



Local Government Standards Panel

Complaint Number	SP 49 of 2017 [DLGSC 20170145]
Legislation	<i>Local Government Act 1995</i>
Complainant	Ms Sue Arazi
Respondent	Councillor Jesse Jacobs
Local Government	City of Canning
Regulation	Regulations 4, 6, 7(1)(b), 8(b), 11(2) of the <i>Local Government (Rules of Conduct)</i> <i>Regulations 2007</i>
Panel Members	Mrs S Siekierka (Presiding Member) Councillor Paul Kelly (Member) Ms M Strauss (Member)
Heard	25 January 2018 Determined on the documents
Outcome	No breaches of regulations 4, 6, 8(b), 11 (2) One Breach of regulation 7(1)(b)

FINDING AND REASONS FOR FINDING

Published 21 February 2018

DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents.



Summary of the Panel's Finding

1. Under the provisions of the *Local Government Act 1995* (WA) (the Act) the Panel considered whether Councillor Jesse Jacobs, a City Councillor, breached regulations 4, 6, 7(1)(b), 8(b) or 11(2) of the *Local Government (Rules of Conduct) Regulations 2007* on 7 August 2017 and 8 August 2017 when he visited the Tate Street Lodge, a residential facility in the City (the Lodge). The Panel found that on 7 and 8 August 2017 Cr Jacobs did not breach either regulation 4, 6, 8(b) or 11(2) however breached regulation 7(1)(b), thereby committing one minor breach.

Jurisdiction and procedural fairness

2. The Act provides for the circumstances in which a council member commits a minor breach.¹
3. On 6 October 2017 the Panel received a Complaint of Minor Breach Form dated 3 October 2017 signed by Ms Sue Arazi, the owner and operator of the Lodge, alleging that Cr Jacobs breached the five regulations referred to in paragraph 1 above when he visited the Lodge without notice on 7 August 2017 and during a pre-arranged visit at the Lodge on 8 August 2018 (the Complaint).
4. Ms Arazi provided copies of the following documents with her Complaint Form:
 - A two-page statement signed by Ms Arazi dated 4 October 2017 (the Statement).
 - A five-page letter to the City's Chief Executive Officer Mr Arthur Kyron dated 30 August 2017 headed "Unfair Treatment by the City of Canning" (the Letter).
 - An eighteen-page document titled "Summary of an Interview" with Ms Arazi on 8 September 2017 (Summary 1) at the Lodge conducted by Mr B, referred to in Summary 1 as an independent consultant engaged by the City's Executive Manager Governance. Summary 1 is signed by Ms Arazi and Mr B as a "true record of the conversation on 8 September 2017".
 - A seven-page document titled "Summary of an Interview" with Ms Arazi's brother on 28 September 2017 (Summary 2) conducted by Mr B. Summary 2 notes that the City's Ms A and an interpreter of Mandarin were also present. Summary 2 is signed by Mr B and Ms A as a "true record of the conversation on 28 September 2017".
 - The City's Code of Conduct.
5. By letter dated 16 November 2017 the Department of Local Government, Sport and Cultural Industries (the Department) sent Cr Jacobs a copy of the Complaint Form and the documents listed in paragraph 4 above inviting Cr Jacobs 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. However, if a councillor has previously committed two or more minor breaches, the Panel may

¹ Section 5.105 of the Act.

send the complaint to the Chief Executive Officer of the Department instead of considering the complaint itself.² As Cr Jacobs had not previously committed any minor breaches the Panel did not consider sending the Complaint to the Chief Executive Officer of the Department.

7. The Panel convened on 25 January 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 Jacobs was first elected as a City Councillor on 17 October 2015 and was a City Councillor at the time of the alleged breach and when the Panel met on 25 January 2018;
- was satisfied the Complaint was made within two years after the alleged breach occurred³ and that the City's Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of a minor breach⁴;
- noted that Cr Jacobs responded to the Complaint in an email to the Department on 13 December 2017 (the Response);
- was satisfied the Department had provided procedural fairness to Cr Jacobs; and
- found it had jurisdiction to consider the Complaint.

Panel's role

8. The Panel is not an investigative body. 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, codes of conduct and policies. 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.

² Sections 5.110(2)(b), 5.111(1) of the Act.

³ Section 5.107(4) of the Act

⁴ Sections 5.107, 5.108, 5.109 of the Act.

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.

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 Complaint

12. By way of background to the Complaint, Ms Arazi says:

- 38 people petitioned the City in July 2017 complaining about the Lodge and Lodge residents. She did not know about the petition until Cr Jacobs told her during their 8 August 2017 meeting at the Lodge.
- On 7 July 2017 a City Health Inspector conducted the normal annual health inspection. She cooperated fully with the inspection and addressed the items on the “requested list” within the 7 day time frame. He told her there had been a complaint about the Lodge but did not go into detail.
- The City’s Building Compliance Officer conducted an inspection (she does not say when). He “seemed to be happy” with the state of the Lodge. He told her a bit more about the complaint about the Lodge, which was not about building issues.

Cr Jacobs’ visit on 7 August 2017

13. Ms Arazi alleges Cr Jacobs visited without notice, accompanied by a journalist. Ms Arazi was not present. Her brother was present and later told her that Cr Jacobs said there had been complaints about the Lodge and that the journalist took photographs.
14. According to Summary 2 Ms Arazi’s brother told Mr B that the journalist spoke to a resident outside for “a long time”. The resident and the journalist later came inside, where the journalist took photographs of Cr Jacobs and the resident sitting together. Cr Jacobs and the journalist stayed for “less than 20 minutes”.
15. Summary 2 also records that Ms Arazi’s brother told Mr B that Cr Jacobs said the residents need to be controlled and that if they weren’t the “Government” could cancel the licence, which would force the Lodge to close.
16. Ms Arazi says she telephoned Cr Jacobs that afternoon and arranged to meet him the next day.

Cr Jacobs’ visit on 8 August 2017

17. The material in the Statement is consistent with the Letter and Summary 1. Together these documents assert that Cr Jacobs stayed for about two hours, made a number of objectionable statements and conducted himself in a way that caused Cr Arazi to feel pressured to give up her business, bullied and humiliated. In these documents Ms Arazi gives several examples of statements she found to be improper and distressing.

⁸ The effect of section 5.106 of the Act.

The Response

18. Cr Jacobs provided a very short response. He says Ms Arazi sought a meeting with him at the Lodge to discuss what she said was a serious problem with her neighbours. She was concerned about whether the Lodge could continue in the long term. He says Ms Arazi's continual efforts to contact him were excessive and annoying; that she doesn't recognise that he needs to take time out of his busy work schedule to meet with her; and that she complains on "baseless grounds".
19. Cr Jacobs does not address the assertion that he went to the Lodge with a journalist on 7 August 2017 without notice or any prior arrangement or that the journalist took photographs. He does not deny that the meeting on 8 August 2017 lasted about two hours or that he made any statements of the kind Ms Arazi found objectionable.

Allegation 1 – breach of regulation 4

20. Regulation 4 provides:

"4. Contravention of certain local laws

- (1) In this regulation —*

'local law as to conduct' means a local law relating to conduct of people at council or committee meetings.

- (2) The contravention of a local law as to conduct is a minor breach for the purposes of section 5.105(1)(b) of the Act."*

21. The Complaint concerns conduct at two visits to the Lodge. Regulation 4 does not apply as the Complaint does not relate to conduct at a council or committee meeting.

Cr Jacobs did not breach regulation 4.

Allegation 2 – breach of regulation 6

22. The relevant part of 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 section 5.23(2) of the Act;

'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."*



23. Ms Arazi does not allege Cr Jacobs disclosed any information which could possibly fall within the scope of regulation 6(2).

Cr Jacobs did not breach regulation 6.

Allegation 3 – breach of regulation 7

24. Regulation 7 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 —

(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. Ms Arazi does not say whether she alleges a breach of regulation 7(1)(a) or (b) of both. However, based on the alleged conduct, the Panel treated this part of the Complaint as an allegation that Cr Jacobs breached regulation 7(1)(b).

26. Regulation 7(2) does not apply because the alleged conduct is not conduct that could breach the sections referred to in regulation 7(2).

Whether Cr Jacobs was a council member using his office on 7 and 8 August 2017

27. The Panel is satisfied that Cr Jacobs was a council member and using his office as a councillor when he visited Ms Arazi on 7 and 8 August 2017.

28. These two elements are established.

Whether Cr Jacobs used his office improperly on 7 August 2017

29. 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

30. 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

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.



Councillors have a duty to be faithful to the proper workings of the local government and their council.¹²

31. 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.
32. 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 lawfully, avoid damage to the local government's reputation and base decisions on relevant and factually correct information.
33. 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
34. 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
35. In his Response Cr Jacobs says "he was called by (Ms Arazi)" regarding a neighbour issue and "wanted to meet with (him) in person". He does not address Ms Arazi's version that she telephoned him on 7 August 2017 to make arrangements to meet because she had not been there when he visited earlier that day. He does not deny that on 7 August 2017 he went to the Lodge with a journalist without notifying Ms Azari, or that the journalist took photographs of Cr Jacobs and a resident together inside the Lodge.
36. The Panel has no reason to doubt the version of events Ms Arazi's brother reported to Mr B or Ms Arazi's statement that Cr Jacobs had not arranged the visit. Based on the material presented the Panel finds:
 - On 7 August 2017 Cr Jacobs went to the Lodge without arranging the visit with Ms Arazi or obtaining her consent to enter the premises with a journalist.
 - Cr Jacobs spoke to a resident inside the premises.
 - The journalist took photographs of the resident and Cr Jacobs sitting together inside the premises.

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.

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.



- Cr Jacobs raised issues with Ms Arazi's brother concerning residents' activities and the Lodge's licence.
 - Complaints about the Lodge and licensing issues were serious issues for Ms Arazi which could affect her business and Lodge residents.
37. Although Ms Arazi's brother allowed Cr Jacobs and the journalist to enter the premises Cr Jacobs should have made arrangements to meet with Ms Arazi. He should have sought her consent to speak to residents, bring a journalist and take photographs inside the premises. Applying the tests for impropriety referred to in paragraphs 29 to 34 above, the Tribunal finds that in the circumstances it was improper for Cr Jacobs to enter the premises with a journalist, talk to a resident and allow the journalist to take photographs.
38. The Panel is satisfied to the required standard that Cr Jacobs made improper use of his office on 7 August 2017.

Whether Cr Jacobs used his office improperly on 8 August 2017

39. In his Response Cr Jacobs does not address Ms Arazi's assertions in the Statement, the Letter and Summary 1 that Cr Jacobs made a number of statements capable of causing Ms Arazi to feel bullied, humiliated and pressurized to give up her business if she could not control the residents.
40. The City and the Council would have had formal processes for dealing with any community concerns about the Lodge and licensing issues. The Panel is satisfied to the required standard that Cr Jacobs acted improperly on 8 August 2017 by, in all the circumstances described by Ms Arazi, questioning Ms Arazi and making a number of statements and implications that caused Ms Arazi to feel bullied and humiliated, for example:
- the Council has the power to revoke her licence without giving any reasons, Council will do what Council wants and has many ways of achieving this (Statement paragraph 1);
 - local businesses had threatened to move out of the area if the Council didn't close the Lodge down, which would cause the City to lose a lot of money (Statement paragraph 2);
 - she should control the residents and if she did not Council would not give her a licence (Statement paragraph 4, Summary 1 page 8);
 - she had brought shame on the Council (Statement paragraph 4, Summary 1 page 8);
 - photographs had been taken and her reputation would be damaged if the Lodge was mentioned in the paper, which may happen next week (Statement paragraph 4, Letter page 3);
 - the Council wanted to do something to please the local businesses because there was an election coming up (Summary 1 page 6);

- the Lodge was on prime land, which she could sell for a lot of money (Letter page 3); and
- she was not getting any younger so what were her long-term plans for the business? (Letter page 3).

41. Ms Arazi also says:

- she asked for a copy of any complaints about the Lodge so she could understand the problems and improve things but Cr Jacobs did not provide any documentation and refused to say whether he would do so (Summary 1 pages 5, 6 and 7); and
- despite asking for the name of the journalist who had taken the photographs, so she could put her side of the story, Cr Jacobs did not provide it (Letter page 3).

Whether Cr Jacobs intended to cause detriment to Ms Arazi

42. “Detriment” means loss, damage or injury.¹⁷ A person causes detriment if they cause a person to be disadvantaged or damaged personally or financially. A person can suffer detriment through others thinking less favourably of them.¹⁸
43. 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 it is more likely than not that the councillor believed that his or her actions would cause detriment and intended to cause detriment.²⁰ 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.²¹
44. The Panel finds that it is more likely than not that Cr Jacobs intended to facilitate an article that may reflect badly on Ms Azari or the Lodge. This is based on the Panel’s findings that Cr Jacobs:
- took a journalist to the Lodge, spoke to a resident and facilitated photographs, all without notice;
 - did not give Ms Arazi any details about what the article would say;
 - did not offer her an interview with the journalist; and
 - told Ms Arazi that if an article was published it might reflect badly on her.
45. There is no evidence that Ms Arazi had not complied with the City’s building and business compliance requirements. Cr Jacobs suggested there would be adverse publicity. He did not use proper processes to inform Ms Arazi of the Council’s concerns or the substance of any complaints or petitions, or give her the opportunity

¹⁷ Macquarie Dictionary Revised Third Edition, 2001.

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

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 *Treby* 2010.

to respond to the complaints. The preferable inference from the evidence is that Cr Jacobs intended to put pressure on Ms Arazi to make decisions about the future of the Lodge that would benefit the City and the Council.

46. In all the circumstances, the Panel is satisfied to the required standard that Cr Jacobs intended to cause detriment to Ms Arazi on 7 and 8 August 2017. Accordingly, this element is established.

47. The Panel finds that Cr Jacobs breached regulation 7(1)(b).

Allegation 4 – breach of regulation 8(b)

48. Regulation 8 provides:

“8. Misuse of local government resources

A person who is a council member must not either directly or indirectly use the resources of a local government —

(a) for the purpose of persuading electors to vote in a particular way at an election, referendum or other poll held under the Act, the Electoral Act 1907 or the Commonwealth Electoral Act 1918; or

(b) for any other purpose,

unless authorised under the Act, or authorised by the council or the CEO, to use the resources for that purpose.”

49. Ms Arazi does not specify whether she alleges a breach of regulation 8(a) or 8(b). There is nothing in the Complaint that could substantiate a breach of regulation 8(a).
50. In relation to regulation 8(b), the role of a councillor includes visiting and talking with ratepayers, residents, business owners and business operators about local government matters, including complaints and other issues relating to business activities in the local government’s area.
51. Although the Panel finds that the way in which Cr Jacobs conducted his visits was improper the Panel is not satisfied to the required standard that Cr Jacobs breached regulation 8(b).
52. Cr Jacobs did not breach regulation 8.

Allegation 5 – breach of regulation 11

53. Regulation 11 applies to a councillor’s failure to disclose an interest (of the type referred to in that regulation) relating to a matter to be discussed at a council or committee meeting.
54. The relevant parts of regulation 11 are:

“11. Disclosure of interest

(1) In this regulation —

interest means an interest that could, or could reasonably be perceived to, adversely affect the impartiality of the person having the interest and



includes an interest arising from kinship, friendship or membership of an association.

- (2) *A person who is a council member and who has an interest in any matter to be discussed at a council or committee meeting attended by the member must disclose the nature of the interest —*

- (a) *in a written notice given to the CEO before the meeting; or*
(b) *at the meeting immediately before the matter is discussed.”*

55. The Panel cannot find that Cr Jacobs has breached regulation 11 unless it is satisfied that matters in which Cr Jacobs had an interest were to be discussed at a council or committee meeting [regulation 11(2)]. Ms Arazi has not provided any information to indicate that any such matters were to be discussed at a council or committee meeting.
56. The Panel is not satisfied to the required standard that the element in regulation 11(2), “a matter to be discussed at a council or committee meeting” is established.

Cr Jacobs did not breach regulation 11.

Panel’s findings

57. The Panel finds that Cr Jacobs breached regulation 7(1)(b) but did not breach either regulation 4, 6, 8 or 11. Cr Jacobs therefore committed one minor breach.

Sheryl Siekierka (Presiding Member)

Paul Kelly (Member)

Merranie Strauss (Member)

Date of Reasons – 20 February 2018