



Local Government Standards Panel

Complaint Number	SP 2019-005
Legislation	<i>Local Government Act 1995</i>
Complainant	Ms Paula Ann Greenway
Respondent	Councillor Benjamin Bell
Local Government	Shire of Toodyay
Regulation	Regulations 6, 7, 9 and 10 of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Ms Sarah Rizk (Presiding Member) Ms Elanor Rowe (Deputy Member) Ms Rebecca Aubrey (Deputy Member)
Heard	26 April 2019 Determined on the documents
Outcome	One breach of regulation 7(1)(b)

FINDING AND REASONS FOR FINDING

Published 14 May 2019

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Summary of the Panel's decision

1. The Local Government Standards Panel ("the Panel") found that Councillor Benjamin Bell ("Cr Bell"), a councillor for the Shire of Toodyay ("the Shire"), committed one breach under the *Local Government Act 1995* (WA) ("the Act") and regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations") when he made statements in an article in the December 2018 edition of The Toodyay Herald newspaper. The Panel found that Cr Bell did not breach regulations 6, 9 and 10 in relation to the same article.

Jurisdiction and procedural fairness

2. The Act makes provision for the circumstances in which a council member commits a minor breach.¹
3. On 17 January 2019 the Department of Local Government, Sport and Cultural Industries ("the Department") received a Complaint of Minor Breach Form dated 4 December 2018 ("Complaint"). The Complaint was signed by Ms Paula Ann Greenway ("Complainant") and contained four allegations of breaches of the Regulations by Cr Bell. It was alleged that Cr Bell breached Regulations 6, 7, 9 and 10 when he made statements in an article ("Article") regarding the departure of the Shire's Environmental Officer ("Officer") that was published in the December 2018 edition of The Toodyay Herald newspaper ("Newspaper").
4. On 11 March 2019, the Department advised Cr Bell of the Complaint and invited him to respond. The Department sent Cr Bell a copy of the original Complaint and all the supporting documents provided by the Complainant.
5. Under the Act the Panel is required to consider a complaint of a minor breach and make a finding as to whether the alleged breach occurred.² On 26 April 2019 the Panel convened to consider the Complaint.
6. The Panel:
 - (a) accepted the Department's advice, based on information from the Western Australian Electoral Commission, that Cr Bell was a councillor at the time of the alleged breaches, having been elected on 21 October 2017, and was still a Councillor when the Panel met on 26 April 2019;
 - (b) was satisfied the Complaint had been made within two years after the alleged breaches are said to have occurred³;
 - (c) was satisfied the Complaint had been dealt with in accordance with the administrative requirements in the Act for dealing with complaints of minor breaches⁴; and
 - (d) was satisfied that the Department had provided procedural fairness to Cr Bell.

¹ Section 5.105 of the Act.

² Section 5.110(2)(a) of the Act.

³ Section 5.107(4) of the Act

⁴ Sections 5.107, 5.108, 5.109 of the Act.



7. 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.
8. 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.
9. Although Cr Bell had previously committed six minor breaches, the Panel did not find that the Complaint ought to be sent to the Chief Executive Officer of the Department as the alleged breaches, if found to have been committed, would not be recurrent breaches as they had not occurred after the Panel had made its earlier findings.
10. Based on the information referred to in paragraphs 2 to 9 above the Panel found it had jurisdiction to determine whether Cr Bell had breached regulations 6, 7, 9 and 10 in connection with the Complaint.

Panel's role

11. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.
12. Any finding, that a councillor has committed a minor breach, must be based on evidence from which it may be concluded that it is more likely than not that the breach occurred than that it did not occur (the required standard of proof).⁵
13. Where direct proof of an alleged fact, proposition or conduct is not available, in order to find the allegation, proposition or conduct has been established, the Panel must be satisfied from the evidence that it is more probable than not that it has occurred. The Panel cannot make a finding that the alleged fact, proposition or conduct occurred if the evidence merely supports two or more conflicting but equally possible inferences.⁶
14. For a finding that a councillor has breached a particular regulation the Panel must be satisfied that every element of the particular regulation has been established to the required standard of proof.

Regulation 6

15. 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 s5.23(2) of the Act;

⁵ Section 5.106 of the Act.

⁶ *Bradshaw v McEwens Pty Ltd* (1951) 217 ALR 1, paragraph 5.

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 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.

Elements of regulation 6(2)(a)

16. Regulation 6(2)(a) provides that a person who is a council member must not disclose information they derived from a confidential document.

17. In light of regulation 6(3), the essential issues or elements which need to be satisfied in order for a contravention of regulation 6(2)(a) to have occurred are that it is more likely than it is not that:

a) a Councillor disclosed information⁷ to someone who at the time was not also a Councillor of the same local government; and

b) the disclosed information was information the disclosing Councillor derived from a document that was marked by his or her local government's CEO, or at the CEO's direction, to clearly show that the information in the document was not to be disclosed; and

⁷ The word 'information' is given its ordinary meaning, which is knowledge or facts communicated about a particular subject, event etc; Shorter Oxford English Dictionary (6th edition). It is not limited to 'advice', legal, strategic or otherwise; *Corr and Local Government Standards Panel* [2012] WASAT 14 at para [50].

- c) the disclosed information was not already in the public domain (ie it was not generally available to all persons⁸) at the time of the disclosure by the disclosing Councillor, and the disclosure did not occur in any of the ways identified in regulation 6(3).

Elements of regulation 6(2)(b)

18. Regulation 6(2)(b) provides that a person who is a council member must not disclose information they acquired at a closed meeting other than information derived from a non-confidential document.

19. Generally, the essential elements which need to be satisfied in order for a contravention of regulation 6(2)(b) to have occurred are that it is more likely than it is not that:

- a. a Councillor disclosed information to someone who at the time was not also a Councillor of the same local government; and
- b. the disclosed information was information the disclosing Councillor acquired 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
- c. the disclosing Councillor did not derive the disclosed information from a non-confidential document; and
- d. the disclosed information was not information already in the public domain at the time of the disclosure by the disclosing Councillor, and the disclosure did not occur in any of the ways identified in regulation 6(3).

20. “Disclose” is defined as “*make (secret or new information) known*”⁹.

Regulation 7(1)(b)

21. Regulation 7(1)(b) provides:

“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 –

.....

(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.”

⁸ Mazza and Local Government Standards Panel [2009] WASAT 165 at paragraphs [82] – [85]

⁹ Oxford English Dictionary online edition

22. The Panel decided that the alleged conduct is not conduct that contravenes section 5.93 of the Act or section 83 of *The Criminal Code*.

Elements of regulation 7(1)(b)

23. In order to find a breach of 7(1)(b), the Panel must be satisfied to the required standard of proof that:

- (a) the person, the subject of the Complaint, engaged in the alleged conduct (first element);
- (b) 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 (second element);
- (c) 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 (third element);
- (d) that when viewed objectively, such use was an improper use of the person's office as a 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, power and authority of the councillor and the circumstances of the case; and
 - (ii) was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty;(fourth element)
- (e) the person engaged in the conduct in the belief that detriment would be suffered by the local government or any other person (fifth element).

Fourth element - meaning of "to make improper use of....office"

24. The Macquarie dictionary definition of "improper" is "not in accordance with propriety of behaviour, manners, etc; unsuitable or inappropriate for the purpose or occasion; abnormal or irregular."¹⁰ The Shorter Oxford dictionary definition is "irregular, wrong; unsuitable, inappropriate; unbecoming, unseemly."¹¹

25. Whether there is impropriety is to be assessed objectively: would a reasonable person with knowledge of the duties, powers and authority of a councillor, and all the circumstances of the particular case, form the view that the councillor had breached the standards of conduct expected of a councillor?¹² "For behaviour to be improper it must be such that a right-thinking person would regard the conduct

¹⁰ Macquarie Dictionary, Revised Third Edition.

¹¹ Shorter Oxford English Dictionary, Sixth Edition.

¹² *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 27, referring to *R v Byrnes* (1995) 183 CLR 501.

as so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty.”¹³

26. Under the Act Panel members must have regard to the general interests of local government in Western Australia.¹⁴ It is in the interests of local government that councillors are, and are seen to be, professional and respectful in their dealings with fellow councillors, local government employees and members of the public.
27. Regulation 3 of the Regulations sets out general principles to guide councillors’ behaviour, although contravention of any of any of these does not amount to a minor breach.¹⁵ Regulation 3 provides, among other things, that councillors should act with reasonable care, diligence and integrity and treat others with respect and fairness.
28. The meaning of “improper” must be considered in the context of relevant legislation, such as the Act and the Regulations, and other rules and standards that apply to a councillor’s role and conduct, such as the local government’s Code of Conduct, and the circumstances and context of the case.¹⁶ All these provisions form part of the backdrop to the Regulations and give context to a complaint but the alleged conduct must also be judged in the particular circumstances.
29. Conduct can be improper even though the councillor’s judgment is that it isn’t improper. A councillor’s use of his or her office can be improper even though the councillor is intending to benefit the local government, the council or the ratepayers and residents.¹⁷

Fifth element - meaning of “to cause detriment to the local government or any other person”

Detriment

30. “Detriment” means loss, damage or injury.¹⁸ It includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage. A person can suffer detriment through others thinking less favourably of them.¹⁹
31. For regulation 7(1)(b) to be satisfied it is not necessary to show that the local government or the person concerned actually suffered detriment.²⁰ However it is not enough to show that the local government or the person concerned suffered detriment, or could have suffered detriment. The Panel must find that it is more likely than not that the councillor believed that his or her actions would cause detriment and intended to cause detriment.²¹

¹³ *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 9, referring to *Robbins v Harness Racing Board* [1984] VR 641.

¹⁴ Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).

¹⁵ Regulation 3.

¹⁶ *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 10.

¹⁷ *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64, referring to *Treby* 2010.

¹⁸ Macquarie Dictionary Revised Third Edition, 2001.

¹⁹ *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraphs 31, 32.

²⁰ *Treby* 2010, paragraph 96, referring to *Chew v The Queen* 1992 CLR 626 (*Chew* 2010).

²¹ *Re and Local Government Standards Panel* [2014] WASAT 111, paragraph 51, referring to *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd* [2013] FCA 1342.



32. “To cause detriment” has been interpreted as meaning “in order to” or “for the purpose of” causing detriment, or “with the will to” cause detriment.²² There can be a finding of intent if, after considering all the evidence, the only reasonable inference is that the councillor intended to cause detriment.²³

Regulation 9

33. Regulation 9 provides:

“9. Prohibition against involvement in administration

- (1) *A person who is a council member must not undertake a task that contributes to the administration of the local government unless authorised by the council or by the CEO to undertake a task.*
- (2) *Subregulation (1) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.*

Elements of regulation 9

34. The essential elements which need to be satisfied for a contravention of regulation 9 to have occurred are that it is more likely than it is not that:
- a. a Councillor took on or was involved or participated in the performance, attempted performance, or part-performance, of a function or responsibility which under the Act or by delegation it is for the local government CEO to perform or direct; and
 - b. such taking on, involvement or participation:
 - (i) contributed (ie played a part in achieving) something in or by such performance, attempted performance, or part-performance; and
 - (ii) did not occur as anything the member did as part of the deliberations at a council or committee meeting; and
 - c. the local government’s council and the CEO did not authorise such taking on, involvement or participation.

35. Section 5.41 of the Act sets out the Chief Executive Officer’s functions.

Regulation 10

36. Regulations provides:

“10. Relations with local government employees

- (1) *A person who is a council member must not –*

²² Chew 2010.

²³ Treby 2010.



- (a) direct or attempt to direct a person who is a local government employee to do or not to do anything in the person's capacity as a local government employee; or*
- (b) attempt to influence, by means of a threat or the promise of a reward, the conduct of a person who is a local government employee in the person's capacity as a local government employee.*
- (2) Subregulation (1) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.*
- (3) If a person, in his or her capacity as a council member, is attending a council meeting, committee meeting or other organised event and members of the public are present, the person must not, either orally, in writing or by another means –*
 - (a) make a statement that a local government employee is incompetent or dishonest; or*
 - (b) use offensive or objectionable expression in reference to a local government employee.*
- (4) Subregulation (3)(a) does not apply to conduct that is unlawful under The Criminal Code Chapter XXXV.*

Elements of regulation 10(1)(a)

37. Subject to regulation 10(2), the essential elements which need to be satisfied for a contravention of regulation 10(1)(a) to have occurred are that it is more likely than it is not that:
- a. a Councillor gave or tried, or made an effort, to give a direction or an order or command;
 - b. to another person, who is an employee of his or her local government;
 - c. to do or not to do something in the other person's capacity as a local government employee.

Elements of regulation 10(1)(b)

38. Subject to regulation 10(2), the essential elements which need to be satisfied for a contravention of regulation 10(1)(b) to have occurred are that it is more likely than it is not that:
- a. a Councillor tried or made an effort to affect, sway or produce an effect on;
 - b. the conduct of another person, who is an employee of his or her local government, in the other person's capacity as a local government employee; and
 - c. the Councillor's effort to affect, sway or produce an effect was carried out by means of –

- i. a threat by the Councillor; or
- ii. a promise or undertaking by the Councillor to give the employee something having a value, or to do or not do something where the act or omission concerned has some value or advantage for or to the employee.

Substance of the Complaint

39. The Complainant attaches a copy of the Article (annexed as “Attachment A” with markings added by the Complainant) and alleges that statements made by Cr Bell in the Article breach Regulations 6, 7, 9 and 10.

First Allegation: Regulation 6

40. It is alleged that Cr Bell breached regulation 6 in the Article by reporting on Councillors’ conversations that he “overheard”:

“But I am confident to make these points with hand-on-heart because it was me (and a few other councillors I would suggest) who overheard conversations between at least one councillor and the administration, as subdued as they were, questioning the merits of retaining the (now-former) environmental officer”.

Second Allegation: Regulation 7

41. It is alleged that in the Article Cr Bell attempted to denigrate unnamed Councillors, the Shire’s CEO and staff in the eyes of the community and other staff members.

Third Allegation: Regulation 9

42. It is alleged that Cr Bell suggested to Shire staff that their jobs were in jeopardy despite the fact staff matters are the concern of the CEO and councillors have no role in the administration.

Fourth Allegation: Regulation 10

43. It is alleged the Article is aimed at Shire staff and the CEO and the Complainant refers to the following statement in particular (emphasis added):

*“It is not just that we no longer have a dedicated and experienced person within the administration overseeing environmental matters on behalf of the shire and its ratepayers that causes me discomfort, it’s the apparent back story about why he lost his job that unsettles me **and, I would suggest, should be of equal concern to other shire employees given its potential implications for their job security**”.*

Councillor Bell’s Response

44. Cr Bell confirms that the Article was prepared and published by him in his capacity as a columnist for the Newspaper. However Cr Bell does not accept the information detailed in the Complaint nor does he accept that he committed the alleged conduct as outlined by the Complainant.

First Allegation: Regulation 6

45. Cr Bell submits that Regulation 6(2)(a) does not apply as the conversation referred to was “*overheard*” by him and any information referred to in the Article was referenced to that conversation and not a confidential document.
46. The conversation referred to, took place on 19 June 2018 at an “*informal meeting*” attended by councillors and a number of Shire employees that was held in the Shire’s community hall. Regulation 6(2)(b) does not apply as it was not a meeting convened in accordance with Section 5.5 of the Act or the Shire’s Standing Orders and it was not a “closed meeting”.

Second Allegation: Regulation 7

47. Cr Bell’s comments in the Article were not intended to cause detriment to anyone.
48. Cr Bell refers to Regulation 3(1) that contains principles to guide the proper exercise of a councillor’s powers. In writing the Article, Cr Bell considers he did not breach Regulation 3 and furthermore:
- a. he relied upon information that he honestly believed to be accurate and of importance to the community (3(1)(b));
 - b. he highlighted potential misadministration of the Shire and therefore helped dispel any appearance that he or the Shire were complicit in it (3(1)(d)); and
 - c. he openly and accountably aired his concerns in a public forum via the local newspaper and under his own name (3(1)(e)).
49. Cr Bell submits his comments were in the best interests of the community and the Shire and they complied with and were in the spirit of Regulation 3(1).

Third Allegation: Regulation 9

50. Cr Bell agrees that staff matters are the concern of the CEO and councillors have no role in their administration. However, Regulation 9 applies to “*tasks that contribute to the administration of the local government*”. The Complainant’s allegation is based upon the publication of the Article, however, whilst Cr Bell comments on genuine concerns Shire employees may have, the Article itself does not contribute to the administration of local government. The Article is purely commentary and is entirely distinct from, and has no bearing upon, the administration of local government.

Fourth Allegation: Regulation 10

51. The Article represents genuine concerns that Shire employees may have regarding the administration of their local government employer and he was merely suggesting that they may be concerned about their job security. He did not “direct” or “attempt to direct” a local government employee from taking any particular course of action and his conduct does not amount to a breach of regulation 10(1)(a) or 10(1)(b):

- the process of considering a state of affairs is distinct from any action taken as a result of that consideration; and
- employees have autonomy to reach their own conclusions as a result of their personal consideration therefore he has not directed that they take a specific course of action in relation to their job security.

52. Additionally, Cr Bell considers that Regulation 10 applies to abuses of power and corruption and the act or omission that a councillor directs an employee to do something must be related to the performance of that employee's role and their position within local government. His actions do not amount to "*directing*" or "*attempting to direct*" an employee to take a course of action but even if they did, they would not be directing an employee to take a course of action connected to their position as a local government employee. Any action that an employee may take as a result of considerations regarding their "job security" would be an action related to their employment rights as an individual.

53. Cr Bell states that his comments did not constitute a threat or a promise of any kind for individuals to take a particular course of action and there is no basis for any such allegation.

Panel's consideration

First Allegation: Regulation 6

54. The Complainant does not state whether it is a breach of regulation 6(2)(a) or 6(2)(b) that is alleged. Regulation 6(2)(a) is concerned with disclosure by a council member of information from a confidential document and regulation 6(2)(b) with disclosure of information a council member acquires at a closed meeting.

55. The Panel has considered all the evidence before it and is not satisfied to the required standard of proof that Cr Bell disclosed information either from a confidential document or that he acquired at a closed meeting, in the Article:

- a. For a finding that a councillor has breached a particular regulation, the Panel must be satisfied that every element of the regulation has been established to the required standard of proof.
- b. It is alleged that Cr Bell breached regulation 6 by reporting on Councillors' conversations that he "*overheard*" regarding the merits of retaining the Officer.
- c. The Panel is not an investigative body; it determines complaints of minor breaches solely upon the evidence presented to it and in this case the Panel finds the allegation is too vague. Apart from the general nature / subject matter of the conversation, no details are provided by the Complainant as to the specific information that was allegedly disclosed.
- d. Furthermore, there is no evidence that the information Cr Bell disclosed (that there had been a conversation regarding the merits of retaining the Officer) was information from a confidential document (6(2)(a)) or information that he had acquired from at a closed meeting (6(2)(b)).

Panel's finding

18. The Panel finds that Cr Bell did not commit a breach of regulation 6 in relation to the First Allegation.

Second Allegation: Regulation 7(1)(b)

First, second and third elements satisfied

56. The Panel finds that Cr Bell engaged in the conduct which is the subject of the Second Allegation and that he was a councillor and was acting as a councillor at all relevant times.

57. The first, second and third elements of regulation 7(1)(b) are established.

Whether Cr Bell acted improperly (fourth element)

58. The Panel has considered all the evidence and it is satisfied that the fourth element has been established and finds that Cr Bell did act improperly. The Panel makes this finding because it is satisfied to the required standard of proof that a reasonable person would consider that Cr Bell did not meet the standards of conduct expected of a councillor when writing the Article and causing it to be published:

- a. The Article is lengthy and repeatedly implies that the departure of the Officer was not in accordance with proper process:

"The more I thought about this saying over the past week or two, the more the events surrounding the departure of the shire's environmental officer concerned me...

.....why the departure of the shire's environmental officer should send a shiver down the back of every employee currently working for the Shire...."

- b. The community looks to councillors to provide leadership and guidance and Cr Bell uses his position as a councillor and the opportunity to communicate with the community to focus on making serious allegations:

"Well, there appears to be more than a suggestion that a councillor may have crossed that very clear line that separates council and the shire administration and potentially influenced the decision to do away with this position."

- c. An individual undertakes significant public obligations when they become a member of the council of a local government. The standards of conduct that are expected of a councillor include that a person in the capacity of a council member should avoid damage to the reputation of the local government and treat others with respect and fairness. The Article is clearly negative towards the circumstances which led to the departure of the Officer and Cr Bell alludes to something underhand taking place within Council. The allegations and negative connotations affect both Council and local government.
- d. Where a council member chooses to communicate with ratepayers and residents in the media and takes it upon them self to make public statements, comments or remarks about the affairs of their local

government and report on council matters, they have an obligation to ensure that any statement of fact they mention or rely upon is substantially true. It is likely that some readers of the Article may simply have read and taken the Article at face value. The Panel refers to the following comments in the Article:

"The idea is wrong that the Shire of Toodyay does not require a full-time environmental officer and thus the position is redundant.

Actually, it is more than wrong, it is a mistruth which appears is being used by the administration as a smoke screen to hide the potentially flawed decision-making process operating in Toodyay at times..."

- e. Such allegations as outlined above are extremely serious and Cr Bell chose to make them recklessly by using language that would arouse suspicion and uncertainty:

"But I am confident to make these points with hand-on-heart because it was me (and a few other councillors I would suggest) who overheard conversations between at least one councillor and the administration, as subdued as they were, questioning the merits of retaining the (now-former) environmental officer".

"As a ratepayer, this affects you too because at the end of the day incidents like the redundancy of the environmental officer on dubious grounds (if indeed that is what occurred here) exposes the shire to the risk of expensive legal action....

Of course, there are only two ways the shire can pay these legal bills – through increasing your rates or decreasing the amount it spends on roads and public infrastructure, or both."

59. The Panel finds it more likely than not that Cr Bell's conduct does not reflect what a reasonable person would expect from a councillor.

Whether Cr Bell intended to cause detriment to the local government or any other person (fifth element)

60. The Panel is satisfied to the required standard of proof that Cr Bell intended to cause detriment to Council and local government by writing the Article. Based on the evidence before it, the Panel finds:

- a. Cr Bell chose to write the Article that clearly concerned matters of local government and were of a serious nature and have the Article published in the Newspaper to a wide local audience.
- b. The Panel finds it more likely that it is not that Cr Bell had time to give real and actual consideration to what should be included in the Article and the implications of publishing it.
- c. The Article is permanent in form and did not give other parties the opportunity to respond or counter Cr Bell's statements and allegations.

61. The Panel finds it more likely than not that readers of the Article would look less favourably on Council and local government and the clear and reasonable inference is that Cr Bell, by publishing the Article, intended to cause detriment to both.

Findings

62. Accordingly for the above reasons, the Panel finds that Cr Bell did breach regulation 7(1)(b) in relation to the Second Allegation.

Third Allegation: Regulation 9

63. Based on the evidence before it, the Panel is not satisfied to the required standard of proof that the elements of regulation 9 have been established in relation to the Third Allegation:

- a. The allegation is that Cr Bell suggested to Shire staff in the Article that their jobs were in jeopardy and this amounted to him involving himself in the administration of the Shire:

"....I would suggest, should be of equal concern to other shire employees given its potential implications for their job security."

- b. The functions and responsibilities of the CEO are set out in section 5.41 of the Act and include:

"5.41. Functions of CEO

The CEO's functions are to —

- (a) advise the council in relation to the functions of a local government under this Act and other written laws; and*
- (b) ensure that advice and information is available to the council so that informed decisions can be made; and*
- (c) cause council decisions to be implemented; and*
- (d) manage the day to day operations of the local government; and*
- (e) liaise with the mayor or president on the local government's affairs and the performance of the local government's functions; and*
- (f) speak on behalf of the local government if the mayor or president agrees;*
- (g) be responsible for the employment, management supervision, direction and dismissal of other employees (subject to section 5.37(2) in relation to senior employees); and*
- (h) ensure that records and documents of the local government are properly kept for the purposes of this Act and any other written law; and*
- (i) perform any other function specified or delegated by the local government or imposed under this Act or any other written law as a function to be performed by the CEO."*

64. Cr Bell expressed his opinion in the Article that employees should consider their job security. While the Panel finds that it was unwise for Cr Bell to do so, it also finds that his actions cannot be considered an administrative function as set out above.

65. In particular, Cr Bell took no specific action to involve himself or participate in *"the employment, management, supervision, direction and dismissal"* of staff and the

link between making a brief suggestion to staff in a newspaper article and actively participating in administrative matters is too tenuous.

66. Based on the evidence before it, the Panel it is not satisfied that it is more likely than not that Cr Bell undertook a task that contributed to the administration of local government by writing the Article.

Findings

67. For the above reasons, the Panel finds that Cr Bell did not breach regulation 9 in relation to the Third Allegation.

Fourth Allegation: Regulation 10

68. For the purposes of this Finding, the Panel does not consider Regulation 10(3) to be of relevance and has only considered Regulation 10(1).
69. The Complainant does not state whether it is a breach of regulation 10(1)(a) or 10(1)(b) that is alleged. Regulation 10(1)(a) is concerned with directing or attempting to direct local government employees to do something in their capacity as an employee, and 10(1)(b) is concerned with influencing the conduct of employees by the means of a threat or promise.
70. For a finding that a councillor has breached a particular regulation, the Panel must be satisfied that every element of the regulation has been established to the required standard of proof. The Panel has considered all the evidence before it and is not satisfied to the required standard of proof that Cr Bell directed or attempted to direct Shire employees or that he attempted to influence them by means of a threat or promise in the Article:

Regulation 10(1)(a)

- a. With regard to whether Cr Bell “*gave or tried to give a direction*”, the dictionary definition of “direct” is to “*give authoritative instructions to; order (a person) to do (a thing) to be done; order the performance of; give instructions; command...*”²⁴
- b. The Panel has considered the Article and while Cr Bell suggests that the departure of the Officer *should* be of concern to Shire employees and they *should* consider their position, none of the statements made by him *directed* staff to do anything.
- c. Furthermore, Cr Bell’s Article was published in the local newspaper for the purpose of expressing his opinions to the general readership and was not intended for or directed solely at employees.
- d. The Panel finds therefore that Cr Bell did not direct or attempt to direct a local government employee to do or not do anything in their capacity as an employee.

²⁴ Oxford English Dictionary Sixth Edition



Regulation 10(1)(b)

- e. The Panel has considered the contents of the Article as well as the tone and language used by Cr Bell and it does not find validity in the assertion that Cr Bell attempted to change or influence Shire employees' conduct in any way by threat or reward.
- f. The dictionary definition of "threat" is "*a statement of an intention to inflict pain, injury, damage, or other hostile action on someone in retribution for something done or not done.*" The definition of "reward" is "*a thing given in recognition of service, effort, or achievement.*"²⁵
- g. Cr Bell discusses the departure of the Officer in the Article and expresses his opinions on that subject. Cr Bell was concerned about the circumstances of the departure of the Officer and the purpose of the Article was to raise awareness of that issue and the implications for other employees as well as the local community. He *suggests* that the departure of the officer *should* be of concern to Shire employees. However, there was no element of a promise of reward or "threat", express or implied, if they failed to do so.

Findings

71. For the above reasons, the Panel finds that Cr Bell did not breach regulation 10(1)(a) or 10(1)(b).

Sarah Rizk (Presiding Deputy Member)

Elanor Rowe (Deputy Member)

Rebecca Aubrey (Deputy Member)

²⁵ Oxford English Dictionary Sixth Edition

Attachment A

NOW you see him – now you don't

The Insider



Ben Bell

IT HAS often been said that the behaviour you ignore is the behaviour you accept.

The more I thought about this saying over the past week or two, the more the events surrounding the departure of the shire's environmental officer concerned me.

It is not just that we no longer have a dedicated and experienced person within the administration overseeing environmental matters on behalf of the shire and its ratepayers that causes me discomfort, it's the apparent back story about why he lost his job that unsettles me and, I would suggest, should be of equal concern to other shire employees given its potential implications for their job security.

Before we get into why the departure of the shire's environmental officer should send a shiver down the back of every employee currently working for the Shire of Toodyay, let's take a step back for a second.

The idea is wrong that the Shire of Toodyay does not require a full-time environment officer and thus the position is redundant.

Actually, it is more than wrong, it is a mistruth which appears is being used by the administration as a smoke screen to hide the potentially flawed decision-making process operating at Toodyay at times.

It was as recently as 2015 that the shire released its environmental management strategy, which proudly boasted that the shire had appointed a dedicated environmental officer as evidence that the administration recognised and was committed to improving Toodyay's environmental management processes.

In fact, the shire lists the environment as one of its five key "outcome areas" each year, including in its 2018 reports as well as in Toodyay's current Corporate Business Plan.

For that reason every single item that comes before council for discussion or decision needs to include an analysis from the administration on its environmental implications.

With the environmental officer role deemed redundant by the shire, the council has now lost its main source of information when assessing the environmental implications of a planning application, extractive industry licence, or any number of other matters that comes before us.

If the Shire of Toodyay considers the environment management to be a core element of its operations, why did it decide to abolish the once lauded position of environmental officer?

Well, there appears to be more than a suggestion that a councillor may have crossed that very clear line that separates council and the shire administration and potentially influenced the decision to do away with this position.

This is the point where I need to clearly state that these are my views and is no way endorsed by *The Herald*.

few other councillors I would suggest) who overheard conversations between at least one councillor and the administration, as subtitled as they were, questioning the merits of retaining the (now-former) environmental officer.

Perhaps I am wrong.

Perhaps the administration was already contemplating making the role redundant long before it was commented on by a current councillor.

However, the fact that a councillor felt that they could comment on the employment of a specific shire employee, may indicate that as a local government body we perhaps haven't taken on board the comments and feedback from the likes of the State Department of Local Government which, as we all know, is continuing to monitor the Shire of Toodyay.

If it proves to be that a councillor was, in some way, involved in the departure of the environmental officer, as a councillor I am concerned that this behaviour may indicate that there are still areas where some in council and the shire executive may not be adhering fully to processes set down by the State Government. A failure in corporate governance is the official term.

As a ratepayer, this affects you too because at the end of the day incidents like the redundancy of the environmental officer on dubious grounds (if indeed that is what occurred here) exposes the shire to the risk of expensive legal action, and we can probably all think of at least one example of where Toodyay incurred huge legal bills fighting a losing case in past few years for seemingly not following procedures.

Of course, there are only two ways the shire can pay these legal bills - through increasing your rates or decreasing the amount it spends on roads and public infrastructure, or both. Thus, it is not a stretch at all to say that poor governance could end up costing you real money again.

I guess we will keep our eyes open over the coming months to see whether any other positions are suddenly made redundant by the shire's administration.

In the meantime, the question remains, how can the position of environmental officer, which was widely promoted as being a key position in the shire, be deemed redundant almost overnight?



MUNTZ & PARTNERS
CHARTERED ACCOUNTANTS

Taxation and
Accounting Services

TOODYAY OFFICE

Ph 9574 2776

104B Stirling Terrace, Toodyay 6568

YORK OFFICE

Ph 9641 2152



Local Government Standards Panel

Complaint Number	SP 2019-005
Legislation	<i>Local Government Act 1995 (WA)</i>
Complainant	Councillor Benjamin Bell
Respondent	Councillor Paula Greenway
Local Government	Shire of Toodyay
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i>
Panel Members for	Mr Michael Connolly (Presiding Member)
Penalty Consideration	Cr Paul Kelly (Member) Mrs Emma Power (Member)
Heard	26 April 2019 Determined on the documents
Penalty Considered	9 July 2019
Outcome	Public Apology

DECISION AND REASONS FOR DECISION

Delivered 24 July 2019

DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005 (WA)*, 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. At its meeting on 26 April 2019, the Panel found that Councillor Benjamin Bell, a councillor for the Shire of Toodyay (**“the Shire”**) committed 1 minor breach of Regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) (**“the Regulations”**) when he made statements in an article in the December 2018 edition of The Toodyay Herald newspaper (**“the Minor Breach”**).

Jurisdiction

2. The Panel convened on 9 July 2019 to consider how it should deal with the Minor Breach.
3. The Panel accepted the advice of the Department of Local Government, Sport and Cultural Industries (**“the Department”**) that on this date there was no available information to indicate that Cr Bell 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).*

Councillor Bell’s Submissions

5. 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
6. By a letter dated 22 May 2019, Cr Bell was:
 - a. notified of the Panel’s finding of the Minor Breaches;
 - b. provided with a copy of the Panel’s Finding and Reasons for Finding; and
 - c. offered an opportunity to make submissions as to how the Minor Breach should be dealt with under section 5.110(6) of the *Act*.
7. By an email dated 5 June 2019, the Department received a response from Cr Bell with the following comments and arguments:

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

- a. the Minor Breach of regulation is minor in substance in that it cannot (and has not) caused any significant or lasting detriment to the Complainant;
- b. the Complainant was not the subject of, or named in the newspaper article and there was no suggestion, inference or insinuation that the article related to the Complainant;
- c. neither the reputation and public standing of the Complainant or any other council member was adversely affected in any way by the newspaper article;
- d. the article was a commentary on the lack of adherence to policies and procedures by Council which cannot be considered as adverse reflection given that the Department has publicly stated that it has reasonable suspicion that the Toodyay Council has breached sections of the *Local Government Act 1995*, including around Council's adherence to policies and procedures;
- e. his commentary and motivation for making the commentary in the newspaper article is therefore consistent with the public position of the Department and is in the interest of openness and transparency for the Toodyay community;
- f. the Chief Executive Officer ("**the CEO**") of the Shire has publicly stated he is of the opinion that censuring an elected member:
 - i. does reputational damage to the Shire;
 - ii. sends a message to the community that the Council is divided; and
 - iii. publicity affects Council's credibility and can impact Council's capacity to attract external funding;
- g. the CEO of the Shire of Toodyay is on the public record stating that;
 - i. elected members (and Shire employees, including the CEO) are allowed to provide commentary on a public debate; and
 - ii. elected members (and Shire employees, including the CEO) should not be required to apologise when commenting on matter that is subject to public debate even if they are found to have breached the Code of Conduct when making such commentary; and
- h. an apology or similar sanction in relation to this matter would run contrary to the publicly stated and strongly held positions of the CEO and the president of the Shire.

Panel's Consideration

8. Section 5.110(6) is about penalty.
9. The Panel does not have the power to review any finding of a breach.
10. 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.
11. The Panel notes that Cr Bell does not argue that he has not committed a breach of the Regulations, but only argues a penalty would be inappropriate and contrary to the opinion of the Shire's CEO and President.



12. The Panel comments that much of Cr Bell's response shows a misunderstanding of the basis of the finding of minor breach.
13. Irrespective of the position of the Shire's CEO and President, it is appropriate to impose a sanction upon a local councillor where the conduct of that councillor does not meet the expectations of the community or other elected members. Any minor breach sanction imposed is based upon an individual councillor's conduct and is not a reflection upon any local authority as a whole.
14. In the circumstances, the Panel considers that the appropriate penalty is that Cr Bell make a public apology.
15. Making a public apology is a significant sanction, being a personal admission by the individual of wrongdoing. It is a suitable and appropriate penalty when a councillor's conduct:
 - a. adversely affects particular individuals²; and/or
 - b. does not meet the standards other councillors seek to uphold.

Panel's decision

16. The Panel orders pursuant to section 5.110(6)(b)(ii) of the Act that, in relation to the Minor Breach of regulation 7(1)(b) of the Regulations, Cr Bell make a public apology in terms of the attached Order.

Mick Connolly (Presiding Member)

Paul Kelly (Member)

Emma Power (Member)

² *Treby and Local Government Standards Panel* [2010] WASAT 81 [127] (Pritchard J).



ORDER

Delivered 24 July 2019

DEFAMATION CAUTION

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THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor Benjamin Bell, an elected member for the Shire of Toodyay publicly apologise, as specified in paragraphs 2 and 3 below.
2. On the ordinary council meeting first occurring after the expiration of 28 days from the date of service of this Order on him, Councillor Benjamin Bell shall:
 - a. attend the relevant ordinary council meeting;
 - b. ask the presiding person for his or her permission to address the meeting to make a public apology to the public;
 - c. 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; and
 - d. address the Council and public 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 *the Local Government (Rules of Conduct) Regulations 2007 (WA)* when I wrote an article that was published in the December 2018 edition of Toodyay Herald newspaper with negative allegations that:
 - a. implied that the Shire of Toodyay had not acted in accordance with proper process;
 - b. alluded to something underhand taking place within Council; and
 - c. were recklessly made using language that would arouse suspicion and uncertainty.
- ii. The Panel found that I breached regulation 7(1)(b) of the said Regulations by making comments that caused damage to the reputation of the local government and did not treat others with respect and fairness.
- iii. I accept that I should not have made relevant comments in the article.



iv. I now apologise to the public and my fellow Councillors and the Shire of Toodyay.”

3. If Councillor Bell fails to, or is unable to, comply with the requirements of paragraph 2 then within the next 28 days following the ordinary council meeting referred to in 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 “Toodyay Herald” newspaper and the “Avon Valley and Wheatbelt Advocate” newspaper:

PUBLIC APOLOGY BY COUNCILLOR BENJAMIN BELL

A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened the Local Government (Rules of Conduct) Regulations 2007 (WA) when I wrote an article that was published in the December 2018 edition of Toodyay Herald newspaper with negative allegations that:

- a. implied that the Shire of Toodyay had not acted in accordance with proper process;
- b. alluded to something underhand taking place within Council;
- c. were recklessly made using language that would arouse suspicion and uncertainty.

The Panel found that I breached regulation 7(1)(b) of the said Regulations by making comments that caused damage to the reputation of the local government and did not treat others with respect and fairness.

I accept that I should not have made relevant comments in the article.

I apologise to the public and my fellow Councillors and the Shire of Toodyay.



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."