

LOCAL GOVERNMENT STANDARDS PANEL

Established under section 5.122 of the *Local Government Act 1995* (WA)

Complaint Number	SP 29 of 2016 DLG 20160139
Legislation	<i>Local Government Act 1995</i> (WA)
Complainant	Deputy Lord Mayor James Limnios
Subject of complaint	Cr Judy McEvoy
Local Government	City of Perth
Regulation	Regulations 6, 7(1)(b) and 8 and 9 of the <i>Local Government (Rules of Conduct) Regulations 2007</i> (WA)
Panel Members	Mr B Jolly (Presiding Member) Councillor P Kelly (Member) Ms R Yates (Member)
Heard	31 October 2016 (Determined on the documents)
Outcome	Breach of regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i> (WA)

FINDINGS AND REASONS FOR FINDING

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1. Summary of the Panel's Decision

1.1 The Panel found that Cr Judy McEvoy:

- (a) committed a breach of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) (**Regulations**) by seconding a notice of motion as a matter of urgent business as set out in paragraph 5.1 below;
- (b) did not commit a breach of regulations 6, 8 and 9 of the *Regulations*.

2. Jurisdiction

- 2.1 On 29 July 2016 the Panel received a complaint of minor breach dated 21 July 2016 (**Complaint**) from the Complaints Officer of the City of Perth (**City**).¹ In the Complaint, Deputy Lord Mayor James Linnios (**Complainant**) alleges that Cr McEvoy contravened regulations 6, 7(1)(b), 8 and 9 of the *Regulations* in relation to conduct that occurred at the City's Ordinary Council Meeting on 17 May 2016 (**Meeting**).
- 2.2 The Complaint was made within two years after the alleged breaches of regulations 6, 7(1)(b), 8 and 9 of the *Regulations* that were set out in the Complaint were alleged to have occurred.
- 2.3 Cr McEvoy was elected as a council member in May 2001 and has remained an elected member of the City since that time.
- 2.4 A breach of regulation 6, 7(1)(b), 8 or 9 of the *Regulations* is a "minor breach"² and the Panel is required to make a finding as to whether each breach occurred or to send the Complaint to the Chief Executive Officer of the Department of Local Government and Communities (**Department**) under section 5.111 of the *Local Government Act 1995* (WA) (**LG Act**).
- 2.5 The Panel finds that the Complaint was made and has been dealt with in accordance with the requirements of Division 9 of the *LG Act*, that the Complaint is not one that should be dealt with under section 5.111 and that the Panel has jurisdiction to determine whether the breaches occurred.

3. The Panel's Role

- 3.1 The Panel observes that its members are required to have regard to the general interests of local government in Western Australia³; it is not an investigative body and determines complaints solely upon the evidence presented to it; a finding of a minor breach may affect an individual both personally and professionally and that in order for the Panel to make a finding that a minor breach has been committed, the finding is to be "based on evidence from which it may be concluded that it is more likely that the breach occurred than that it did not occur"⁴ (**Required Standard**).
- 3.2 When assessing whether it is satisfied to the required standard:
 - (a) the Panel considers, amongst other things, the seriousness of the allegations made in the Complaint, the likelihood of an

¹ Document 1 of Attachment "A".

² *LG Act*, s 5.104 and s 5.105(1).

³ Clause 8(6) of Schedule 5.1 of the *LG Act*.

⁴ *LG Act*, s 5.106.

occurrence of the given description and the gravity of the consequences flowing from a particular finding; and

- (b) where direct proof is not available, the Panel considers that it must be satisfied that the circumstances appearing in evidence give rise to a reasonable and definite inference of a breach, not just to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture.

4. Documents

- 4.1 The documents considered by the Panel are set out in Attachment “A” (**Documents**).

5. The Complaint

- 5.1 The Complaint alleges that at the Meeting, Cr McEvoy seconded a motion moved by Cr Davidson without any notice as a matter of urgent business that the Council declares a vote of no confidence in the Complainant (**Motion**). The Motion was supported by a document tabled with the Motion, being a list of events to which an invitation was extended to the City and the name of the council member attending (**Tabled Document**)⁵. The Complainant alleges that in committing that conduct Cr McEvoy made improper use of her office as a council member to cause detriment to his reputation, in contravention of all or any of regulation 6, 7(1)(b), 8 or 9 of the *Regulations* (**Allegation**).

6. The Response

- 6.1 By letter dated 16 August 2016, the Department wrote to Cr McEvoy to provide her with the Complainant’s allegations and an opportunity to provide comments and any information she desires in relation to the matter.⁶
- 6.2 On 30 August 2016, Cr McEvoy provided her response to the Panel.⁷
- 6.3 In her response to the Panel, Cr McEvoy:
 - (a) denies having committed the minor breaches alleged in the Complaint;
 - (b) admits that she made a decision to put forward an urgent motion of no confidence in the Complainant;
 - (c) says that this arose in circumstances where:
 - (i) she had spoken to the Complainant prior to his election to the role of Deputy Lord Mayor about her reservations that he would be able to fulfil the role;
 - (ii) not long after the Complainant was elected to the role of the Deputy Lord Mayor on 22 October 2015 she noticed “*a high number of LM reps coming through our email system*”;
 - (iii) she was very concerned that “*many of these reps fell back to the regular Cr’s when the DLM is paid a much higher wage to attend these functions*” and that “[*w*]hile this did not form the basis of the decision to move the No

⁵ Document 4 of Attachment “A”.

⁶ Document 6 of Attachment “A”.

⁷ Document 7 of Attachment “A”.

Confidence Motion the Cr's discussed this fact and a decision was made to put forward an urgent motion of No Confidence in the DLM for non-peformance of reps."

- (d) says further that *"we queried verification of how many reps had been passed up"*, a print out *"verified our thinking fully and hence the Motion as you saw was passed"*.

7. Findings of fact

7.1 Having reviewed the Documents, the Panel is satisfied, to the Required Standard, that:

- (a) During the week prior to the Meeting, the Chief Executive Officer of the City provided a memorandum of advice dated 13 May 2016 to the elected members of the City on notices of motion (**Memorandum of Advice**)⁸. The memorandum of advice included the following:

"Conduct at the Council Meeting:

- *An Elected Member may move a motion of urgent business. No preamble to the motion is allowed at this point;*
- *The Presiding Member will then determine to allow or disallow the motion based on two tests, being;*
 - *the nature of the business is such that the business cannot await inclusion in the agenda for the next meeting; or*
 - *the delay in referring the business to the next meeting could have adverse legal or financial implications for the City.*
 - *A seconder to the motion will be sought. If no seconder is determined then the motion lapses. If the motion is seconded then it becomes a Primary Motion and is dealt with like all standard motions of Council (i.e. each Elected Member has the right to speak once and the Mover closes the debate);*
- *Each motion received will need to go through the same process; and*
- *Importantly each motion considered under Urgent Business must be approved by Absolute Majority Decision, meaning a minimum of five Elected Members will need to vote in favour of the motion regardless of the number of Elected Members not present on the night.*

In relation to the above there has been a lot of media speculation of motions of no confidence being submitted. I wish to remind Elected Members that such a motion has no binding effect or obligations placed upon the Elected Member. The positions of Lord Mayor, Deputy Lord Mayor and Councillor mean you have been elected for a fixed term of office and there are no statutory powers to reduce that term based on a motion of no confidence.

⁸ Document 8 of Attachment "A".

Finally I would also like to take the opportunity to state that whilst it is your right to submit a notice of motion, I would encourage you where possible to submit your requests through the Committee process of General Business in the first instance. General Business allows for greater collaboration amongst Elected Members and Officers, whilst allowing the opportunity to provide input on matters prior to Council's determination of a matter."

- (b) At the Meeting, Cr Davidson moved the Motion as an item of urgent business, with the transcript of the Meeting⁹ recording the following text for the motion:

"So, concerning the Deputy Lord Mayor position, that the Council declares a vote of no confidence in the Deputy Lord Mayor and the reasons being that the duties of the Deputy Lord Mayor have not been undertaken to full capacity as out of ninety-nine delegations on behalf of the Lord Mayor only thirty four have been undertaken with the others being taken up by Elected Members, and we did hear today that in fact, you know, such a position is there to fulfil role and duties".
- (c) Cr McEvoy seconded the Motion when the Lord Mayor called for a seconder;
- (d) Clause 4.14 of the City's *Standing Orders Local Law 2009 (Standing Order 4.14)*¹⁰ provides that:

"(1) A member, at an ordinary meeting of the Council, may move a motion involving business that is not included in the agenda for that meeting if the Presiding Member has first consented to the business being raised because the Presiding Member considers that either –

 - (a) the nature of the business is such that the business cannot await inclusion in the agenda for the next meeting; or*
 - (b) the delay in referring the business to the next meeting could have adverse legal or financial implications for the City."*
- (e) The Lord Mayor, as the Presiding Member at the Meeting under section 5.6 of the *LG Act* consented to the business in the Motion being raised;
- (f) Cr Davidson provided the Tabled Document at the Meeting in support of the Motion and the Tabled Document was considered by the elected members at the Meeting with the minutes of the Meeting¹¹ recording that the Lord Mayor allowed a three minute reading time for them to do so;
- (g) The Motion was put to the Meeting and was carried by a majority of the elected members;
- (h) The Meeting was open to the public at the time the Motion was put and considered.

⁹ Document 3 of Attachment "A".

¹⁰ Document 5 of Attachment "A".

¹¹ Document 2 of Attachment "A".

8. Alleged contravention of regulation 6

- 8.1 The Complaint does not specify whether it is alleged that the conduct breached paragraph (2)(a) or (2)(b) of regulation 6.
- 8.2 Regulation 6(2) provides that a person who is a council member must not disclose information that:
- (a) 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.
- 8.3 The term “confidential document” is defined in regulation 6(1) for the purpose of regulation 6 as meaning “a document marked by the [local government’s] CEO to clearly show that the information in the document is not to be disclosed”. If the document does not bear this marking, the fact that there may be other indications to the confidentiality of the information contained in the document is not relevant.¹²
- 8.4 In light of regulations 6(1) and (3), the essential elements or issues of a breach of regulation 6(2) are that it is more likely than not that:
- (a) a person who is currently a council member;
 - (b) disclosed information to someone who at the time was not also a council member;
 - (c) that information was information that the council member:
 - (i) derived from a document marked by the local government’s CEO, or at his or her direction, to clearly show that the information in the document is not to be disclosed; or
 - (ii) acquired at a closed meeting other than information derived from a non-confidential document;
 - (d) the disclosure was not of information that was public knowledge at the time of the member’s disclosure, and did not occur in any of the ways identified in regulation 6(3).
- 8.5 On the information before the Panel, it is not satisfied to the Required Standard that the third element set out in paragraph (c) above is established because:
- (a) The Tabled Document was not marked by the CEO, or at his direction, to clearly show that the information in the document is not to be disclosed; and
 - (b) There is no evidence to suggest that Cr McEvoy acquired the information in the Tabled Document at a closed meeting.
- 8.6 It follows that the Panel finds that Cr McEvoy did not commit a breach of regulation 6 of the *Regulations* as alleged in the Complaint.

¹² *Corr and Local Government Standards Panel* [2012] WASAT 14 (31 January 2012), [57] Sharp J.

9. Alleged contravention of regulation 7(1)(b)

9.1 Where, as here, the alleged conduct is not conduct that contravenes s 5.93 of the *LG Act* or s 83 of *The Criminal Code*, the following elements must be established, to the Required Standard, before a contravention of regulation 7(1)(b) of the *Regulations* is established:

- (a) first, it must be established that the person the subject of the Complaint engaged in the alleged conduct;
- (b) secondly, it must be established that the person the subject of the Complaint was a council member both at the time of the conduct and the time when the Panel makes its determination;
- (c) thirdly, it must be established that by engaging in the conduct, the person the subject of the complaint made use of his or her office as a council member (in the sense that he or she acted in their capacity as a councillor, rather than in some other capacity);
- (d) fourthly, that when viewed objectively¹³, such use was an improper use of the person's office as council member in that it:
 - (i) involved a breach of the standards of conduct that would be expected of a person in the position of a councillor by reasonable persons with knowledge of the duties, powers and authority of the councillor and the circumstances of the case (by for example, an abuse of power or the doing of an act which the councillor knows or ought to have known that he or she had no authority to do);¹⁴ and
 - (ii) was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty;¹⁵ and
- (e) fifthly, that the person engaged in the conduct in the belief that detriment would be suffered by the local government or another person.

9.2 The Panel is satisfied to the Required Standard that the first, second and third elements have been established, in that:

- (a) On 17 May 2016 Cr McEvoy was a Council member;
- (b) That at Meeting Cr McEvoy seconded the Motion being put as an item of urgent business;
- (c) That in engaging in this conduct she used her office as a Council member.

9.3 The Panel is satisfied to the Required Standard that the fourth element has been established, in that:

¹³ That is, when viewed by a reasonable person (i.e. a hypothetical person with an ordinary degree of reason, prudence, care, self-control, foresight and intelligence, who knows the relevant facts).

¹⁴ *Treby and Local Government Standards Panel* [2010] WASAT 81 (11 June 2010), [26] – [33]

¹⁵ *Hipkins and Local Government Standards Panel* [2014] WASAT 48 (22 April 2014), [9].

- (a) The Panel notes that in *Frazer v Cervini* Gray J said: “A vote of no confidence ... is normally expressed in relation to an elected person and indicates the desire of the meeting concerned to be rid of that person from an elected office”;¹⁶
- (b) A motion of “no confidence” in the context of the *LG Act* is meaningless in that if such a motion is passed by the council:
 - (i) there is no lawful means or process available under the *LG Act* or otherwise to have the elected person under consideration removed from his or her office; and
 - (ii) the passed motion would simply express a meaningless opinion, as the council is not being asked to “do” or “not do” anything;
- (c) The Motion was introduced by Cr Davidson when the Meeting was open to the public as an item of urgent business under Standing Order 4.14, as a result of which no notice of the Motion was given prior to the Meeting;
- (d) If the Motion had not been seconded, it would not have been open to debate under clause 9.4 of the *Standing Orders Local Law 2009*;
- (e) Further, the general principles to guide the behaviour of council members are set out in regulation 3 of the *Regulations*. These principles provide an indication of the standards that can be reasonably be expected of councillors.¹⁷ Under these principles, council members should treat others with respect and fairness;¹⁸
- (f) It follows that the conduct of Cr McEvoy in seconding the Motion as an item of urgent business at the Meeting, is an improper use of the office of her office as a council member.

9.4 The Panel is also satisfied to the Required Standard that the fifth element has been established, in that:

- (a) Cr McEvoy has said that she made a decision prior to the Meeting to “put forward a urgent motion of No Confidence in the DLM for non-performance of reps”;¹⁹
- (b) In *Mullet v Nixon*, Forrest J described a vote of “no confidence” in circumstances where those voting had no power to remove the subject of the vote as a “public rebuke”;²⁰

¹⁶ (1992) 42 IR 263, 264.

¹⁷ *Treby and Local Government Standards Panel* [2010] WASAT 81 (11 June 2010), [91].

¹⁸ *Regulations*, reg 3(1)(g).

¹⁹ Document 7 of Attachment “A”.

²⁰ [2016] VSC 512 (31 August 2016), [27].

- (c) The nature of a “no confidence” motion is plainly capable of causing detriment to the person that is the subject of that motion, in the sense of diminishing his or her reputation or causing others to think of him less favourably;²¹
- (d) The Memorandum of Advice had been provided to the elected members of the City prior to the Meeting, which set out advice in similar terms to paragraph 9.3(b) above, the criteria for an urgent motion under Standing Order 4.14 and encouraging motions to be put through the committee process of general business;
- (e) On the evidence before it, the Panel is satisfied that the only reasonable inference which is open on all of the evidence before it is that in seconding the moving of the Motion as an item of urgent business at the Meeting, Cr McEvoy intended to cause detriment to the Complainant.

9.5 For these reasons the Panel finds that Cr McEvoy committed the breach of regulation 7(1)(b) of the *Regulations* which is the subject of the Allegation.

10. Alleged contravention of regulation 8

10.1 The following elements must be established to the Required Standard, before a contravention of regulation 8 of the *Regulations* is established:

- (a) First, it must be established that the person the subject of the Complaint directly or indirectly used the City’s resources;
- (b) Secondly, that the resources were used for the purpose of persuading electors to vote in a particular way at an election, referendum or other poll held under the *LG Act*, the *Electoral Act 1907* (WA) or the *Commonwealth Electoral Act 1918* (Cth) or any other purpose;
- (c) Thirdly, it must be established that such use was not authorised under the *LG Act* or by the council or the local government’s CEO.

10.2 The Panel is not satisfied on the evidence before it to the Required Standard that a resource of the City, being a “source of supply, support or aid”²² was used by Cr McEvoy in seconding the Motion. It follows that the Panel is not satisfied that the first and second elements are established.

10.3 The Panel finds that Cr McEvoy did not commit a breach of regulation 8 of the *Regulations*.

11. Alleged contravention of regulation 9

11.1 The following elements must be established to the Required Standard, before a contravention of regulation 9 of the *Regulations* is established:

²¹ See *Treby and Local Government Standards Panel* [2010] WASAT 81 (11 June 2010), [95], [106].

²² See *Western Australia v Ward* (2000) 99 FCR 316, [517] (Beaumont and von Doussa JJ).

- (a) a person who is currently a council member;
- (b) undertook a task (i.e. performed work that is or arises from a function of his or her local government's CEO pursuant to section 5.41 of the *LG Act*);
- (c) the task contributed to the administration of the local government (i.e. the work played a part in the achievement of a result in regard to the local government's CEO's function concerned);
- (d) the task or work was not performed by the person as a council member as part of the deliberations at a council or committee meeting; and
- (e) prior to the task work being commenced, the council or the CEO did not authorise the person to perform it.²³

11.2 The Complaint did not particularise the task that Cr McEvoy was alleged to have undertaken that contributed to the administration of the City and on the evidence before it, the Panel was not satisfied to the Required Standard that any such task had been undertaken.

11.3 It follows that the Panel finds that Cr McEvoy did not commit a breach of regulation 9 of the *Regulations* as alleged.



Brad Jolly (Presiding Member)



Paul Kelly (Member)



Rachel Yates (Deputy Member)

²³ See *Yates and Local Government Standards Panel* [2012] WASAT 59 (30 March 2012), [56] – [59].

Attachment "A"

Doc ID	Description
Document 1	Copy of complaint of Minor Breach dated 21 July 2016 made by Deputy Lord Mayor James Limnios
Document 2	Copy of extracted confirmed minutes relating to the subject motion
Document 3	Copy of transcript from the City of Perth Council Meeting held on 17 May 2016 relating to ensuing debate of the subject motion
Document 4	Copy of spreadsheet information tabled at the meeting held on 17 May 2016 by Cr Janet Davidson relating to the subject motion
Document 5	Copy of City of Perth Standing Orders Local Law 2009
Document 6	Copy of request for comments letter to Cr Judy McEvoy dated 16 August 2016
Document 7	Copy of Cr McEvoy's response to the allegations received on 30 August 2016
Document 8	Copy of memorandum of advice dated 13 May 2016 from the Chief Executive Officer of the City
Document 9	Statement of Facts