



Local Government Standards Panel

Complaint Number	SP 48 of 2017 [DLGSC 20170141]
Legislation	<i>Local Government Act 1995</i>
Complainant	Mr Alan Sheridan
Respondent	Councillor Donald Gibson
Local Government	Shire of Chittering
Regulation	Regulations 7(1)(b), 10(1)(a) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Ms M Strauss (Presiding Member) Mr M Beecroft (Deputy Member) Councillor P Kelly (Member)
Heard	15 February 2018 Determined on the documents
Outcome	Breach of regulation 7(1)(b) Breach of regulation 10(1)(a)

FINDING AND REASONS FOR FINDING

Published 26 February 2018

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Summary of the Panel's finding

1. Under the provisions of the *Local Government Act 1995* (WA) (the Act) the Panel decided that Councillor Donald Gibson, a Councillor for the Shire of Chittering (the Shire), breached regulations 7(1)(b) and 10(1)(a) of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) on 28 September 2017 when sending an email to Mr Alan Sheridan, the Shire's Chief Executive Officer, and other Shire Councillors concerning an invoice Cr Gibson had received from the Shire for the use of data on a Shire-issued iPad (the Complaint).

Jurisdiction

2. The Act provides for the circumstances in which a council member commits a minor breach.¹
3. On 29 September 2017 the Panel received a Complaint of Minor Breach Form dated 29 September 2017 signed by the CEO alleging Cr Gibson breached regulations 7 and 10 of the Regulations on 28 September 2017 when sending an email to the CEO and all other Shire Councillors headed "Your FAKE invoice 12178" (the Email).
4. Mr Sheridan provided copies of the following documents with his Complaint Form:
 - the Shire's invoice number 12178 dated 21 August 2017 issued to Cr Gibson (the Invoice);
 - the Email; and
 - an email from Mr Sheridan to Cr Gibson dated 29 September 2017 replying to the Email.
5. On 1 December 2017 the Department of Local Government, Sport and Cultural Industries (the Department) sent Cr Gibson copies of the Complaint Form and the documents listed in paragraph 4 above, inviting Cr Gibson to respond to the Complaint.
6. 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 breach occurred.
7. The Panel convened on 15 February 2018 to consider the Complaint. The Panel:
 - accepted the advice of the Department that, based on information published on the Western Australian Electoral Commission's website, Cr Gibson was first elected as a Shire Councillor on 7 May 2005, was a councillor at the time of the alleged breaches and was still a councillor when the Panel met on 15 February 2018;
 - was satisfied the Complaint was made within two years after the alleged breaches occurred² and that the Shire's Complaints Officer had dealt with the Complaint in

¹ Section 5.105 of the Act.

² Section 5.107(4) of the Act

accordance with the administrative requirements in the Act for dealing with complaints of a minor breach³;

- noted that Cr Gibson responded to the Complaint in an email dated 5 January 2018 and an accompanying Elected Member's Response Form (the Response);
- was satisfied the Department had provided procedural fairness to Cr Gibson; and
- found it had jurisdiction to consider the Complaint.

Panel's role

8. The Panel is not an investigative body.⁴ It makes decisions about complaints of minor breaches solely upon the evidence presented to it and, when relevant, information published on a local government's website, such as agendas for and minutes of council meetings and codes of conduct. For the Panel to find that a councillor committed a minor breach it must be satisfied on the evidence before it that it is more likely than not that the alleged breach occurred.⁵ This is commonly referred to as "the required standard" or "the required standard of proof".
9. The Panel cannot rely on an alleged fact unless it is satisfied that it is more likely than not that the alleged fact is true.⁶ The Panel cannot merely choose between two or more conflicting but equally possible versions of events.⁷ To accept one of the competing versions of events it must be satisfied that one is more likely to be the correct version.
10. For a finding that a councillor has breached a particular regulation the Panel must be satisfied to the required standard that every element of that regulation has been established.
11. Where the complainant submits the Panel should come to a particular conclusion, such as that the evidence establishes an element of the regulation, the Panel must be satisfied, after weighing up all the evidence and applying the relevant legal principles, that its conclusion is the one best supported by the evidence.⁸

The relevant regulations

12. Mr Sheridan does not specify whether he alleges a breach of regulation 7(1)(a) or 7(1)(b) or both. Based on the Complaint Form the Panel treated the Complaint as an allegation of a breach of regulation 7(1)(b).
13. 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 —

³ Sections 5.107, 5.108, 5.109 of the Act.

⁴ *Re and Local Government Standards Panel* [2015] WASAC 51, paragraph 24.

⁵ Section 5.106 of the Act.

⁶ The effect of section 5.106 of the Act.

⁷ *Bradshaw v McEwens Pty Ltd* (1951) 217 ALR 1, paragraph 5.

⁸ The effect of section 5.106 of the Act.



...

(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."*

14. Mr Sheridan does not specify whether he alleges a breach of regulation 10(1) or 10(3) [regulations 10(2) and 10(4) provide exemptions] but based on the content of his Complaint Form the Panel treated the Complaint as an allegation that Cr Gibson breached regulation 10(1)(a).

15. Regulation 10(1)(a) provides:

"10. Relations with local government employees

(1) A person who is a council member must not —

(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;

...

(2) Subregulation (1) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting."

The Complaint

16. The Email reads in full:

"Subject: Your FAKE invoice 12178

Alan,

You are required to disclose evidence of payment by (another named councillor) for his alleged over use of his iPad by Wednesday 27th September.

You are also required to explain why you have failed your employment contract and KPIs by withholding information from an elected member.

Regarding your misinformation on iPad use, my iPads are used for communicating with community groups, not loaned to anyone.

You need to stick to the facts.

*Don Gibson
(phone number inserted)."*

17. In his Complaint Form Mr Sheridan asserts:

- In the Email Cr Gibson makes unsubstantiated allegations about information he (Mr Sheridan) had provided to all Councillors.



- In the Email Cr Gibson makes “one or more” allegations of wrongdoing by Mr Sheridan, “broadcast to other Elected Members with the intent of causing detriment to (him)”, in breach of regulation 7.
 - The second sentence of the Email “could be construed as a defamatory statement due to the gravity of the allegation broadcast to Cr Gibson’s colleagues” who are his employers;
 - The Invoice was issued at the direction of Council at the ordinary council meeting on 19 July 2017 (the OCM).
 - Cr Gibson breached regulation 10 by attempting to direct him in the Email to take certain actions.
18. Mr Sheridan refers the Panel to his email to Cr Gibson on 29 September 2017 (written after the alleged breach) for further information. Mr Sheridan sets out what appears to be the full resolution of Council made at the OCM. Mr Sheridan said the other named Councillor mentioned in the Email had been incorrectly invoiced for excess data use because there had been a problem with his iPad settings. Another Councillor’s iPad had also been set incorrectly. Mr Sheridan also said in that his email: Cr Gibson and other Councillors had been made aware of the problem of incorrect settings; Cr Gibson had been invited to hand in his iPad so the Shire could check the settings; Cr Gibson had refused on a number of occasions to hand in his iPad for checking; and he was again inviting Cr Gibson to hand in his iPad to have the settings checked.
19. Mr Sheridan also told Cr Gibson in his email on 29 September 2017 that he was not withholding information from Cr Gibson. He said Cr Gibson’s iPad had been disabled and would be enabled once checked. In the meantime the Shire was sending hard copy emails and agendas to Councillors.

The Response

20. Cr Gibson denies he breached either regulation 7 or 10. In his Elected Member’s Response Form Cr Gibson submits:
- Mr Sheridan “an employee of the Council, is unwilling to accept any direction, or supply relevant information to Councillors”.
 - Mr Sheridan “has failed to perform the basic requirement of providing information to Councillors”.
 - Regulation 10(1) “contradicts any normal relationship between an employee and his employers, and removes any accountability for the CEO’s actions”.
21. In his 5 January 2018 email to the Department Cr Gibson says:
- Mr Sheridan immediately takes offence “when he is required to take action by a Councillor”.
 - He should not have been invoiced because another Councillor’s invoice had been cancelled.



- Mr Sheridan had failed in his duty to keep him fully informed by blocking his email account.
 - Mr Sheridan refuses to accept the previous Chief Executive Officer's agreement about Councillors' IT allowances being used to pay for Councillors' iPads.
 - He sent the Email "only in an attempt to clarify the situation", not to gain any advantage for himself.
22. Cr Gibson does not address specifically Mr Sheridan's claims that Cr Gibson intended to damage him by sending the Email to him and copying it to all other Councillors.

Alleged breach of regulation 7(1)(b)

23. Regulation 7(2) does not exclude the operation of regulation 7(1)(a) because the alleged conduct is not conduct that could contravene the parts of the Act and *The Criminal Code* referred to in regulation 7(2).

First element – whether Cr Gibson was a councillor when he sent the Email

24. Clearly this element is established.

Second element - whether Cr Gibson used his office as a councillor when he sent the Email

25. This element is also established because Cr Gibson sent the Email in his capacity as a Councillor.

Third element – whether Cr Gibson made improper use of his office as a councillor

26. The Invoice is on a Shire letterhead addressed to Cr Gibson for \$1,000.00 for:

"Reimbursements – Members of Council
Excess data charges on iPad (number stated) September and October 2016
1.0 @ 1000.00 ea"

27. The published minutes of the OCM Council (the Minutes) record that Council moved behind closed doors to discuss item 14.1.3, "Recovery of Excess Broadband Usage Charges". The Minutes include an extract from Mr Sheridan's report to Council:

"Executive Summary

The purpose of this report is to summarise the background regarding excess mobile Broadband Charges associated with a Council broadband account linked to a mobile computing device (iPad) and to recommend actions which are intended to recover the costs associated with those excess charges and other actions to ensure the security of information which is distributed to Councillors and staff via iPad."

28. The Minutes record that Cr Gibson himself moved the motion:



“That Council endorse the Chief Executive Officer’s proposed actions in recovering the excess mobile broadband usage charges and in ensuring the security of information which is distributed to both Staff and Councillors via mobile computing devices.

THE RECOMMENDATION WAS PUT AND DECLARED CARRIED 6/1
BY AN ABSOLUTE MAJORITY”

29. According to Mr Sheridan’s email to Cr Gibson on 29 September 2017, Council passed a more detailed resolution, referring to recovery of the \$1,000 and other action to be taken to check Cr Gibson’s iPad. Cr Gibson does not deny Council made the full resolution set out in Mr Sheridan’s email. Cr Gibson was present for item 14.1.3. The Panel has no reason to doubt that in his email dated 29 September Mr Sheridan accurately recounted the full resolution made at the OCM.
30. The 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.”⁹
31. 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?¹⁰ “For behaviour to be improper it must be such that a right-thinking person would regard the conduct as so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty.”¹¹ Councillors have a duty to be faithful to the proper workings of the local government and their council.¹²
32. Under the Act Panel members must have regard to the general interests of local government in Western Australia.¹³ It is in the interests of local government that councillors are, and are seen to be, professional and to act consistently with authorised decisions of Council and the administration. Councillors must also respect, and be seen to respect, the local government’s processes and the roles of its officers and their lawful decisions.
33. 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.¹⁴ Regulation 3 provides, among other things, that councillors should act with reasonable care and diligence, act with honesty and integrity and treat others with respect and fairness.

⁹ Macquarie Dictionary, Revised Third Edition.

¹⁰ *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 27, referring to *R v Byrnes* (1995) 183 CLR 501.

¹¹ *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 9, referring to *Robbins v Harness Racing Board* [1984] VR 641.

¹² *Yates and Local Government Standards Panel* [2012] WASAT 59 paragraph 64(5), *Treby and Local Government Standards Panel* [2009] WASAT 224 paragraph 19.

¹³ Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).

¹⁴ Regulation 13.

34. The meaning of “improper” must be considered in the context of relevant legislation, such as the Act and the Regulations, 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.¹⁵
35. 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.¹⁶
36. The Shire’s Code of Conduct for Councillors is consistent with the legal principles (outlined above) that apply to a councillor’s standard of conduct. It provides, in part:

“Relationships between Elected Members and Staff

An effective Elected Member will work as part of the Council team with the Chief Executive Officer and other members of staff. That teamwork will only occur if Elected Members and staff have a mutual respect and cooperate with each other to achieve the Council’s corporate goals and implement the Council’s strategies.

To achieve that position Elected Members need to:

- Accept that their role is a leadership, not a management or administrative one
- Acknowledge that they have no capacity to individually direct members of staff to carry out particular functions
- Refrain from publicly criticising staff in any way that casts aspersions on their professional competence and credibility.

Conduct of Elected Members

Personal behaviour

(a) Elected Members will:

- (i) Act, and be seen to act, properly and in accordance with the requirements of the law and the terms of this Code
- (ii) Perform their duties impartially and in the best interests of the Shire of Chittering uninfluenced by fear or favour
- (iii) Act in good faith (i.e. honestly, for the proper purpose and without exceeding their powers) in the interests of the Shire of Chittering and the community
- (iv) Make no allegations which are improper or derogatory (unless true and in the public interest) and refrain from any conduct, in the performance of their official duties, which may cause any reasonable person unwarranted offence or embarrassment; and
- (v) Always act in accordance with their obligation of fidelity to the Shire of Chittering.”

¹⁵ *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 10, referring to *Treby and Local Government Standards Panel* [2010] WASAT 81 (*Treby* 2010).

¹⁶ *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64(4), referring to *Treby* 2010.

37. Mr Sheridan was performing his duty by sending the Invoice pursuant to Council's detailed resolution at the OCM. Cr Gibson was present when Council resolved that the Invoice be issued. Cr Gibson's response that Mr Sheridan was not authorised to send the Invoice is untenable.
38. Cr Gibson's response that he was only seeking to "clarify the situation" is also untenable. A councillor can ask questions of a Chief Executive Officer, if done in an appropriate way. Cr Gibson made blunt accusations, he did not ask any questions. If Cr Gibson had genuine concerns about the matters referred to in the Email he should have taken them to Council.
39. Cr Gibson alleges Mr Sheridan failed to comply with his performance contract by "blocking" his email. Again, Mr Sheridan was acting pursuant to Council's resolution, which included a decision requiring the administration to suspend Cr Gibson's email account until a number of things could be checked. Cr Gibson did not acknowledge or dispute that after suspending Cr Gibson's email account the administration made arrangements to send him hard copies of all emails to Councillors and Agendas.
40. Any reasonable person knowing the standards of conduct that apply to Councillors in their dealings with Shire employees and people generally would find the tone and content of the Email, including its Subject title ("Your FAKE invoice 12178") insulting, disrespectful, unprofessional and likely to offend any recipient. Cr Gibson makes a number of statements challenging Mr Sheridan's integrity and directly accuses him of breaching his employment contract. It is understandable that Mr Sheridan felt offended by this Email and was concerned about his professional standing in the eyes of other Councillors.
41. Cr Gibson acted with disregard for Council's resolution at the OCM, contrary to his obligation to be faithful to Council decisions. Further, it is not a Councillor's role to personally question the Chief Executive Officer's performance. Cr Gibson is obliged to refer any performance issues to Council.
42. After applying the tests for impropriety referred to above the Panel finds Cr Gibson committed a serious breach of the standards of conduct expected of a councillor when sending the Email.
43. The Panel finds that Cr Gibson made improper use of his office when sending the Email to Mr Sheridan and all other Shire Councillors.
44. This element is established.

Fourth element – whether Cr Gibson made improper use of his office to cause detriment to the local government or any other person

45. "Detriment" means loss, damage or injury.¹⁷ It includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage. A person or organisation can suffer detriment through others thinking less favourably of them/it.¹⁸

¹⁷ Macquarie Dictionary Revised Third Edition, 2001.

¹⁸ *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraphs 31, 32.



46. 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.¹⁹ And 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 the councillor believed that his or her actions would cause detriment and took the action to cause detriment.²⁰
47. “To cause detriment” means “in order to” or “for the purpose of” causing detriment, or “with the will to” cause detriment.²¹ 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.²²
48. Cr Gibson bluntly stated Mr Sheridan was dishonest (the references to “Your fake invoice” and spreading wrong or misleading information) and incompetent (the allegation of failing to comply with his employment contract). In all the circumstances a reasonable person would judge these comments to be offensive, denigrating and humiliating. Cr Gibson did not use the proper processes to air his grievances about Mr Sheridan’s performance. Further, the comments had the potential to damage Mr Sheridan’s reputation amongst the other Councillors.
49. The only reasonable conclusion is that Cr Gibson intended to malign Mr Sheridan. The Panel is satisfied to the required standard that Cr Gibson intended to cause detriment to Mr Sheridan. This element is established.

Panel's finding

50. The Panel finds that Cr Gibson breached regulation 7(1)(b).

Alleged breach of regulation 10(1)(a)

First element – whether Cr Gibson was a councillor at the time of the alleged breach

51. Clearly this element is established.

Second element - whether Cr Gibson directed or attempted to direct an employee to do something

52. 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 ...”²³
53. Cr Gibson is clearly issuing directions in the Email, “You are required to ...” This element is established.

¹⁹ *Treby* 2010, paragraph 96, referring to *Chew v The Queen* 1992 CLR 626 (*Chew* 2010).

²⁰ *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.

²¹ *Chew* 2010.

²² *Treby* 2010.

²³ Shorter Oxford English Dictionary, Sixth Edition.



Third element - whether Mr Sheridan had the capacity, in his role as Chief Executive Officer, to do what Cr Gibson directed him to do


54. Mr Sheridan had the capacity to provide information about another Councillor's iPad and speak about his own performance to Council as a whole, if he chose to or if requested or authorised by Council.
55. This element is established.


Panel's finding

56. The Panel finds that Cr Gibson breached regulation 10(1)(a).

Panel's finding

57. The Panel finds that Cr Gibson breached regulations 7(1)(b) and 10(1)(a) of the *Local Government (Rules of Conduct) Regulations 2007* and therefore committed two minor breaches.



Merranie Strauss (Member)

Paul Kelly (Member)

Mark Beecroft (Deputy Member)

Date of Reasons – 26 February 2018