



Local Government Standards Panel

Complaint Number	SP 2019-046
Legislation	<i>Local Government Act 1995</i>
Complainant	Mr Stanley Scott
Respondent	Councillor Benjamin Bell
Local Government	Shire of Toodyay
Regulation	Regulation 7 of the <i>Local Government (Rules of Conduct)</i> <i>Regulations 2007</i>
Panel Members	Mr Michael Connolly (Presiding Member) Cr Peter Rogers (Member) Mrs Emma Power (Member)
Heard	2 September 2020 Determined on the documents
Finding	1 x Breach of Regulation 7(1)(b)

FINDING AND REASONS FOR FINDING

Delivered 8 October 2020

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Summary of the Panel's decision

1. On 2 September 2020, the Panel found that Councillor Benjamin Bell, a councillor of the Shire of Toodyay ("**the Shire**") did commit a minor breach pursuant to the *Local Government Act 1995 (WA)* ("**the Act**") regulation 7 of the *Local Government (Rules of Conduct) Regulations 2007* ("**the Regulations**") when he made a Facebook Post that was intended to cause detriment to the Complainant as set out in paragraph 18 below.

The Panel's Role

2. Under section 5.110(2) of the Act the Panel is required to consider a minor breach complaint and make a finding as to whether the alleged minor breach occurred.
3. The Act provides for the circumstances in which a council member commits a minor breach.¹
4. The Panel may make a finding that a councillor has committed a minor breach of the Act and Regulations based on evidence from which it may be concluded that it is more likely that the alleged breach occurred than it did not occur.²
5. In order to find a breach, it must be established that each element of the relevant Regulation is more likely than not to have been breached or met.
6. In considering whether a minor breach is established the Panel must consider:
 - a. all evidence provided and, where there are conflicting circumstances, inferences or evidence, must come to a reasonable conclusion that any circumstance, inference or evidence relied upon is more likely than not to have occurred or be accurate³; and
 - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding⁴.
7. The Panel does not possess investigative or supervisory powers.⁵ The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials published by the relevant local authority's website.
8. It is the responsibility of both complainants and respondents to provide the Panel with all information they wish the Panel to consider when making its determination.
9. The Panel also must have regard to the general interests of local government in Western Australia⁶.
10. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

¹ Section 5.105 of the Act

² Section 5.106 of the Act

³ *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1

⁴ *Briginshaw v Briginshaw* (1938) 60 CLR 336

⁵ *Re and Local Government Standards Panel* [2015] WASC 51 (at paragraph 24)

⁶ Section 8(6) of Schedule 5.1 of the Act



Jurisdiction and Procedural Fairness

11. On 17 May 2019 the Panel received a complaint from Mr Stan Scott acting as complaints officer of the Shire (**“the Complaints Officer”**). The same enclosed a Complaint of Minor Breach Form dated 16 May 2019.
12. Due to the fact that Cr Bell had been found to have committed six prior minor breaches, at its meeting of 24 June 2019, the Panel made the decision:
 - a. that if the alleged minor breach was found to have been committed, the same may be a recurrent breach; and
 - b. to send the complaint to the Departmental Chief Executive Officer (**“Department CEO”**) under section 5.111 of the Act, to determine whether the Department CEO would make an allegation to the State Administrative Tribunal (**“SAT”**) under section 5.112(2) of the Act.
13. The complaint was duly referred to the Department CEO on 10 July 2019.
14. On 30 July 2020 the Director General referred complaint SP 2019-046 back to the Panel pursuant to section 5.112(4) of the Act on the basis that, if the allegation was made out, SAT would not consider any further penalties for Cr Bell than those already available to the Panel.
15. In the complaint form, the Complainant alleges that, on 10 February 2019 Cr Bell breached regulation 7 of the Regulations when he wrote a Facebook Post that was intended to cause detriment to the Complainant as set out in paragraph 18 below (**“the Complaint”**).
16. The Panel convened on 2 September 2020 to reconsider the Complaint.
17. The Panel:
 - a. accepted the advice of the Department that, based on information published on the Western Australian Electoral Commission’s website, Cr Bell was:
 - i. elected to the Council of the Shire in October 2017 for a term expiring in October 2019 and re-elected for a term commencing October 2019 and expiring October 2023;
 - ii. a Councillor at the time of the alleged breach; and
 - iii. a Councillor when the Panel met on 2 September 2020;
 - b. was satisfied the Complaint was made within two years after the alleged breach occurred⁷;
 - c. was satisfied that the Shire’s Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of a minor breach⁸;
 - d. was satisfied the Department had provided procedural fairness to Cr Bell; and
 - e. found it had jurisdiction to consider the Complaint.

⁷ Section 5.107(4) and 5.109(2) of the Act (as at the time of the Complaint)

⁸ Section 5.107 and 5.109 of the Act



The Specifics of the Complaint

18. The Complainant provided the following arguments and comments in respect to the Complaint:

- a. Cr Benjamin Bell has recently changed his Facebook Page removing reference to his position as a Councillor for the Shire of Toodyay and including the following disclaimer.

“All statements made by me on this Facebook page are done in my capacity as a resident and ratepayer of the Shire of Toodyay.

At no time should any statement made by me on this, my private Facebook page, be taken as anything but my own personal views.”

- b. Despite the disclaimer he continues to discuss Council matters and continues to denigrate the CEO, the Shire, fellow Councillors and the Local Government Standards Panel, including grossly misrepresenting the outcomes of previous considerations by the Panel.

- c. On 10 May 2019 the following Post appeared on Cr Bell's Facebook page.

“I would like to thank the Shire CEO for his regular monthly column on me in the Toodyay Community Newsletter.

The only other councillor that gets a regular column in the newsletter is the President.

So I do appreciate that the CEO acknowledges that my tireless work of endeavouring to give the community a fearless and independent voice on council warrants monthly updates from him.

Regarding this month's article, the Standards Panel did not rule that anything I have ever said was incorrect or wrong.

Instead, the ruling was just that the (factual) information I brought to light was embarrassing for the CEO.

The Toodyay community deserves a council that is not afraid to be open and honest with them on every issue. I wholeheartedly believe this and I will continue to represent you to the best of my ability (without fear or favour).”

(“the Post”)

- d. On 4 April 2019 the Department wrote to the Complainant advising that the Standards Panel had made penalty decisions in relation to a number of findings by the Panel. An extract of the letter is as follows:
- e. The Local Government Standards Panel has considered the complaint and in accordance with section 5.110(6) of the Local Government Act 1995, has ordered Cr Bell to undertake the following:-
- SP 52 of 2018 - to publicly apologise, as outlined in the attached Order.
 - SP 53 of 2018 - to publicly apologise, as outlined in the attached Order.
 - SP 54 of 2018 - be publicly censured, as outlined in the attached Order.



- iv. SP 65 of 2018 - be publicly censured and apologise publicly, as outlined in the attached Order.
 - v. SP 2018-083 - be publicly censured, apologise publicly and undertake training, as outlined in the attached Order.
 - vi. SP 2018-092 - be publicly censured and apologise publicly, as outlined in the attached Order.
 - f. The appeal period has now expired on these matters and as a result details of the findings were provided, including a link to the Standards Panel's web page.
 - g. Cr Bell's Post suggests that any public apology he is required to deliver will be in name only and clearly will not be sincere. As the recipient of the mandated apology the Complainant will not in any way feel mollified.
 - h. Further he is grossly misrepresenting the findings of the Standards Panel to try to change the public narrative and reduce the effect of both the apologies and the public censures.
 - i. The Standards Panel has referred three additional complaints to the CEO of the Department to consider referral to the Standards Panel. This one should as well. Given the timing and the subject matter this is probably the most serious breach.
 - j. The Complainant has (as CEO and Complaints Officer) lodged eight previous complaints against Councillor Bell in relation to Facebook posts, and a further complaint in relation to comments in a newspaper column. Six of these complaints were determined by the Standards Panel and its findings were distributed on 25 January 2019.
 - k. This latest Post was made with full knowledge of the Standards Panel findings and sanctions.
 - l. Cr Bell has once again set out to denigrate the Complainant as CEO both in the performance of his duties and to misrepresent the Standards Panel's findings as lacking substance, and the upheld complaints as frivolous. He seeks to represent his own actions as "fearless and independent".
 - m. Cr Bell meets the requirements that:
 - i. he was a Council Member at the time;
 - ii. he made the post as a Councillor;
 - iii. the office of a Council Member was used improperly;
 - iv. he used his office improperly to disadvantage the Local Government and me as CEO.
 - n. These breaches also have a direct and serious impact on all Shire staff.
 - o. In light of the repeated offending behaviour the Complainant believes this complaint should be considered a recurrent breach and referred to the Departmental CEO for further action.
19. The Complainant also provided a copy of the Post.



Respondent's Response

20. By an email dated 27 August 2020, Cr Bell provided a response to the Complaint.
21. It is denied that Cr Bell has committed any minor breach.
22. Cr Bell makes the following comments in respect to the Complaint:
 - a. The Post was made on Cr Bell's private Facebook page, not a public page.
 - b. As the CEO noted, Cr Bell clearly stated on his private page that he was not commenting as a councillor.
 - c. Cr Bell had sought to impose privacy settings on this page that were designed to only allow permitted family and close acquaintance to be able to view the page.
 - d. The fact that the CEO would find a way around these security settings reflects more on the motivation of the CEO to find something, anything, that he could use to base another complaint against me to the Standards Panel.
 - e. Cr Bell disputes the CEO's claim that the Post states or insinuates in any way that any apology by Cr Bell in response to a Standards Panel finding has not been sincere.
 - f. Cr Bell disputes the CEO's claim that the Post has had any impact on all the Shire staff given that not a single Shire employee had access to the private Facebook page.
 - g. Cr Bell disputes the CEO's claim that:
 - i. the Post in question was made by Cr Bell in the role as a councillor given it was posted on his private (closed) page, which was also clearly accompanied by the disclosure statement that any comments on the page in question were by Cr Bell as a private individual; and
 - ii. Cr Bell is unable to express a private opinion to family and friends on a matter in a private setting.
 - h. Cr Bell disputes the CEO's position that any previous breach that Cr Bell may have committed has any relevance in this matter. Surely natural justice dictates that every matter brought to the Panel is dealt with on its own merits. By making statements that he has brought 8 other complaints against Cr Bell, the CEO is simply trying to bluff the Panel into thinking that if one complaint from him is valid, then they must all be valid. This is clearly an inappropriate approach by the CEO to attempt to contaminate the matter with unrelated issues.
 - i. Cr Bell disputes the CEO's statement that "*Cr Bell has been found to have committed 6 previous breaches. There are also further complaints pending*" has any relevance to this particular matter.
 - j. Cr Bell disputes the CEO's claim that this post makes any comment on the CEO's performance or his ability to undertake his duties.
 - k. Cr Bell disputes any inference by the CEO that this Post makes any comment or passes any judgement on Shire employees.



- l. The CEO's principle motivation behind this (unjustified) complaint is best summarised by the last paragraph of his complaint; namely, to dig up anything that he can use to make a claim of recurring breaches against Cr Bell to the Department CEO, with the ultimate aim of having the matter referred to the Standards Panel.
 - m. Why else would the CEO bother trying to 'hack' into, or find a way around the security settings on Cr Bell's private Facebook page to find any comment that he may have made in private to friends and family, that he could base a complaint around.
 - n. For their own mental health and well-being, a councillor should be able to talk to their family and friends in a private setting (such as a closed Facebook page) about matters affecting them.
 - o. In this case, the CEO was running a campaign against Cr Bell via the official Shire Community Newsletter whereby he would provide comment on me each month. It is important to note that other Toodyay councillors received sanctions from the Standards Panel during the period in question, including the Shire President. Yet the CEO failed to make any mention of these in the official Shire Community Newsletter. Instead, he purposefully elected only to highlight matters related to Cr Bell. He did so in full knowledge that, as a councillor, there are no formal mechanisms for Cr Bell to make a complaint against him.
 - p. Thus, the only avenue available to a councillor is to accept the repeated assaults by the CEO and find your own way to deal with any mental anguish associated with being the repeated subject of comment by the CEO.
 - q. It should be noted that when Cr Bell did try to raise the matter of the CEO using the official Shire Community Newsletter to make public comment regarding me to the then Shire President in the months prior to the post in question, his concerns were dismissed as frivolous by the then Shire President and he failed to take matter further. This is a repeat of the situation Ms Granger experienced when she, as a councillor, endeavoured to make a formal complaint against the CEO. (That matter is outlined in the Report of the Inquiry into the Shire of Toodyay- see attached document).
 - r. Is it the expectation of the Standards Panel that a councillor should bottle up how they feel at all times rather than seek a private outlet to discuss the matters concerning them, or to seek support of friends and family via a private setting?
 - s. There is nothing derogatory in the Post in question. It is simply a post that states, in a light-hearted way, that Cr Bell acknowledges that the Shire CEO has Cr Bell in his cross-hairs and there is absolutely nothing Cr Bell can do but to take it and continue to fulfil his duties as an elected member to the best of his ability.
23. Cr Bell also provided a copy of the *Report of the Inquiry into the Shire of Toodyay*.

Regulation 7



24. Regulation 7 prohibits councillors engaging in conduct to either gain an advantage for themselves (or another party) or cause detriment to another party and specifically provides as follows:

“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 —*
 - (a) to gain directly or indirectly an advantage for the person or any other person; or*
 - (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.*
25. The Complainant has not made any allegation that there was any intention to provide an advantage to any particular party, so the Panel has only considered regulation 7(1)(b) of the Regulations in this decision.

Panel’s Consideration

Regulation 7(1)(b)

26. To make a finding of a minor breach of regulation 7(1)(b) of the Regulations the Panel must be satisfied to the required standard that:
- a. Cr Bell was an elected member at the time of the alleged breach and the time of the determination;
 - b. Cr Bell made use of his office as Council member of the Shire;
 - c. when viewed objectively, such use was an improper use of Cr Bell’s office in that it:
 - i. involved a breach of the standards of conduct that would be expected of a person in the position of councillor by reasonable persons; and
 - ii. was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty; and
 - d. Cr Bell engaged in the conduct in the belief that detriment would be suffered by another person.

Cr Bell was an Elected Member at the relevant times

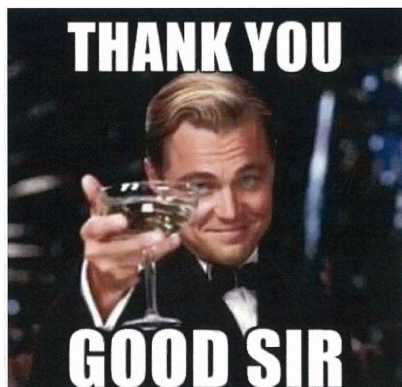
27. Cr Bell was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.
28. This element is met.

Cr Bell made use of his office as Council Member of the Shire

29. Cr Bell asserts that the Post was made in his capacity as a private individual and that:
- a. he *“sought to impose privacy settings”* on the relevant Facebook Page; and

- b. the disclaimer shown on his personal Facebook Page indicates he was not acting in his capacity as councillor.
- 30. Various elements may indicate whether a Councillor is acting in their capacity as a councillor when making public comment such as:
 - a. the name or title attributed to the Councillor in the communication;
 - b. the subject matter or contents of the communication and the degree to which the same are related to the Council or City or local community;
 - c. the public or private nature of the communication; and
 - d. the audience with which the communication is shared.
- 31. In this case Cr Bell is discussing matters specific to the Shire and the CEO of the Shire and refers to himself in his capacity as an elected member.
- 32. The commencement of the Post reads as follows:

“I would like to thank the Shire CEO for his regular monthly column on me in the Toodyay Community Newsletter.”
- 33. The Post also included the following image:



- 34. Although, clearly intended to be sarcastic, the statement and image indicate that the Post was also intended to be viewed by the CEO.
- 35. Further, although Cr Bell asserts that the Post was written to family members and close friends the particular words used in the closing paragraph are:

“The Toodyay community deserves a council that is not afraid to be open and honest with them on every issue. I wholeheartedly believe this and I will continue to represent you to the best of my ability (without fear or favour).”
- 36. This choice of wording indicates that the intended audience was the community/electors of the Shire in the Post, not to a closed and private group.
- 37. In addition, there are a variety of comments in response to the Post which are of a nature that indicate they are made by members of the public. It is enough that the Post was shared to even a small number of persons, although the Panel does not, in fact, accept that this was the case.
- 38. A councillor is not prevented from sharing his personal opinions with close friends and family. However, it is to be considered that Facebook is not intended to be a



solely private forum and readily permits extensive “sharing” with persons outside of a “friends” group.

39. The Panel finds it is more likely than not that at the time the Post was made:
 - a. Cr Bell’s privacy settings allowed the Post to be seen by other members of the public including the CEO;
 - b. the CEO did not “hack” into Cr Bell’s Facebook page; and
 - c. due the wording of the Post, it was intended to be seen by, or Cr Bell was carelessly indifferent as to whether the Post was seen by, members of the public.
40. In addition, the use of a disclaimer is not enough to remove the responsibility a councillor has from their obligations under the Regulations. It is not reasonable to expect that:
 - a. every person visiting his Facebook Page, or reading a comment by Cr Bell, would read such disclaimer; or
 - b. where Cr Bell is commenting on the Shire, or the CEO and specifically refers to himself as a councillor, that persons reading his comments would reasonably consider such comments to be made separately from Cr Bell’s role as an elected member.
41. All of the above indicate that Cr Bell was acting in his capacity as a councillor and made use of this office.
42. The standards of behaviour expected of councillors are of a generally higher standard than a member of the public due to their public position. Councillors must always remain aware of situations where their comments are made publicly, or semi-publicly, and may be passed on or shared by other parties or where it is likely they may be considered to be acting in their capacity as an elected member.
43. The Panel finds that it is more likely than not that Cr Bell made use of this office as an elected member when making the Post as Cr Bell:
 - a. was discussing matters specific to the Shire and the CEO of the Shire;
 - b. refers to himself as an elected member; and
 - c. used language that indicates that he was speaking to his electors or members of the community.
44. This element is met.

Cr Bell’s use was improper

45. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or a lack of wisdom⁹. It requires an abuse of power or the use of the councillor’s position in a manner that such councillor knew (or ought to have known) was not authorised.
46. Impropriety does not depend on a councillor’s consciousness of impropriety. It is to be judged objectively and does not involve an element of intent¹⁰.

⁹ Complaint of Minor Breach No. SP 3 of 2013

¹⁰ *Chew v R* [1992] HCA 18



47. Any decision as to what is “improper” cannot be made in isolation but must be considered in the relevant context including the specifics of the relevant event as well as councillor's formal role and responsibilities.
48. In addition to the guiding principles set out in Regulation 3 of the Regulations breaches of any code of conduct adopted by a local authority may indicate that certain conduct by a councillor is improper.
49. The Shire has a Code of Conduct adopted 18 October 2007 (“**the Code**”) which prescribes guidelines for dealing with others including the following specific provisions:
- a. **“1.2 Act Honestly and with Integrity**
- We will observe the highest standards of honesty, probity and integrity, and avoid any conduct that might suggest a departure from these standards. We will be loyal and act in good faith (i.e. honestly, for the proper purpose, and without exceeding our powers) in the interests of the Shire. We will not tolerate dishonesty.*
- b. **“1.3 Exercise Fairness and Impartiality**
- We will perform all our duties impartially and in the best interests of the Shire, uninfluenced by fear or favour. We will conduct our business respectfully, courteously and fairly. We will refrain from any form of conduct which may cause any reasonable person unwarranted offence or embarrassment....”*
- c. **“3.1 Our Shire Relationships**
- We will all work together courteously and effectively as part of the Shire team. Our teamwork will be based on our mutual respect for each other and our committed co-operation to achieve the Shire’s goals and implement its strategies. In all our official dealings with each other we will be frank and honest and always endeavour to resolve any serious conflict through discussion. If necessary, this can be facilitated by either the Shire President, Deputy Shire President and/or the Chief Executive Officer. To achieve this teamwork, all elected members will:*
-
- c) *refrain from publicly criticising staff in a way that casts aspersions on their professional competence and credibility;*
-
- At the same time, staff will recognise that elected members’ views and opinions often reflect valid community viewpoints that should be considered in conjunction with professional opinion. Staff will therefore make every effort to assist elected members in the performance of their role, and to achieve the satisfactory resolution of issues that may arise in the performance of their official role. ”*
- d. **“3.4 Communication and Public Relations**
- To ensure accountability and transparency in our activities we will effectively communicate with and promote participation by all sections of our community. All aspects of our Shire-related communication, including*



verbal, written or personal communications, will be accurate, polite and professional. We will not publicly reflect adversely upon any decision of the Council or the Chief Executive Officer/staff. Unless confidentiality is essential, our administrative and management practices will be open and accessible.

Elected members will be responsive to community views and accurately and adequately communicate the adopted policies, procedures and decisions of the Shire. In doing so elected members will demonstrate their respect for the Council's majority decision making processes. Confidential information will not be communicated until we are sure that it is no longer treated as confidential. Information relating to Council decisions on approvals, permits and so on will only be communicated in an official capacity by a designated officer of the Shire.

...."

e. "3.5 Avoid Derogatory Statements

We will not make any allegations that are derogatory or improper. We will always act in the best interests of the Shire and refrain from any type of communication, in our public or professional duties, which may cause any reasonable person unwarranted offence or embarrassment. When we are uncertain about the probable impact of our communications we should seek access to legal advice."

50. The Complainant asserts that Cr Bell has acted improperly:
- by misrepresenting the outcomes of the prior minor breach complaints against Cr Bell;
 - by using the Post to cause detriment to the CEO; and
 - as the Post indicates that any apology provided by Cr Bell in respect to the prior complaints would not be sincere.
51. Cr Bell asserts that:
- there is nothing derogatory in the Post in question, and simply, in a light-hearted way, that Cr Bell acknowledges that the Shire CEO has Cr Bell in his cross-hairs;
 - the Post does not make any comment or pass any judgement on Shire employees;
 - any previous breach that Cr Bell may have committed does not have any relevance in this matter;
 - the Post does not state or insinuate in any way that any apology by Cr Bell in response to a Standards Panel finding has not been sincere; and
 - Councillors should not have to bottle up how they feel at all times.
52. In this case the Panel considers that there are three issues to be considered when deciding if the Post is improper being:
- the assertion that the CEO included incorrect facts in the Toodyay Community Newsletter regarding Cr Bell's minor breaches;



- b. the implication that the CEO was wrongfully persecuting Cr Bell in publishing the article in the Toodyay Community Newsletter regarding Cr Bell's minor breaches; and
 - c. the assertion that *"the Standards Panel did not rule that anything I have ever said was incorrect or wrong. Instead, the ruling was just that the (factual) information I brought to light was embarrassing for the CEO."*
- 53. The Panel notes that the publication in the Toodyay Community Newsletter referred to was simply a listing of the relevant sanctions that had been imposed on Cr Bell in respect to his various minor breaches and included a link to the relevant findings.
- 54. The contents of that publication were strictly factual in nature and made no comment as to the contents of the relevant findings. As such, it was false to imply that anything published by the CEO was incorrect in any manner.
- 55. It is a further stretch to imply that the public listing of such sanctions was a persecution of Cr Bell.
- 56. The Panel notes that Cr Bell did not appeal the findings of minor breach.
- 57. The facts remain that Cr Bell was found to have breached the Regulations six times and that he was sanctioned by the Panel for such breaches as set out in the relevant publication. It is unusual for one councillor to have so many minor breaches found against them in such a short period of time this, in itself, makes it of public interest.
- 58. It is specified in the Act that, when a minor breach is found, the findings are made available to the public. In addition, several of the prescribed sanctions, such as a public apology and a censure, are specifically designed to be public in nature in the public interest.
- 59. As such, the Panel finds to the required standard that the fact that the findings and sanctions were made public was not on the basis of any persecution of Cr Bell by the CEO, nor was such publication inaccurate in content.
- 60. In respect to the various contents of the findings of minor breach by the Panel, the assertion that the *"Standards Panel did not rule that anything I have ever said was incorrect or wrong"* and that Cr Bell's asserted *"information"* was *"factual"* is false and misleading.
- 61. In each of the six complaints:
 - a. the conduct by Cr Bell in each case supported a finding of a minor breach under regulation 7(1)(b);
 - b. Cr Bell's conduct was expressly found to be "improper" by the Panel;
 - c. the Panel did not make findings as to the "correctness" of comments by Cr Bell. In each case the Panel found that:
 - i. certain of Cr Bell's comments were improper to the extent that the same were deserving of a penalty and, in many cases, found to be not factual but unfounded or incorrect;
 - ii. Cr Bell's conduct on several occasions was in breach of the Code of Conduct of the Shire; and



- iii. Cr Bell's comments were intended to denigrate and therefore cause a detriment to one or more parties (not necessarily only the CEO).
 - d. the findings were not based on any perceived or actual embarrassment to the CEO. They were based on the fact that it is a breach of section 1.3 and 3.5 of the Shire's Code of Conduct to make improper or derogatory statements which *"may cause any reasonable person unwarranted offence or embarrassment"*. Therefore, Cr Bell's comments, in many instances, were found to be unwarranted.
62. Cr Bell's "interpretation" of the outcome of the Panel decisions is misleading at best, and deliberately deceptive at worst.
63. Given the above, the Panel finds that the Post:
- a. in breach of clause 1.2 of the Code of Conduct by not being honest; and
 - b. breaches the guiding principle set out in Regulation 3(1)(a) to act with reasonable care and diligence;
 - c. was not respectful or courteous in breach of clause 1.3 of the Code;
 - d. was not accurate, polite or professional in breach of clause 3.4 of the Code; and
 - e. makes an allegation against the CEO that is derogatory or improper in breach of clause 3.5 of the Code.
64. In respect to the argument that the past breaches by Cr Bell are unrelated to this new complaint, the Panel directs Cr Bell to section 5.111 of the Act which permits the Panel to refer a "recurrent breach" to the Department CEO. As such, the fact a councillor has prior breaches for similar conduct is directly relevant to the Panel's consideration.
65. Given the above, the Panel finds that it is more likely than not that the Post by Cr Bell was improper as:
- a. the contents of the Post were a breach of the Code of Conduct and the guiding principles set out in Regulation 3; and
 - b. the conduct was of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
 - c. the conduct is deserving of a penalty.
66. This element is met.

Cr Bell intended to cause a disadvantage

67. "Detriment" means loss, damage or injury. It is construed widely and includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage.



68. It is not necessary to find whether any detriment was actually suffered¹¹, but an intent to cause such detriment must be established.
69. The Complainant asserts that the Post was written to cause detriment to the CEO and that the Post also had a direct and serious impact on all Shire staff.
70. Cr Bell disputes that the Post:
 - a. makes any comment on the CEO's performance or his ability to undertake his duties; and
 - b. had any impact on all the Shire staff given that not a single Shire employee had access to his private Facebook page; and
71. Further, Cr Bell asserts that the Post was made to speak privately to his family and friends in a private setting.
72. As noted above, the Panel has found to the required standard that the Post was made in a manner that was accessible to the public and was intended to have a public audience.
73. As such, the Panel does not accept that the purpose of the Post was for Cr Bell to vent his personal feelings to friends and family for his mental health.
74. It appears that the predominate intention of the Post is to indicate that:
 - a. in publishing the relevant article in the Toodyay Community Newsletter in the CEO had acted wrongfully; and
 - b. that the CEO included incorrect information in the said article; and
 - c. to indicate that the findings of the Panel supported Cr Bell's conduct or were insignificant.
75. In addition, the sarcastic and aggressive tone of the Post indicates that Cr Bell wished to show the CEO in a negative and derogatory light.
76. The Panel does not agree that the tone of the Post is "light-hearted" as asserted.
77. In this case, the Panel finds it is more likely than not that Cr Bell made the Post with the intention to denigrate the CEO and therefore cause a detriment to the CEO.
78. Further, the implication that the Standards Panel did not find Cr Bell's conduct in the relevant findings improper and incorrect indicates an intention to minimise and denigrate the minor breach complaints procedure designated by the Act. This is not in the interests of the local government system.
79. This element is met.

Conclusion

80. Given the above, the elements required to find a breach of regulation 7(1)(b) of the Regulations have been met.

¹¹ *Yates and Local Government Standards Panel* [2012] WASAT 59 at [72]



Panel's Findings

81. Cr Bell did commit a breach of Regulation 7(1)(b) of the Regulations and therefore did commit a minor breach.

A handwritten signature in blue ink, appearing to read 'Mick Connolly'.

Mick Connolly (Presiding Member)

A handwritten signature in black ink, appearing to read 'Emma Power'.

Emma Power (Member)

A handwritten signature in black ink, appearing to read 'Peter Rogers'.

Peter Rogers (Member)



Local Government Standards Panel

Complaint Number	SP 2019-046
Legislation	<i>Local Government Act 1995 (WA)</i>
Complainant	Mr Stan Scott
Respondent	Councillor Benjamin Bell
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 Peter Rogers (Member) Mrs Emma Power (Member)
Heard	2 September 2020 Determined on the documents
Penalty Considered	10 November 2020
Outcome	Public Censure and Public Apology

DECISION AND REASONS FOR DECISION

Delivered 12 January 2021

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 2 September 2020, the Panel found that Councillor Benjamin Bell, a councillor for the Shire of Toodyay (**“the Shire”**), committed a minor breach under the Local Government Act 1995 (WA) (**“the Act”**) and regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) (**“the Regulations”**) when he made a Facebook Post that was intended to cause detriment to the Complainant (**“the Minor Breach”**).

Jurisdiction and Law

2. Due to the fact that Cr Bell had been found to have committed six prior minor breaches, at its first consideration of this Complaint on 26 April 2019, the Panel made the decision:
 - a. that if the alleged minor breach was found to have been committed, the same may be a recurrent breach; and
 - b. to send the complaint to the Departmental Chief Executive Officer (**“Department CEO”**) under section 5.111 of the Act, to determine whether the Department CEO would make an allegation to the State Administrative Tribunal (**“SAT”**) under section 5.112(2) of the Act.
3. The complaint was duly referred to the Department CEO on 9 May 2019.
4. On 30 July 2020 the Director General referred complaint SP 2019-046 back to the Panel pursuant to section 5.112(4) of the Act on the basis that, if the allegation was made out, SAT would not consider any further penalties for Cr Bell than those already available to the Panel.
5. On 2 September 2020 the Panel reconsidered the Complaint and found Cr Bell committed a minor breach pursuant to section 7(1)(b) of the regulations.
6. The Panel then convened on 10 November 2020 to consider how it should deal with the sanction for the Minor Breach.
7. 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.
8. 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
9. By a letter dated 8 October 2020, 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.
10. Cr Bell did not make any submissions regarding how the Minor Breach should be dealt with.

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

Possible Sanctions

11. 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) *ordering that no sanction be imposed; 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
 - (iv) *the person against whom the complaint was made pay to the local government specified in the order an amount equal to the amount of remuneration and allowances payable by the local government in relation to the complaint under Schedule 5.1 clause 9;*
- or*
- (c) *ordering 2 or more of the sanctions described in paragraph (b).*

Panel’s Consideration

12. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach.
13. The Panel may order under section 5.110(6)(a), that no sanction be imposed with respect to the complaint, not to reverse the Panel’s finding of a breach, but to indicate that in all the circumstances the relevant councillor should not be penalised further.
14. Guidance as to the factors which the Panel may consider in determining the appropriate penalty to impose include, but are not limited to, the following:
- a. the nature and seriousness of the breaches;
 - b. the councillor’s motivation for the contravention;
 - c. whether or not the councillor has shown any insight and remorse into his/her conduct;
 - d. whether the councillor has breached the Act knowingly or carelessly;
 - e. the councillor’s disciplinary history;
 - f. likelihood or not of the councillor committing further breaches of the Act;
 - g. personal circumstances at the time of conduct, and of imposing the sanction;



- h. need to protect the public through general deterrence and maintain public confidence in local government; and
 - i. any other matters which may be regarded as aggravating conduct or mitigating its seriousness².
- 15. Although the Panel appreciates that it has been some time since the Complaint was first made, the relevant delay was caused due to the referral of the matter to the Department CEO due to repeated findings of minor breach against Cr Bell.
- 16. In this case the conduct of Cr Bell was deemed to be serious as the Facebook Post was misleading in content and publicly criticised the CEO in an improper manner.
- 17. The conduct was further aggravated by the fact that, at the time the relevant conduct occurred, Cr Bell had already been found to have committed several minor breaches for substantially similar conduct.
- 18. In these circumstances, the Panel considers that the appropriate sanctions are that Cr Bell be publicly censured and make a public apology.
- 19. A censure is a public statement of disapprobation of a councillor's conduct. The Panel considers this to be an appropriate penalty as it will send a message to the community and other councillors that Cr Bell's conduct was unacceptable and deserving of a serious penalty.
- 20. Making a public apology is also 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 individuals³; and/or
 - b. does not meet the standards other councillors seek to uphold.
- 21. The Panel confirms that at the time the Complaint was made, Schedule 5.1 clause 9 was not in effect and consequently the Panel does not order that Cr Bell recoup to the Shire the costs of the Department incurred in respect to the Complaint.

² Chief Executive Officer, Department of Local Government and Communities and Scaffidi [2017] WASAT 67 (S)

³ Treby and Local Government Standards Panel [2010] WASAT 81 [127] (Pritchard J).



Panel's decision

22. The Panel orders pursuant to section 5.110(6)(b)(i) and section 5.110(6)(b)(ii) and section 5.110(6)(c) of the Act that, in relation to the Minor Breach of regulation 7(1)(b) of the Regulations, Cr Bell:
- a. make a public apology in terms of the attached Order; and
 - b. be publicly censured in terms of the attached Order.

Mick Connolly (Presiding Member)

Emma Power (Member)

Peter Rogers (Member)



ORDER

Delivered 12 January 2021

DEFAMATION CAUTION

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THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor Benjamin Bell, a councillor for the Shire of Toodyay **publicly apologise**, as specified in paragraph 3, or failing compliance with paragraph 3, then paragraph 4 below.
2. Councillor Benjamin Bell, a councillor for the Shire of Toodyay, be **censured** as specified in paragraph 5 below.

Public Apology

3. On the ordinary council meeting first occurring after the expiration of **28 days** from the date of service of this Order on him, Councillor 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 made a Facebook Post that was misleading, derogatory and intended to cause detriment to Mr Stan Scott.
- i. The Panel found that I breached regulation 7(1)(b) of the said Regulations as my conduct was in breach of the Shire's Code of Conduct and deserving of a penalty.
- ii. I accept that I should not have made the misleading and derogatory comments.
- iii. I now apologise to Mr Stan Scott, my fellow Councillors and the public."



4. If Councillor Bell fails to, or is unable to, comply with the requirements of paragraph 3 above then, within the next **28 days** following the ordinary council meeting referred to in paragraph 3 above, THEN the Chief Executive Officer shall arrange for the following notice of public apology to be published in no less than 10 point print or font:
 - a. on the Facebook Page of the Shire of Toodyay;
 - b. on an appropriate page of the website of the Shire of Toodyay; and
 - c. be published in every Shire of Toodyay public or community newsletter (whether in electronic or print copy) (if any):

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 made a Facebook Post that was misleading, derogatory and intended to cause detriment to Mr Stan Scott.

The Panel found that I breached regulation 7(1)(b) of the said Regulations as my conduct was in breach of the Shire's Code of Conduct and deserving of a penalty.

I accept that I should not have made the misleading and derogatory comments.

I now apologise to Mr Stan Scott, my fellow Councillors and the public.

Public Censure

5. Within the period of 29 days to 43 days from the day following the date of service of this Order on Councillor Bell, the Chief Executive Officer of the Shire of Toodyay shall arrange for the following Notice of Public Censure to be published, in no less than 10 point print or font:
 - a. on the Facebook Page of the Shire of Toodyay;
 - b. on an appropriate page of the website of the Shire of Toodyay; and
 - c. be published in every Shire of Toodyay public or community newsletter (whether in electronic or print copy) (if any).



NOTICE OF PUBLIC CENSURE

The Local Government Standards Panel has found that Councillor Benjamin Bell, a Councillor of the Shire of Toodyay, breached regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007 (WA)* when he made a Facebook Post that was misleading and intended to cause detriment to Mr Stan Scott.



Councillor Bell's conduct was in breach of the Shire's Code of Conduct and deserving of a penalty.

The Panel censures Councillor Bell for the breach regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007 (WA)*.

**LOCAL GOVERNMENT
STANDARDS PANEL**



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."