinary, reasonable person would consider that he did not meet the standards of conduct expected of a councillor. On the contrary, he would expect an ordinary resident or ratepayer to be grateful that a councillor was prepared to be honest and forthright and help bring matters of considerable public interest to light.

    d. As he has already faced penalties for other breaches and has not repeated the behaviours complained of since those findings, he submits there is no beneficial purpose to be served by imposing an additional penalty in this case.

Panel's consideration

9. The Panel found that Cr Southwell committed one breach of regulation 7(1)(b) that related to his conduct when he made comments in public regarding the payment of funds by the Shire towards legal costs. The Panel found that Cr Southwell did not breach regulation 4 and regulation 6 in relation to the same conduct. Cr Southwell has previously been found to have committed nine minor breaches.

10. The Panel has considered Cr Southwell's submissions as to how the Complaint should be dealt with. Cr Southwell shows no remorse for his actions and he does not apologise. Rather he trivialises the matter and continues to justify his conduct as being both reasonable and commendable. Cr Southwell also takes the opportunity when responding to criticise the decision and processes of the Panel.

11. The Panel found that Cr Southwell's comments undermined Council's decision and the processes of local government and showed a lack of respect for his fellow councillors. Cr Southwell chose to make those comments publicly and they were ultimately published subsequently in articles appearing online and in a local newspaper.

12. The Panel does not consider that dismissal of the Complaint is appropriate because this would indicate that the breach is so minor that no penalty is warranted.

13. Given Cr Southwell's clear disregard for the Complaint and the Panel's Finding, the Panel does not consider that ordering Cr Southwell to undergo further training is appropriate. Furthermore, Cr Southwell has previously been ordered by the Panel to undergo training for previous breaches, but the repetitive nature of his offending conduct strongly suggests to the Panel that a further order for training would not serve any useful purpose.

14. The options left for the Panel to consider are to order the publication of a Notice of Public Censure or to order Cr Southwell to make a Public Apology (or both).

15. When the Panel makes an order that a Notice of Public Censure be published, that Notice is published by the local government's CEO, at the expense of the local government, and such expense is significant where the Notice is to be published in a newspaper or newspapers.

16. In the present case, on the evidence available to the Panel, the Panel does not consider that it should order a public censure.

17. Cr Southwell's comments were published publicly online and to the community in the local newspaper. In the circumstances, a public apology is appropriate as it reflects the impact of Cr Southwell's statements on Council and the Shire and may go some way to repairing the damage caused by his conduct. An apology in public is also appropriate when a councillor's conduct does not meet the standards other councillors seek to uphold.

18. The Panel considers a public apology to those who suffered the damage, Council and the Shire, is the appropriate penalty.

Panel's decision

19. Having regard to the Findings, the matters set out herein, and the general interests of local government in Western Australia, the Panel's decision on how the Minor Breach is to be dealt with under s5.110(6) of the Act, is that pursuant to subsection (b)(ii) of that section, Cr Southwell is ordered to publicly apologise to Council and the Shire.

Sarah Rizk (Presiding Deputy Member)

Elanor Rowe (Deputy Member)

Rebecca Aubrey (Deputy Member)

ATTACHMENT

Complaint Number	SP 2018-100
Legislation	*Local Government Act 1995*
Complainant	**Councillor Jennifer Scott**
Respondent	**Councillor Michael Southwell**
Local Government	**Shire of Capel**
Regulation	Regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007*
Panel Members	Ms S Rizk (Presiding Member) Ms E Rowe (Deputy Member) Ms R Aubrey (Deputy Member)
Heard	23 May 2019 Determined on the documents
Outcome	Public apology

ORDER FOR PUBLIC APOLOGY

Published 16 July 2019

THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor Michael Southwell ("Cr Southwell"), a Councillor for the Shire of Capel ("the Shire"), publicly apologise to Council and the Shire as specified in paragraph 2 below.

2. At the Shire's first ordinary council meeting Cr Southwell attends after the expiration of 28 days from the date of service of this Order on him, Cr Southwell shall:

   (a) ask the presiding person for his or her permission to address the meeting to make a public apology to Council and the Shire;

   (b) make the apology immediately after Public Question Time or during the Announcements part of the meeting or at any other time when the meeting is open to the public, as the presiding person thinks fit;

   (c) address the Council as follows, without saying any introductory words before the address, and without making any comments or statement after the address:

> "I advise this meeting that:
>
> (i) A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened a provision of the *Local Government (Rules of Conduct) Regulations 2007* when I made comments in public regarding the payment of funds by the Shire towards legal costs that were subsequently published in the media in September and October 2018.
>
> (ii) The Panel found that by behaving in this manner I made improper use of my office as Councillor with the intention of damaging Council and the Shire, thereby committing one breach of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007.*
>
> (iii) I accept that I should not have acted in such a manner towards Council and the Shire, and I apologise to the parties concerned for having done so."

3. If Cr Southwell fails or is unable to comply with the requirements of paragraph 2 above, he shall cause the following notice of public apology to be published in no less than 10 point print, as a one-column or two-column display advertisement in the first 10 pages of the Bunbury Herald newspaper.

> **PUBLIC APOLOGY BY CR MICHAEL SOUTHWELL**
>
> A formal complaint was made to the Local Government Standards Panel alleging that I contravened a provision of the *Local Government (Rules of Conduct) Regulations 2007* when I made comments in public regarding the payment of funds by the Shire of Capel ("Shire") towards legal costs that were subsequently published in the media in September and October 2018.
>
> The Panel found:

(1) I committed one breach of regulation 7(1)(b) of the Rules of Conduct Regulations when I made comments in public regarding the payment of funds by the Shire towards legal costs.

(2) By behaving in this way to Council and the Shire, I failed to meet the standards of conduct expected of a councillor

I apologise to Council and the Shire for acting in such a manner.

Sarah Rizk (Presiding Deputy Member)

Elanor Rowe (Deputy Member)

Rebecca Aubrey (Deputy Member)

Date of Order – 16 July 2019

NOTICE TO THE PARTIES TO THE COMPLAINT

RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (the Panel) advises:

(1) Under section 5.125 of the *Local Government Act 1995* the person making a complaint and the person complained about each have the right to apply to the State Administrative Tribunal (the SAT) for a review of the Panel's decision in this matter.

In this context, the term "decision" means a decision to dismiss the complaint or to make an order.

(2) By rule 9(a) of the *State Administrative Tribunal Rules 2004*, subject to those rules an application to the SAT under its review jurisdiction must be made within 28 days of the day on which the Panel (as the decision-maker) gives a notice [see the Note below] under the *State Administrative Tribunal Act 2004* (*SAT Act*), section 20(1).

(3) The Panel's *Breach Findings and these Findings and Reasons for Finding – Sanctions,* constitute the Panel's notice (i.e. the decision-maker's notice) given under the *SAT Act,* section 20(1).

Note:

(1) This document may be given to a person in any of the ways provided for by sections 75 and 76 of the *Interpretation Act 1984.* [see s. 9.50 of the *Local Government Act 1995*]

(2) Subsections 75(1) and (2) of the *Interpretation Act 1984* read:

> *"(1) Where a written law authorises or requires a document to be served by post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used,* ***service shall be deemed*** *to be effected by properly addressing and posting (by pre-paid post) the document as a letter to the last known address of the person to be served, and,* ***unless the contrary is proved, to have been effected at the time when the letter would have been delivered in the ordinary course of post.*** [Bold emphases added]
>
> *(2) Where a written law authorises or requires a document to be served by registered post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, then, if the document is eligible and acceptable for transmission as certified mail, the service of the document may be effected either by registered post or by certified mail."*

(3) Section 76 of the *Interpretation Act 1984* reads:

> *"Where a written law authorises or requires a document to be served, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, without directing it to be served in a particular manner, service of that document may be effected on the person to be served —*
>
> *(a) by delivering the document to him personally; or*
>
> *(b) by post in accordance with section 75(1); or*
>
> *(c) by leaving it for him at his usual or last known place of abode, or if he is a principal of a business, at his usual or last known place of business; or*
>
> *(d) in the case of a corporation or of an association of persons (whether incorporated or not), by delivering or leaving the document or posting it as a letter, addressed in each case to the corporation or association, at its principal place of business or principal office in the State."*