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## Local Government Standards Panel

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Complaint Number	SP 40 of 2018
Legislation	<i>Local Government Act 1995 (WA)</i>
<b>Complainant</b>	<b>Councillor Kevin Bailey</b>
<b>Respondent</b>	<b>Councillor Andrew Kiely</b>
Local Government	<b>City of Swan</b>
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i>
Panel Members for	Mrs Sheryl Siekierka (Presiding Member)
Sanction Consideration	Cr Paul Kelly (Member) Mrs Emma Power (Member)
Heard	24 October 2018 Determined on the documents
Penalty Considered	5 February 2019
Outcome	Training

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### SANCTION DECISION AND REASONS FOR DECISION

Delivered: 22 February 2019

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#### 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 24 October 2018, the Panel found that Councillor Andrew Kiely, a Councillor for the City of Swan (**“the City”**) committed one minor breach of Regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) (**“the Regulations”**) by and made improper use of his office as council member when he:
  - a. circulated certain correspondence originally sent to the Minister for Local Government (**“the Correspondence”**) to members of the public; and
  - b. following such public disclosure, refused to provide a copy of the Correspondence to Mayor Lucas and his fellow Councillors,(**“the Minor Breach”**).

## Jurisdiction

2. The Panel convened on 5 February 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 Kiely 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 Kiely’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).<sup>1</sup>
6. By a letter dated 15 November 2018, Cr Kiely was:
  - a. notified of the Panel’s finding of the Minor Breach;
  - b. provided with a copy of the Panel’s Finding and Reasons for Finding; and

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<sup>1</sup> *Local Government Act 1995* (WA), s 5.110(5).



- 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 email dated 3 December 2018, the Department received a response from Cr Kiely. In his response Cr Kiely states that:
  - a. he finds it abhorrent that he is the one being sanctioned for being the whistle blower for what he sees as a catastrophic failure of good governance and non-adherence to the Local Government Act;
  - b. he does not see why he should be made an example of for his conduct;
  - c. he is still waiting for the Department to provide findings in respect to the review being undertaken in relation to the matters he brought up in the Correspondence;
  - d. the Panel is all too willing to make a judgement upon him without taking into account the veracity of the claims he made in the Correspondence;
  - e. he rejects the finding of the Panel that his aim was to “*cause detriment to his fellow Councillors*”;
  - f. he will await the Panel’s finding but will not give any guarantee that he will abide by the Panel’s findings or agree to undertake any action; and
  - g. on principle he will find it difficult to adhere to any ruling by the Panel for being a whistle blower and bring the matter to the Minister’s attention.
- 8. Cr Kiely also:
  - a. provides examples of the matters currently under review by the Department in respect to the City and the matters brought up in the Correspondence; and
  - b. provides an extract from Hansard showing remarks made by the Hon. Charles Smith regarding certain of the issues dealt with in the Correspondence and being reviewed by the Department.

### **The Panel’s Consideration**

- 9. Section 5.110(6) is about penalty. 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 Kiely does not agree with the Panel’s findings of a breach.
- 12. The Panel further notes that Cr Kiely appears somewhat confused as to exactly what conduct the Panel’s finding relates to. The Panel is not suggesting that any Councillor ignore failures of good governance. However, the same must be dealt with appropriately, taking into consideration the obligations of all elected members under the Act and Regulations.
- 13. It was appropriate for Cr Kiely to bring the relevant matter to the attention of the Minister and provide the Correspondence to him. There was no finding of breach in relation to this action.



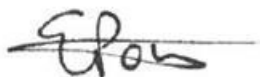
14. However, it was not appropriate to provide a copy of the Correspondence to the public. Further, once this had occurred it was inappropriate to refuse to provide a copy of the Correspondence to Mayor Lucas and his fellow Councillors.
15. The manner in which Cr Kiely publicly dealt with the Correspondence and the matter allowed the Panel to come to the conclusion that, it was more likely than not, Cr Kiely intended to cause a detriment to his fellow Councillors by the public release of the Correspondence.
16. The Panel also reminds Cr Kiely that he did not provide a copy of the relevant Correspondence to the Panel. The Panel therefore finds Cr Kiely's argument that the Panel should take into account the veracity of his claims unconvincing.
17. The Panel is an independent body that deals with Minor Breaches under the Act. It considers only the information provided to it and must consider all alleged breaches strictly in accordance with the terms of the Act and Regulations. It is not open for the Panel to make a judgement as to any review being separately undertaken by the Department, or the alleged misconduct of any other council member, in respect to an allegation of minor breach.
18. The Panel has considered all available sanctions under section 5.110(6).
19. The Panel does not consider it appropriate to dismiss the Minor Breach as this would condone Cr Kiely's conduct. Further, Cr Kiely does not appear to appreciate how the relevant conduct can be characterised as inappropriate and not in keeping with the standards of behaviour expected from elected members.
20. In these circumstances, the appropriate penalty is that Cr Kiely undertake training so that he may, in the future, properly identify the manner in which is appropriate to deal with an allegation of poor governance or wrongdoing within the City.
21. The sanction of an order to undertake training would align with the intent of the Act and the purpose of the civil penalties under the Act to ensure future compliance with the statutory obligations imposed on councillors for the better protection of the public.

#### **Panel's decision**

22. The Panel orders that in relation to the breach of regulation 9(1) of the Regulations and section 5.110(6)(b)(iii) of the Act, Cr Kiely undertake training pursuant to section 5.110(6)(b)(i) of the Act as set out in the attached Order.



Sheryl Siekierka (Presiding Member)



Emma Power (Member)



Paul Kelly (Member)



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## ORDER

Delivered: 22 February 2019

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### THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

Within 4 months of the date of this Order, Councillor Andrew Kiely, a Councillor for the City of Swan, shall undertake:

1. the training course for Elected Members "Serving on Council" provided by WA Local Government Association (WALGA) for a period of no less than 7 hours; or
2. a training course with substantially similar learning outcomes provided by an alternative registered training organisation for a period of not less than 7 hours.

Sheryl Siekierka (Presiding Member)

Emma Power (Member)

Paul Kelly (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."