



Local Government Standards Panel

Complaint Number	SP 4 of 2018 [DLGSC 20180205]
Legislation	<i>Local Government Act 1995</i>
Complainant	Councillor Dorothy Newton
Respondent	Councillor Paul Miles
Local Government	City of Wanneroo
Regulation	Regulations 6(2)(a) and 6(2)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Ms M Strauss (Presiding Member) Mr M Beecroft (Member) Ms R Aubrey (Member)
Heard	30 April 2018 Determined on the documents
Outcome	One breach of regulation 6(2)(b)

FINDINGS AND REASONS FOR FINDING

Published **24 MAY 2018**

DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents.



Summary of the Panel's decision

1. This complaint (the Complaint) concerns item CR04-11/17 "Wanneroo Town Centre – Road Construction" (the Item), which came before Council at an ordinary council meeting on 14 November 2017 (the OCM). Part of the OCM was closed to members of the public (the Closed OCM).
2. Under the provisions of the *Local Government Act 1995 (WA)* (the Act) the Panel found that Councillor Paul Miles, a Councillor for the City of Wanneroo (the City), breached regulation 6(2)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) when he disclosed information acquired during the Closed OCM in a Facebook post on 15 November 2017.

Jurisdiction

3. The Act provides for the circumstances in which a council member commits a minor breach.¹
4. On 18 January 2018 the Panel received a Complaint of Minor Breach Form dated 15 November 2017 signed by Councillor Dorothy Newton, another City Councillor, alleging Cr Miles breached regulation 6 of the Regulations by disclosing confidential information in the Post which he obtained at the Closed OCM.
5. Cr Newton provided a copy of Cr Miles' statement on Facebook posted at 2.15pm on 15 November 2017 with her Complaint Form (the Post).
6. On 29 January 2018 the Department of Local Government, Sport and Cultural Industries (the Department), on behalf of the Panel, asked the City's Complaints Officer to provide a copy of the confidential minutes of Council's consideration of the Item at the Closed OCM.² On 1 February 2018 the Complaints Officer provided a copy of the confidential minutes relating to the Item (the Confidential Minutes).
7. The Panel convened on 30 April 2018 to consider the Complaint. The Panel:
 - accepted the Department's advice, based on information from the Western Australian Electoral Commission, that Cr Miles was elected as a City Councillor on 21 October 2017, was a councillor at the time of the alleged breach and was still a councillor when the Panel met on 30 April 2018;
 - was satisfied the Complaint was made within two years after the alleged breach occurred³ and that the City's Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of minor breaches⁴;
 - noted that by letter dated 2 February 2018 the Department sent Cr Miles a copy of the Complaint Form, an extract from the published minutes of the OCM referring to the Item (the Published Minutes) and a copy of the Confidential Minutes, inviting him to respond to the Complaint;

¹ Section 5.105 of the Act.

² Under section 5.110(3) of the Act the Panel may request the complaints officer to provide further information.

³ Section 5.107(4) of the Act

⁴ Sections 5.107, 5.108, 5.109 of the Act.



- noted that Cr Miles responded to the Complaint in an email to the Department on 19 February 2018, attaching a statement denying he committed the alleged breach (the Response);
- was satisfied the Department had provided procedural fairness to Cr Miles;
and
- found it had jurisdiction to consider the Complaint.

Panel's role

8. The Panel is not an investigative body.⁵ It makes decisions about complaints of minor breaches solely upon the evidence presented to it and, when relevant, information published on the local government's website, such as minutes of council meetings, policies and codes of conduct. For the Panel to find that a councillor committed the alleged breach it must be satisfied on the evidence before it that it is more likely than not that the alleged breach occurred.⁶ This is commonly referred to as "the required standard of proof".

9. The Panel cannot rely on an alleged fact unless it is satisfied that it is more likely than not that the alleged fact is true.⁷ The Panel cannot merely choose between two or more conflicting but equally possible versions of events.⁸ To accept one of the competing versions of events it must be satisfied that one is more likely to be the correct version.

10. For a finding that a councillor has breached a particular regulation the Panel must be satisfied to the required standard of proof that every element of that regulation has been established.

11. Where the complainant submits the Panel should come to a particular conclusion, such as that the evidence establishes an element of the regulation, the Panel must be satisfied, after weighing up all the evidence and applying the relevant legal principles, that its conclusion is the one best supported by the evidence.⁹

The Complaint

12. In her Complaint Form Cr Newton submits:

- The Item came before Councillors at a Council briefing session on 7 November 2017, although it was then named "Confidential Item ... Wanneroo Town Centre Road Construction".
- Council considered the Item as a confidential item during the Closed OCM and, based on the officer's report to Council presented at the Closed OCM, approved the City negotiating and entering a legal agreement.
- One or two days after the Closed OCM a resident asked Cr Newton about the reopening of a particular road (the Road). The resident told Cr Newton that Cr

⁵ *Re and Local Government Standards Panel* [2015] WASAC 51, paragraph 24.

⁶ Section 5.106 of the Act.

⁷ The effect of section 5.106 of the Act.

⁸ *Bradshaw v McEwens Pty Ltd* (1951) 217 ALR 1, paragraph 5.

⁹ The effect of section 5.106 of the Act.



Miles had posted information about the reopening of the Road on his Facebook page.

- On checking Cr Miles' Facebook page she saw that on 15 November 2017 Cr Miles had posted information about the Road taken from Council's confidential discussions about the Item.

The Response

13. Cr Miles does not deny he made the Post.

14. He says in his Response:

- He made sure that he did not say or suggest in the Post that Council was proposing to spend money on the Wanneroo town centre road construction project referred to in the Item (the Project) or that the administration was going to enter negotiations.
- He could not see how his Post breached confidentiality because he had not in any way referred to the Project or the Road as an item of business.
- He is a former tenant of the Wanneroo town centre site and is friendly with many Wanneroo town centre tenants; plans for the site are often discussed; as a ward Councillor his view was that the public should never have been prevented from accessing the Road; and Council had now agreed with him.
- He made sure he was not speaking for Council or the Mayor; he was just providing information to the central ward ratepayers who knew him and had always agreed with him.

Background

15. Under section 5.23(2)(c) of the Act council may close any part of a meeting to members of the public when council is dealing with:

“a contract entered into, or which may be entered into, by the local government and which relates to a matter to be discussed at the meeting”.

16. The complete text of the Published Minutes referring to the Item is:

“CR04-11/17 Wanneroo Town Centre - Road Construction

File Ref: DA2017/411 – 17/357030
Responsible Officer: Director Planning and Sustainability
Disclosure of Interest: Nil

This report is to be dealt with in confidential session, under the terms of the Local Government Act 1995 Section 5.23(2), as follows:

(c) a contract entered into, or which may be entered into, by the local government and which relates to a matter to be discussed at the meeting

Moved Cr Coetzee, Seconded Cr Newton



That Council:-

1. APPROVE the City negotiating and entering into a Legal Agreement (based on the terms set out in this report);
2. AUTHORISE the Chief Executive Officer to sign the final Legal Agreement and all documentation required to give effect to the terms of the Legal Agreement; and
3. APPROVE BY ABSOLUTE MAJORITY the unbudgeted expenditure of \$520,000, to be funded from the Strategic Projects/Initiatives Reserve, pursuant to Section 6.8(1)(b) of the Local Government Act 1995.
4. NOTES that Administration will consider various funding options for any future expenditure requirements.

CARRIED UNANIMOUSLY

Moved Cr Hayden, Seconded Cr Newton
That the meeting be reopened to the public.

CARRIED UNANIMOUSLY

The meeting was reopened to the public and all recordings recommenced at 8.18pm.

Mayor Roberts read aloud the resolutions carried on Items ... and CR04-11/17.”

17. The Post reads:

“UPDATE (the Road) Reopening

Something I have (talked) about for years Council has agreed to reopen (the Road) as part of the redevelopment of Wanneroo Central.”

18. The Panel is always careful when referring to confidential minutes in its Findings and Reasons for Findings, to preserve confidentiality to the greatest extent possible. It is sufficient to say here that the Confidential Minutes include a detailed officer’s report (the Officer’s Report) referring to:

- the need to deal with the Item behind closed doors, in accordance with section 5.23(2) of the Act;
- the background relevant to the Item;
- a discussion of the issues and options relating to the Project; and
- a recommended motion.



Regulation 6

19. In her Complaint Form Cr Newton does not specify whether she alleges a breach of regulation 6(2)(a) or 6(2)(b) or both. The Panel therefore addresses both regulations.

20. Regulation 6(2)(a) applies to disclosure of information in a “confidential document”, as defined in regulation 6(1). A “confidential document” need not be a document that is produced or discussed at a council meeting. Regulation 6(2)(b) applies to disclosure of information obtained at a “closed meeting”, as defined in regulation 6(1). A councillor does not breach regulation 6(2)(a) or 6(2)(b) if any of the exemptions in regulation 6(3) applies.

21. Regulation 6 provides:

“6. Use of information

(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.”

Alleged breach of regulation 6(2)(a)

Whether Cr Miles was a councillor at the time of the alleged

22. Clearly Cr Miles was a councillor at the time of the alleged breach, so this element is established.



Whether Cr Miles disclosed information derived from a confidential document

23. The Post referred to a Council decision about the Road. There is no reference to any particular document.

24. The Panel has no reason to doubt that the Published Minutes and Confidential Minutes accurately record what happened at the open part of the OCM and the Closed OCM, and what documents were before Council.

25. The Published Minutes do not contain an officer's report or any other document relating to the Road, or record any discussions about the Item. The Published Minutes indicate that Council moved behind closed doors as soon as the Item came to be considered. There is no evidence that any document was presented to or discussed by Council at the open part of the OCM.

26. The only document included in the Confidential Minutes is the Officer's Report, which refers to work that might involve changing public access to the Road. The Officer's Report does not say that Council had previously made a decision about public access to the Road.

27. Even if the information in the Post was taken from the Officer's Report, the Officer's Report is not a "confidential document" as it is not marked by the CEO as confidential.¹⁰

28. There is no other document included or referred to in the Confidential Minutes that meets the definition of a "confidential document" in regulation 6(1).

29. Cr Newton has not suggested that Cr Miles took the information in the Post from any document other than the Officer's Report, and there is no evidence that he did so.

30. As there is no evidence that Cr Miles derived the information in the Post from a "confidential document" Cr Miles did not breach regulation 6(2)(a).

Alleged breach of regulation 6(2)(b)

Whether Cr Miles was a councillor at the time of the alleged breach

31. Clearly Cr Miles was a councillor at the time of the alleged breach, so this element is established.

Whether Cr Miles disclosed information acquired at a closed meeting

32. A "closed meeting" is a council or committee meeting that has been formally closed to the public under section 5.23(2) of the Act.¹¹ At the open part of the OCM Council resolved, under section 5.23(2) of the Act, to close the meeting to members of the public while it considered the Item.¹² Pursuant to that resolution, Council moved into the Closed OCM to consider the Item. The Closed OCM was a "closed meeting" within the meaning of that term in regulation 6(2)(b).

33. The Published Minutes indicate that at the Closed OCM Council approved the motion referred to in paragraph 16 above (the Motion).

¹⁰ See the definition of "confidential document" in regulation 6(1).

¹¹ See the definition in regulation 6(1).

¹² Published Minutes, page 154.



34. The Panel is satisfied to the required standard that at the Closed OCM Council discussed the Officer's Report and potential road works affecting the Road before passing the Motion. There is no evidence before the Panel to indicate that Cr Miles took the information in the Post from anywhere other than the Closed OCM.

35. Considering the contents of the Officer's Report and the Motion together, the Panel finds that it is more likely than not that at the Closed OCM, after considering the Officer's Report and any other issues affecting the Road, Council passed the Motion because it was in favour of reopening the Road, albeit subject to negotiations to be undertaken by the administration.

36. The Panel is satisfied to the required standard that Cr Miles acquired, from Council's discussions at the Closed OCM and its vote on the Motion, that Council was in favour of reopening the Road. This was, in effect, what Cr Miles disclosed in the Post.

37. This Panel finds that in the Post Cr Miles disclosed information he acquired at a closed meeting.

The exemptions

38. The Panel's findings in paragraphs 31 and 37 above mean that Cr Miles breached regulation 6(2)(b) unless any of the exemptions apply.

39. The second phrase in regulation 6(2)(b) provides an exemption for a councillor who discloses information obtained at a closed meeting if the information is derived from a "non-confidential document". Although the Officer's Report is a "non-confidential document"¹³ the information in the Post referred to a Council decision, not the contents of the Officer's Report. Therefore, this exemption does not apply.

40. In relation to the exemptions in regulation 6(3), there is no evidence that could possibly establish that any of these apply.

Cr Miles' submissions

41. Before making its findings referred to above the Panel considered Cr Miles' submissions in his Response.

42. The Panel's view is that:

- It is not relevant that Cr Miles did not expressly link the information in his Post to a specific item of business. Based on the matters discussed above the Panel is satisfied to the required standard that Cr Miles was referring to what happened the day before at the Closed OCM. There is no evidence before the Panel to indicate that Cr Miles took the information in the Post from anywhere other than discussions at the Closed OCM.
- The submission that he didn't suggest Council was proposing to spend money on the Project or that the administration was going to enter negotiations is not relevant. The Panel must consider what information is disclosed and its source.

¹³ Because it was not a "confidential document". See the definition of "non-confidential document" in regulation 6(1).



- It is not relevant that Cr Miles thought he was doing the right thing by his constituents and tenants in the area, or that Council's view on the matter now aligned with what he had been advocating for some time. Intention is not an element of regulation 6. Regulation 6 imposes a strict responsibility to maintain confidentiality concerning matters discussed at closed meetings, unless any of the exemptions discussed above apply, even if the councillor intended to do what he or she thought was right.

Panel's decision

43. Cr Miles breached regulation 6(2)(b) and therefore committed one minor breach.



Merranie Strauss (Member)



Mark Beecroft (Deputy Member)



Rebecca Aubrey (Deputy Member)

Date of Reasons for Decision - 24 May 2018