



Local Government Standards Panel

Complaint Number	SP 16 of 2018
Legislation	<i>Local Government Act 1995</i>
Complainant	Mr Gary Evershed
Respondent	Councillor Michael Smart
Local Government	Shire of Augusta- Margaret River
Regulation	Regulations 6(2)(a) and 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mrs Sheryl Siekierka (Presiding Member) Ms Elanor Rowe (Deputy Member) Ms Rebecca Aubrey (Member)
Heard	21 November 2018 Determined on the documents
Outcome	Public apology

SANCTION DECISION AND REASONS FOR DECISION

Delivered 14 December 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.



Introduction

1. On 21 August 2018 the Panel found that Cr Michael Smart (“Cr Smart”), a member of the Shire of Augusta-Margaret River (“Shire”), committed two breaches under the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) and regulation 6(2)(a) and 7(1)(b) when he publicly quoted from information derived from confidential documents.
2. On 25 September 2018 the Panel published its Finding and Reasons for Finding (“Findings”) that Cr Smart had breached regulations 6(2)(a) and 7(1)(b). The Panel reviewed all the evidence presented to it and said (extracts shown below):

“First Allegation of breach: Regulation 6

31. Based on the evidence presented, the Panel finds that Cr Smart did read and quoted from selected sections of the Confidential Documents and disclosed information from them at the Council Meeting; the information disclosed related to the position of the Working Party in relation to specific aspects of the Winter Diversion Trail project.
32. Cr Smart asserts that he paraphrased from the Confidential Documents and provides copies of two pages of the Confidential Documents with the sections he referred to in highlight. The Panel finds that regardless of whether Cr Smart read verbatim from the Confidential Documents as alleged by the Complainant, or paraphrased from them as Cr Smart claims, Cr Smart breached the confidentiality of the documents.
33. The Panel does not find validity in Cr Smart’s assertions, in justifying his actions, that he was trying to make the people aware of the genuine wishes of the Working Party and he was simply reflecting their opinions and there was no culturally sensitive content.
34. The Panel finds that although some of the general views or sentiment in the Confidential Documents may have been familiar to the public, the precise and specific information contained within the Confidential Documents and disclosed by Cr Smart was not. It was highly inappropriate for Cr Smart to make reference directly from the documents.
35. Furthermore, an email sent by Shire President, Councillor Pam Townsend, to the CEO Mr Gary Evershed on 20 March 2018, in which she requests that the Confidential Documents be made public, supports the assertion that the Confidential Documents were not already in the public domain.
36. On the information available to the Panel, it is satisfied that it is more likely than not that:
 - a) Cr Smart is and was at all relevant times a member of the Council of the Shire;
 - b) The Confidential Documents were clearly marked as being “Confidential” at the CEO’s direction;
 - c) Cr Smart read from the Confidential Documents at the Council Meeting on 28 February 2018 at which members of the public and the press were present;
 - d) By reading from the Confidential Documents, Cr Smart disclosed information from the Confidential Documents being documents marked at the CEO’s direction, to clearly show that the information in the documents was not to be disclosed; and
 - e) The information disclosed by Cr Smart from the Confidential Documents was not information that was public knowledge or in the public domain at the time when Cr Smart made the disclosure.



Second allegation of breach: Regulation 7

58.

- a) The maintenance of confidentiality by council members is a serious obligation.
- b) The Confidential Documents had clearly been marked as so, however Cr Smart proceeded to ignore the CEO's directions and disclose information from the Confidential Documents at the Council Meeting;
- c) The report by Brad Goode & Associates had been prepared on the basis that it was both Confidential and Culturally Restricted and was marked as such by them. By disclosing information in the report, Cr Smart showed a lack of consideration and respect for the consultants and the strict process that had been followed in putting the report together;
- d) The Confidential Documents contained sensitive information and some of this information related to the position of the Working Party in relation to the proposals by Council; Cr Smart took it upon himself to disclose certain sections of the Confidential Documents whilst debating to further his arguments when he did not have authority to do so; and
- e) The Meeting was open to the public; members of the public and the press were present when Cr Smart disclosed the information and the disclosure of confidential information by Cr Smart was reported in the local press. In breaching the confidentiality of the documents Cr Smart failed in his duty as a Councillor, and damaged the reputation of the Shire in the eyes of the community and wider.

59.

- a) the decision to disclose information from the Confidential Documents was a conscious decision on the part of Cr Smart;
- b) by selectively quoting from the Confidential Documents, Cr Smart put his fellow Councillors at a disadvantage as they were not able to also quote from the same documents and were therefore not on an equal footing during the debate;
- c) on the evidence before the Panel, the only reasonable inference that can be drawn is that Cr Smart chose to disclose information from the Confidential Documents to cause disadvantage to and undermine the position of other Councillors during the debate who themselves were unable to refer to the Confidential Documents;
- d) by disclosing information from the Confidential Documents Cr Smart intended to cause detriment to the local government and undermine its position; Cr Smart did not following or respect the correct procedures and revealed confidential information in a highly inappropriate manner;
- e) by disclosing information from the Confidential Documents, Cr Smart caused detriment to not only his fellow councillors and the Shire, but also the Working Party, Brad Goode & Associates, the CEO and council staff.

Jurisdiction

3. The Panel convened on 21 November 2018 to consider how it should deal with the breach. The Panel accepted the Department's advice that on this date there was no available information to indicate that Cr Smart had ceased to be or was disqualified from being a councillor.



Possible sanctions

4. Section 5.110(6) of the Act provides that the Panel is to deal with a minor breach by —
 - “(a) *dismissing the complaint; or*
 - (b) *ordering that —*
 - (i) *the person against whom the complaint was made be publicly censured as specified in the order; or*
 - (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.

Cr Smart’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
7. In a letter dated 26 September 2018, the Department notified Cr Smart of the Panel’s findings, providing him with a copy of its Findings published on 25 September 2018 and inviting him to make submissions on how the Panel should deal with the breach under section 5.110(6).
8. Cr Smart sent his submissions to the Department by email on 9 October 2018, in which he submitted:
 - Cr Smart thanked the Department for dealing with the matter in a fair and reasonable manner and stated that he hoped it was the last of a series of complaints.
 - Cr Smart apologised for breaching the confidentiality provisions and he was fully aware there may be consequences for having done so.

¹ Section 5.110(5) of the Act.



- Cr Smart has been on Council for eleven years and prior to this year has not had a complaint lodged against him. His actions were instigated by frustrations regarding the Complainant and how the Complainant, as CEO, had used the confidentiality provisions to restrict opposing debate by councillors to strengthen his own intended outcome.
- The Complainant has now resigned;
- Cr Smart lodged two major complaints against the Complainant late last year and the Complainant's response was to lodge nine minor breach complaints against Cr Smart in a short period of time; Cr Smart can only presume the Complainant did this with the hope of having Cr Smart suspended for committing more than two offences. There are provisions within the Act to deal with vindictive behaviour and on at least two occasions when Cr Smart was reported, other councillors had committed the same offence but were not reported.
- Cr Smart's complaints against the Complainant have not yet been dealt with by the Department, and may not be now, as the Complainant has resigned.
- Cr Smart had just experienced the unpleasantness of a public censure, which he feels was an excessive outcome to what he considers was an innocent breach of the regulations with a low impact. Cr Smart states it was "a poor reward" for having dedicated twelve years of his life to the community as a councillor.
- Cr Smart is fully aware of the confidentiality regulations but would be happy to undertake further training if considered appropriate. Cr Smart has no intention of running for Council for another term.

Panel's consideration


9. The Panel notes that there is an error in the Finding and Reasons for Finding for SP 16 of 2018, published on 25 September 2018, wherein it was stated on page 2, paragraph 8, that "*Cr Smart had previously committed two minor breaches*". The Panel puts on record by way of correction that Cr Smart had previously committed four minor breaches.
10. In relation to the current matter, the Panel found that Cr Smart committed one breach of regulation 6(2)(a) and one breach of regulation 7(1)(b). Both breaches related to Cr Smart's conduct when he publicly quoted information derived from confidential documents at a Council Meeting on 28 February 2018. The Panel found that by doing so, Cr Smart intended to cause detriment to his fellow councillors, the Shire, the CEO and council staff, the SW Boojarah Working Party and Brad Goode & Associates.
11. When responding to the Findings, Cr Smart states he has taken on board the comments made by the Panel and apologises for his actions. However, Cr Smart also uses his opportunity to criticise the Complainant and further explain the background to their dealings with one other.
12. The act of breaching confidentiality by an elected member is a serious matter.



13. The Panel does not consider that dismissal of the Complaint is appropriate as this would indicate that the breach is so minor that no penalty is warranted.
14. Nor does the Panel consider that ordering Cr Smart to undergo further training is appropriate or an adequate sanction, and given Cr Smart states that he will not run for re-election, further training would appear to serve little purpose.
15. The options left for the Panel to consider are to order the publication of a Notice of Public Censure or to order Cr Smart to make a Public Apology (or both).
16. 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.
17. In the present case, on the evidence available to the Panel, the Panel does not consider that it should order a public censure.
18. The disclosure by Cr Smart of the confidential information caused detriment to several groups of people and he disclosed the information publicly at the Council Meeting with the result that his actions were subsequently reported in the press. Therefore, the harm caused was likely serious and widespread amongst the community. A public apology is appropriate as it reflects the impact on the various parties who were subjected to Cr Smart's disclosure and the lasting effect of his actions.
19. An apology in public is also appropriate when a councillor's conduct does not meet the standards other councillors seek to uphold. It serves as an acknowledgement that Cr Smart's conduct was unacceptable and demonstrates that councillors are accountable for their actions.
20. The Panel considers a public apology to those who suffered the damage is the appropriate penalty.

Panel's decision


21. 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 Smart is ordered to publicly apologise to his fellow councillors, the Shire, the CEO and council staff, the SW Boojarah Working Party and Brad Goode & Associates.



Sheryl Siekierka (Presiding Member)



Elanor Rowe (Deputy Member)



Rebecca Aubrey (Deputy Member)



ATTACHMENT

Complaint Number	SP 16 of 2018
Legislation	<i>Local Government Act 1995</i>
Complainant	Mr Gary Evershed
Respondent	Councillor Michael Smart
Local Government	Shire of Augusta Margaret River
Regulation	Regulations 6(2)(a) and 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mrs Sheryl Siekierka (Presiding Member) Ms Elanor Rowe (Deputy Member) Ms Rebecca Aubrey (Member)
Heard	24 November 2018 Determined on the documents
Outcome	Public apology

ORDER FOR PUBLIC APOLOGY

Delivered 14 December 2018

DEFAMATION CAUTION

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THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor Michael Smart, a Councillor for the Shire of Augusta-Margaret River (Shire), publicly apologise to his fellow councillors, the Shire, the CEO and council staff, the SW Boojarah Working Party and Brad Goode & Associates.
2. At the Shire's first ordinary council meeting Cr Smart attends after the expiration of 28 days from the date of service of this Order on him Cr Smart shall:
 - (a) ask the presiding person for his or her permission to address the meeting to make a public apology to his fellow councillors, the Shire, the CEO and council staff, the SW Boojarah Working Party and Brad Goode & Associates;
 - (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 two provisions of the *Local Government (Rules of Conduct) Regulations 2007* when I publicly quoted information from confidential documents at the Council Meeting on 28 February 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 my fellow councillors, the Shire, the CEO and council staff, the SW Boojarah Working Party and Brad Goode & Associates thereby committing one breach of regulation 6(2)(a) and 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 my fellow councillors, the Shire, the CEO and council staff, the SW Boojarah Working Party and Brad Goode & Associates and I apologise to the parties concerned for having done so."

3. If Cr Smart 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 Augusta Margaret River Times newspaper.
- 4.

PUBLIC APOLOGY BY CR MICHAEL SMART

A formal complaint was made to the Local Government Standards Panel alleging that I contravened two provisions of the *Local Government (Rules of Conduct) Regulations 2007* when I publicly quoted information derived from confidential documents.




The Panel found:

(1) I committed one breach of regulation of 6(2)(a) and one breach of regulation 7(1)(b) of the Rules of Conduct Regulations when I publicly quoted information derived from confidential documents at the Council Meeting on 28 February 2018.

(2) By behaving in this way to my fellow councillors, the Shire, the CEO and council staff, the SW Bojarah Working Party and Brad Goode & Associates, I failed to meet the standards of conduct expected of a councillor

I apologise to the parties concerned for acting in such a manner.


Sheryl Siekierka (Presiding Member)


Elanor Rowe (Deputy Member)


Rebecca Aubrey (Deputy Member)



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."