



Local Government Standards Panel

Complaint Number	SP 57 and 59 of 2018
Legislation	<i>Local Government Act 1995</i>
Complainant	Mr Paul Sheedy Councillor Brian Hearne
Respondent	Councillor Michael Southwell
Local Government	Shire of Capel
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Ms Sheryl Siekierka (Presiding Member) Ms Elanor Rowe (Deputy Member) Ms Rebecca Aubrey (Deputy Member)
Heard	12 December 2018 Determined on the documents
Outcome	One breach of regulation 7(1)(b)

FINDING AND REASONS FOR FINDING

Published 20 February 2019

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Summary of the Panel's decision

1. The Local Government Standards Panel ("the Panel") found that Councillor Michael Southwell ("Cr Southwell"), a councillor for the Shire of Capel ("the Shire"), committed one breach under the *Local Government Act 1995* (WA) ("the Act") and regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations") on 29 June 2018 when he published a Facebook post in relation to the council meeting held on 27 June 2018 ("Council Meeting").

Jurisdiction and procedural fairness

2. The Act makes provision for the circumstances in which a council member commits a minor breach.¹
3. On 13 July 2018 the Department of Local Government, Sport and Cultural Industries ("the Department") received a Complaint of Minor Breach Form ("SP57 of 2019") dated 2 July 2018. The Complaint was signed by Mr Paul Sheedy ("First Complainant") and contained one allegation of a breach of regulation 7 in relation to Cr Southwell. On 18 July 2018 the Department received a second Complaint of Minor Breach Form ("SP59 of 2018") dated 13 July 2018 signed by Councillor Brian Hearne ("Second Complainant") alleging a breach of regulation 7(1)(b) in relation to Cr Southwell. Both complaints (together the "Complaints") relate to the same conduct by Cr Southwell when on 29 June 2018 he published a Facebook post ("Facebook Post") in relation to the Council Meeting.
4. On 18 and 19 July 2018 respectively, the Department advised Cr Southwell of the Complaints and invited him to respond. The Department sent Cr Southwell copies of the original Complaints and all the supporting documents provided by the First and Second Complainants.
5. Under the Act the Panel is required to consider a complaint of a minor breach and make a finding as to whether the alleged breach occurred.² On 12 December 2018 the Panel convened to consider the Complaints.
6. The Panel:
 - (a) accepted the Department's advice, based on information from the Western Australian Electoral Commission, that Cr Southwell was a councillor at the time of the alleged breach, having been elected on 21 October 2017, and was still a Councillor when the Panel met on 12 December 2018;
 - (b) was satisfied the Complaints had been made within two years after the alleged breach is said to have occurred³;
 - (c) was satisfied the Complaints had been dealt with in accordance with the administrative requirements in the Act for dealing with complaints of minor breaches⁴; and

¹ Section 5.105 of the Act.

² Section 5.110(2)(a) of the Act.

³ Section 5.107(4) of the Act

⁴ Sections 5.107, 5.108, 5.109 of the Act.



- (d) was satisfied that the Department had provided procedural fairness to Cr Southwell.
7. A recurrent breach is a minor breach that has occurred after the council member has been found to have committed two or more other minor breaches.⁵
 8. The Panel may send the complaint which if found would be a recurrent breach to the Chief Executive Officer of the department assisting the relevant Minister at the time instead of considering the Complaint itself.⁶
 9. Although Cr Southwell had previously committed nine minor breaches, the Panel did not find that the Complaint ought to be sent to the Chief Executive Officer of the Department as the alleged breaches, if found to have been committed, would not be recurrent breaches as they had not occurred after the Panel had made its earlier findings⁷.
 10. Based on the information referred to in paragraphs 2 to 9 above the Panel found it had jurisdiction to determine whether Cr Southwell had breached regulation 7 in connection with the Complaints.

Panel's role

11. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.
12. Any finding, that a councillor has committed a minor breach, must be based on evidence from which it may be concluded that it is more likely than not that the breach occurred than that it did not occur (the required standard of proof).⁸
13. Where direct proof of an alleged fact, proposition or conduct is not available, in order to find the allegation, proposition or conduct has been established, the Panel must be satisfied from the evidence that it is more probable than not that it has occurred. The Panel cannot make a finding that the alleged fact, proposition or conduct occurred if the evidence merely supports two or more conflicting but equally possible inferences.⁹
14. For a finding that a councillor has breached a particular regulation the Panel must be satisfied that every element of the particular regulation has been established to the required standard of proof.

Regulation 7

15. Regulation 7 provides:

"7. Securing personal advantage or disadvantaging others

⁵ Section 5.105(2) of the Act

⁶ Sections 5.110(2)(b), 5.111(1) of the Act.

⁷ Sections 5.111 and 5.105(2) of the Act

⁸ Section 5.106 of the Act.

⁹ *Bradshaw v McEwens Pty Ltd* (1951) 217 ALR 1, paragraph 5.



(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.”*

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

Elements of regulation 7(1)(b)

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

(a) the person, the subject of the Complaint, engaged in the alleged conduct (first element);

(b) the person, the subject of the Complaint, was a council member both at the time of the conduct and the time when the Panel makes its determination (second element);

(c) by engaging in the conduct, the person, the subject of the complaint, made use of his or her office as a council member (in the sense that he or she acted in their capacity as a councillor, rather than in some other capacity (third element);

(d) that when viewed objectively, such use was an improper use of the person's office as a council member in that it:

(i) involved a breach of the standards of conduct that would be expected of a person in the position of a councillor by reasonable persons with knowledge of the duties, power and authority of the councillor and the circumstances of the case; and

(ii) was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty;

(fourth element)

(e) that the person engaged in the conduct in the belief that detriment would be suffered by the local government or any other person (fifth element).



Fourth element - meaning of “to make improper use of....office”

18. The Macquarie dictionary definition of “improper” is “not in accordance with propriety of behaviour, manners, etc; unsuitable or inappropriate for the purpose or occasion; abnormal or irregular.”¹⁰ The Shorter Oxford dictionary definition is “irregular, wrong; unsuitable, inappropriate; unbecoming, unseemly.”¹¹
19. Whether there is impropriety is to be assessed objectively: would a reasonable person with knowledge of the duties, powers and authority of a councillor, and all the circumstances of the particular case, form the view that the councillor had breached the standards of conduct expected of a councillor?¹² “For behaviour to be improper it must be such that a right-thinking person would regard the conduct as so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty.”¹³
20. Under the Act Panel members must have regard to the general interests of local government in Western Australia.¹⁴ It is in the interests of local government that councillors are, and are seen to be, professional and respectful in their dealings with fellow councillors, local government employees and members of the public.
21. Regulation 3 of the Regulations sets out general principles to guide councillors’ behaviour, although contravention of any of any of these does not amount to a minor breach.¹⁵ Regulation 3 provides, among other things, that councillors should act with reasonable care, diligence and integrity and treat others with respect and fairness.
22. The meaning of “improper” must be considered in the context of relevant legislation, such as the Act and the Regulations, and other rules and standards that apply to a councillor’s role and conduct, such as the local government’s Code of Conduct, and the circumstances and context of the case.¹⁶ All these provisions form part of the backdrop to the Regulations and give context to a complaint but the alleged conduct must also be judged in the particular circumstances.
23. Conduct can be improper even though the councillor’s judgment is that it isn’t improper. A councillor’s use of his or her office can be improper even though the councillor is intending to benefit the local government, the council or the ratepayers and residents.¹⁷

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

¹⁰ Macquarie Dictionary, Revised Third Edition.

¹¹ Shorter Oxford English Dictionary, Sixth Edition.

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

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

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

¹⁵ Regulation 3.

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

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

24. "Detriment" means loss, damage or injury.¹⁸ It includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage. A person can suffer detriment through others thinking less favourably of them.¹⁹
25. For regulation 7(1)(b) to be satisfied it is not necessary to show that the local government or the person concerned actually suffered detriment.²⁰ However it is not enough to show that the local government or the person concerned suffered detriment, or could have suffered detriment. The Panel must find that it is more likely than not that the councillor believed that his or her actions would cause detriment and intended to cause detriment.²¹
26. "To cause detriment" has been interpreted as meaning "in order to" or "for the purpose of" causing detriment, or "with the will to" cause detriment.²² There can be a finding of intent if, after considering all the evidence, the only reasonable inference is that the councillor intended to cause detriment.²³

Substance of the Complaints

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27. The First Complainant alleges that Cr Southwell breached regulation 7 by posting disparaging remarks on Facebook about the First Complainant in his former role as CEO of the Shire. The First Complainant alleges the remarks were made in a post on Cr Southwell's own Facebook page ("Facebook Post") and that the same post was also published on the Gelorup Gazette – Greater Bunbury Region's Facebook page ("Gelorup Gazette's Facebook Post").
28. The First Complainant attaches a copy of the Facebook Post to the Complaint:

6/30/2018

councillor michael southwell – Facebook Search



Councillor Michael Southwell

2 hrs ·

I look forward to working with new CEO Ian McCabe.
At the June Council meeting we saw more of the arrogance and bullying which I have experienced during departing CEO Sheedy's reign.
He said he couldn't answer my question about how much the Shire spent on his farewell party with dozens of guests at the golf club a week earlier because the club had not submitted its invoice yet. What?
He breached confidentiality he himself had imposed on a February workshop about Rates, in a weak attempt to contradict me in the Agenda.
He forced people to give him their questions in writing before public question time, then censored these, preventing some from being asked and verbally threatening another ratepayer that he would "see you in Court" if the question was asked the way it was written.
He successfully encouraged councillors to vote against my bid to make Council more accessible, open and accountable by the simple measure of tape recording meetings.
And perhaps worst of all, he chose to sit in on the 'behind closed doors' debate on his Motion urging the Shire to pay legal bills for him to threaten ratepayers with defamation – despite declaring an obvious financial conflict of interest.

¹⁸ Macquarie Dictionary Revised Third Edition, 2001.

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

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

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

²² *Chew* 2010.

²³ *Treby* 2010.



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29. The Second Complainant alleges that Cr Southwell breached regulation 7(1)(b) by publishing the Facebook Post in which Cr Southwell made offensive comments about the former CEO (the First Complainant).
30. The comments in the Facebook Post that the Second Complainant refers to include:
- a. Cr Southwell accuses the former CEO of arrogance and bullying;
 - b. Cr Southwell criticises the former CEO for not answering a question concerning the cost of the former CEO's resignation retirement function. However, the Second Complainant states:
 - i. the former CEO was not involved in the organisation of the function;
 - ii. final invoices had not been received; and
 - iii. the function had been previously approved by the President of the Shire and his Deputy. Councillors were advised on 12 July 2018 that the cost was \$2118 for 55 attendees.
 - c. Cr Southwell states the former CEO "*forced*" ratepayers to give questions in writing before public question time, then "*censored*" those questions. The Second Complainant attaches a document with the title "Questions, Presentations, Petitions and Deputations" that describes the procedure for asking a question at a Council meeting and which appears on page 2 of the Shire's Notice of Council Meeting page. The Second Complainant states:

"The policy has been in force for some time with no objection raised by Council. No apparent force has been applied to ratepayers however on one occasion a series of similar questions were asked on a topic outside the jurisdiction of the Shire. During the meeting the ratepayers appeared to accept the CEO response that he would write to them directing them to the responsible agency."
 - d. Cr Southwell states that the former CEO urged Councillors to support the Shire paying legal costs despite an "*obvious*" conflict of interest that the former CEO declared. However, the Second Complainant states that the former CEO was present in the meeting to answer technical questions. As the Second Complainant was the presiding officer at the time and the matter was discussed behind closed doors, the Second Complainant can confirm that only one question was asked of the former CEO and it was answered in accordance with the Act. An examination of the definition "*urging*" suggests it could mean the former CEO "*urged, suggested, exerted a compelling force, urged a course of action or strongly advised*" action should be taken however this did not happen. Council voted 7/1 to support the motion based on legal advice received and did not appear to be under any duress.



- e. Cr Southwell stated the former CEO successfully “*encouraged councillors to vote against*” Cr Southwell’s bid to make Council more accessible, open and transparent. However, the Second Complainant states the CEO’s role was to prepare an agenda item for consideration in accordance with Cr Southwell’s request. Again, the definition of encourage could infer that the CEO talked or behaved in a way to make someone more likely to do something or support his line of thought. The Second Complainant was not under that pressure and Council voted on the merit of the information provided and the debate in Council and did not support the motion.
 - f. Cr Southwell stated the former CEO breached confidentiality that he himself imposed in a February workshop (in the agenda) in a “*weak attempt*” to contradict Cr Southwell. In the Second Complainant’s opinion, the former CEO did not breach confidentiality however the Second Complainant is concerned at the words used to describe the former CEO’s action.
31. The Second Complainant’s concern in raising the minor breach is that offensive comments were posted by Cr Southwell on his Facebook page, which used language that misrepresented what actually occurred, and provoked further negative comments from other Facebook users that could cause detriment to the Shire and other persons. The Second Complainant attaches copies of comments such as “*Paul Pot’s regime*” and others that are a cause for concern and that appeared under Cr Southwell’s Facebook Post that in his opinion should not have been posted in the first place.
32. The former CEO has spent a lifetime in local government including a period in excess of 12 years as CEO of the Shire and the Second Complainant is informed he has received numerous awards for his service; he does not deserve the treatment detailed above and in the attachments.

Councillor Southwell’s Response

33. Cr Southwell denies the allegations.

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34. Cr Southwell states the Complaint is defective. The First Complainant accuses Cr Southwell of posting the comments he complains of to the Gelorup Gazette Facebook page, however Cr Southwell did not and he does not have the means or ability to post things to that page. If the comments were published on his own personal Facebook page, then they were “shared” to the Gelorup Gazette Facebook page, but this was not done by Cr Southwell.
35. The Complaint is also defective in that the First Complainant does not explain what detriment has been caused, or how. Cr Southwell states: “*It is a sloppy, inadequate and offhand complaint*”.
36. Cr Southwell states that the remarks he made were not disparaging.



37. Cr Southwell's states the Facebook Post does not cause a detriment to the First Complainant; it is only honest and fair reporting of events that may happen to cause a detriment to the First Complainant. The First Complainant is responsible for any personal detriment caused by his actions, not the person who may accurately report those actions.
38. It is a true fact that Cr Southwell has experienced arrogance and bullying behaviours as a councillor during the First Complainant's time as CEO.
39. It is a true fact that the Complainant told Council he could not answer a question about the cost of his farewell party because the venue had not submitted an invoice. Cr Southwell refers to and attaches the following excerpt from the Council Meeting Minutes (with markings added by Cr Southwell):

QUESTIONS OF WHICH PREVIOUS NOTICE HAS BEEN GIVEN

Cr Southwell has submitted the following Questions on Notice:

What was the total cost to the Shire of arranging and providing a farewell party for CEO Paul Sheedy at the Capel golf club two weeks ago?

Under what Shire policy was approval for this expenditure given?

Chief Executive Officer Response: As the Capel Golf Club has not submitted an invoice for payment at this time, I am not in a position to confirm the total cost of the function.

The function was not approved under any Council policy but was requested and endorsed by the Shire President and Deputy Shire President with the costs being allocated to Schedule 4 Account 101520 Members of Council 'Refreshments and Receptions.'

40. It is a true fact that the First Complainant breached confidentiality he himself had imposed on a Budget workshop agenda to contradict Cr Southwell in the June Council Meeting agenda. Cr Southwell refers to and attaches the following excerpt from the Council Meeting Minutes (with markings added by Cr Southwell):

Finally, Cr Southwell's statement that 'The staff recommendation to change the Shire's Rates system from differential to single rate appeared in the May Council meeting Agenda without public consultation and forewarning to this councillor, at least' is not correct as all Councillors, including Councillor Southwell, were provided with an agenda and background paper that included a number of models, including proposals to move away from the current differential rating system to a single rate in the dollar, prior to the Rating Workshop on 28 February 2018. The fact that Councillor Southwell chose not to attend the Rating Workshop and be part of that discussion was his decision but he was given forewarning of the proposals put forward by staff.

41. It is a true fact that the First Complainant insisted on people providing their questions in writing prior to public question time at the Council Meeting. It is true the First Complainant told some people their questions would not be allowed to be asked and told one ratepayer "see you in Court" if the question was asked as it was written. This is a form of censorship. Cr Southwell refers to and attaches the following excerpt from the Council Meeting Minutes (with markings added by Cr Southwell):



PUBLIC QUESTION TIME

Mr Sheedy commented that a number of questions had been submitted about the Council position on the Bunbury Outer Ring Road (BORR), specifically about the alignment being moved or the impact on the community. He said that the proposed BORR is a state responsibility being managed by Main Roads WA and that under Local Government (Administration) Regulations 7 (4) (a), Council is not required to respond to any questions that do not relate to a matter affecting the local government. Questions previously submitted that would not be permitted to be asked at the meeting included Miss Natalie Bellamotti's first question, Mr Mat Goodlad's two questions, Mr Barney Tompkins' question, and Mr Steve Flower's first question.

Mr Sheedy also advised that a written response as outlined above would be provided to the community members who submitted these questions.

42. It is a true fact that in the Agenda to the Council Meeting, in the background to Cr Southwell's Motion for the tape recording of meetings, the First Complainant encouraged councillors to defeat the Motion. Cr Southwell refers to and attaches the following excerpts from the Council Meeting Minutes (with markings added by Cr Southwell):

11 MOTIONS OF WHICH PREVIOUS NOTICE HAS BEEN GIVEN

Cr Michael Southwell has submitted the following Notice of Motion as per Standing Orders Local Law Clause 4.12:

MOTION – Audio Recording of Council Meetings

Point 9
Council instruct the CEO to prepare a report for the next meeting of Council regarding the arrangements needed and cost of taking and keeping audio recordings of Council meeting proceedings, except when meetings are closed for confidential matters.

Reasons: This is an attempt to introduce improved accountability at the Capel Shire. The addition of audio recording would mean there was a permanent record which could be examined by interested parties of Council proceedings. Because Council meetings commence during normal working hours at 4.30pm, many cannot be present for all or part of the meeting. Audio records would allow any interested party to catch up with exactly what has occurred and how councillors voted. Any possible dispute which may arise over what might have been said would be ended. The practice of keeping audio records of Council meetings is common at other Shire Councils.

13.2 Audio Recording of Council Meetings

Location:	Capel
Applicant:	Shire of Capel
File Reference:	N/A
Disclosure of Interest:	Nil
Date:	06.06.18
Author:	Chief Executive Officer, PF Sheedy
Senior Officer:	Chief Executive Officer, PF Sheedy
Attachments:	Nil

IN BRIEF

Council has requested a report from the Chief Executive Officer to prepare a report regarding arrangements needed and cost of taking and keeping audio recordings of Council meeting proceedings, except when meetings are closed for confidential matters.

RECOMMENDATION

That Council resolves not to support the audio recording of Council meetings as despite the minimal cost involved there does not appear to be any significant benefits to the community by implementing audio recording of Council meetings or to justify the costs involved.



43. It is a true fact that the First Complainant wrote a Motion urging Council to approve payment for a private defamation legal action, then stayed in the meeting while this was debated behind closed doors and it is a fact that the First Complainant has an obvious financial interest in the matter. Cr Southwell refers to and attaches the following excerpt from the Council Meeting Minutes (with markings added by Cr Southwell):

SHIRE OF CAPEL ORDINARY COUNCIL MINUTES – 27 JUNE 2018.....150

ITEMS FOR CONSIDERATION BEHIND CLOSED DOORS

Cr McCleery declared an Impartiality interest in Item 21.1 Legal Action – Defamation Statements. The extent and nature of his interest is that his neighbour is one of the publishers mentioned in the item.

Mr Paul Sheedy and Cr Murray Scott declared a Financial interest in Item 21.1 Legal Action – Defamation Statements. The extent and nature of their interest is that they are the parties requesting Council to meet legal costs.

OC0624 (21.1) Legal Action – Defamation Statements

Location: Shire of Capel
Applicant: Civic Legal
File Reference: LI.AD.2/ILM471
Disclosure of Interest: I wish to disclose a financial interest in this matter being one of the parties the subject of the legal advice.
Date: 25.06.18
Author: Chief Executive Officer, PF Sheedy
Senior Officer: Chief Executive Officer, PF Sheedy
Attachments: Civic Legal – Legal Advice (CONFIDENTIAL)

IN BRIEF

The legal advice provided by Civic Legal indicates that, in their view, potential defamatory statements have been made on Facebook posts, against the Shire President and Chief Executive Officer by alleged defamers, that Council Policy 1.5 allows the Council to agree to meet the legal costs involved in issuing 'concerns notices', with Council being requested to formally resolve to support the action.

OC0626 OFFICER'S RECOMMENDATION – 21.1/COUNCIL DECISION

Moved Cr Bell, Seconded Cr J Scott

That Council resolves to:

1. Support the Shire President and the CEO in obtaining advice and representation, from Civic Legal, to issue concerns notices on their behalf with a view to obtaining a public apology and other amends to a maximum combined cost of \$6,000 (i.e. a maximum of \$3,000 to support the Shire President and a maximum of \$3,000 to support the CEO); and
2. Endorse the deeds between the Shire and Shire President and Chief Executive Officer (as tabled at the meeting) and authorise the President and Chief Executive Officer to affix the Common Seal to the deeds.

Carried 7/1

Cr Southwell requested that his vote against the Motion be recorded.

VOTING REQUIREMENTS

Simple majority

44. As a councillor, it is Cr Southwell's role to facilitate communication with ratepayers and residents. Among the ways he does this is to have a Facebook page and to report Council matters on the page.

45. It is important for ratepayers and residents to know how the CEO of the Shire conducts Council business and handles its responsibilities. They have a right to know this information and not everyone can be present at every Council meeting.

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46. The Second Complainant accuses Cr Southwell of causing detriment to "*the local government and other persons*". He does not say who those other persons are.



47. Cr Southwell did not cause detriment to the local government, because the person to whom his remarks were directed was no longer an employee of the local government at the time.
48. The only subjective remarks made in his Facebook Post were mentions of arrogance and bullying. Cr Southwell would argue that factual statements in the Facebook Post set out a legitimate case that the former CEO exhibited behaviours that would accurately be described as arrogant and bullying.
49. It is a fact that the former CEO did not provide an answer to the question of how much his send-off function had cost the Shire a week after the event.
50. It is a fact that ratepayers, on the former CEO's instruction, were forced to submit questions in writing before they were allowed to ask them at public question time. It is a fact that the CEO then censored these and told one ratepayer "*I'll see you in court*" if they asked the question as it was written.
51. It is a fact that the former CEO's Motion recommending Council pay the costs for himself and the President to initiate defamation actions against some residents urged Councillors to support the motion. It is a fact that the former CEO has an obvious conflict of interest (which he declared) and it is a fact that he nevertheless chose to author the Motion and recommend to support it, and to stay in the meeting during the debate. Cr Southwell would argue that the former CEO's presence in the meeting at which a Motion to provide a payment to him for legal action would amount to undue influence and could be seen as intimidating towards other councillors.
52. It is a fact that the former CEO, in the background and recommendation sections that he prepared and published, encouraged councillors to vote against a proposition Cr Southwell had put forward to have audio recordings of Council proceedings. The former CEO's recommendation was successful and the idea was rejected.
53. It is a fact that the former CEO imposed strict confidentiality on a so-called Budget Workshop for councillors and staff in February, then breached that same confidentiality in the Agenda for the Council Meeting by stating that Cr Southwell had been given the agenda, identifying that information.
54. It is not Cr Southwell's reportage on Facebook that may have caused the local government a detriment but instead the former CEO's actions.
55. Cr Southwell should not be held responsible for comments other people make on Facebook. Perhaps they were elicited, not by his remarks, but by a history of arrogant and bullying behaviour by the former CEO.
56. The former CEO's length of service and unspecified claims of awards does not change the facts of his behaviour, as outlined by Cr Southwell. The former CEO should not be protected from fair comment by the Regulations.



Panel's consideration

57. The First Complainant does not state whether it is a breach of regulation 7(1)(a) or 7(1)(b) that is alleged. However based on the evidence before it, the Panel finds it is a breach of regulation 7(1)(b) that is alleged by both Complainants.

Regulation 7(1)(b)

First, second and third elements satisfied

58. The Panel finds that Cr Southwell engaged in the conduct which is the subject of the Complaints and that he was a councillor and was acting as a councillor at all relevant times.

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

Whether Cr Southwell acted improperly (fourth element)

60. The Panel has considered all the evidence and it is satisfied that the fourth element has been established and finds that Cr Southwell did act improperly. The Panel makes this finding because it is satisfied to the required standard of proof that a reasonable person would consider that Cr Southwell did not meet the standards of conduct expected of a councillor when adding the Facebook Post:

- a. Cr Southwell's Facebook Post is several paragraphs long and apart from the first sentence in which Cr Southwell welcomes the new CEO, the post is wholly directed at the alleged wrongful actions of the former CEO during his term in that role. The community looks to councillors to provide leadership and guidance and Cr Southwell uses his position as a councillor and the opportunity to communicate with the community in welcoming the new CEO, to focus on making those allegations. The Panel finds that it was inappropriate, given the occasion, to do so.
- b. An individual undertakes significant public obligations when they become a member of the council of a local government. The standards of conduct that are expected of a councillor include that a person in the capacity of a council member should avoid damage to the reputation of the local government and treat others with respect and fairness. The Facebook Post is clearly negative towards the former CEO and Cr Southwell makes some serious allegations against him including: *arrogance and bullying; breaching confidentiality; threatening and forcing residents to act in a certain way; censorship and affecting the impartiality of council decisions*.
- c. Furthermore, the allegations against the former CEO affect not only him personally, but also have an impact on Cr Southwell's fellow councillors who were also responsible for making the decisions Cr Southwell refers to in the Facebook Post, and the Shire itself. Generally, a council member, has an obligation of loyalty to their local government irrespective of whether they voted for or against the decision or they agreed or not with the decision or the reason or any reasons for the decision. If Cr Southwell had doubts about the lawfulness of a process or decision by council, he should have brought the matter to the attention of council by lodging an appropriate notice of motion, and if council had failed to deal with the notice of motion in a lawful



manner or in a way that was not satisfactory to him, to report the matter to the appropriate agency.

- d. Where a council member chooses to communicate with ratepayers and residents on social media and takes it upon them self to make public statements, comments or remarks about the affairs of their local government and report on council matters, they have an obligation to ensure that any statement of fact they mention or rely on is substantially true and that their comments or remarks are not made or delivered with malice. It is likely that some readers of the Facebook Post may simply have read and taken the post at face value. The Panel refers to the following comment in the Facebook Post referring to the former CEO:

“He breached confidentiality he himself had imposed on a February workshop about Rates, in a weak attempt to contradict me in the agenda”.

- e. The Panel finds that the comment referred to above presupposes that the former CEO breached confidentiality. Furthermore, the Panel has considered the evidence put forward by Cr Southwell in his response (below) and finds that it does not support his argument that the statement was factually correct:

Finally, Cr Southwell’s statement that ‘The staff recommendation to change the Shire’s Rates system from differential to single rate appeared in the May Council meeting Agenda without public consultation and forewarning to this councillor, at least’ is not correct as all Councillors, including Councillor Southwell, were provided with an agenda and background paper that included a number of models, including proposals to move away from the current differential rating system to a single rate in the dollar, prior to the Rating Workshop on 28 February 2018. The fact that Councillor Southwell chose not to attend the Rating Workshop and be part of that discussion was his decision but he was given forewarning of the proposals put forward by staff.

- f. The Panel also refers to the following statement by Cr Southwell about the former CEO:

“He forced people to give him their questions in writing before public question time, then censored these, preventing some from being asked and verbally threatening another ratepayer that he would “see you in Court” if the question was asked the way it was written”.

- g. With regard to the allegation that the First Complainant *forced* people to give him their questions in writing before public question time, *censored the questions submitted*; and *verbally threatened a ratepayer*, Cr Southwell refers to the following excerpt from the Council Meeting Minutes as evidence:



PUBLIC QUESTION TIME

Mr Sheedy commented that a number of questions had been submitted about the Council position on the Bunbury Outer Ring Road (BORR), specifically about the alignment being moved or the impact on the community. He said that the proposed BORR is a state responsibility being managed by Main Roads WA and that under Local Government (Administration) Regulations 7 (4) (a), Council is not required to respond to any questions that do not relate to a matter affecting the local government. Questions previously submitted that would not be permitted to be asked at the meeting included Miss Natalie Bellamotti's first question, Mr Mat Goodlad's two questions, Mr Barney Tompkins' question, and Mr Steve Flower's first question.

Mr Sheedy also advised that a written response as outlined above would be provided to the community members who submitted these questions.

- h. The Panel does not find that the excerpt above supports Cr Southwell's argument that his comment was factually correct. Rather, the Panel finds that the excerpt shows that Council was not required to respond to questions that did not relate to a matter affecting local government and on that basis there were some questions that would not be permitted.
- i. Such allegations as outlined above are extremely serious and Cr Southwell chose to make them on Facebook. The Panel finds it was wrong for Cr Southwell to do so.

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

61. The Panel is satisfied to the required standard of proof that Cr Southwell intended to cause detriment to the former CEO of the Shire (the First Complainant) and the Shire by publishing the Facebook Post. Based on the evidence before it, the Panel finds:

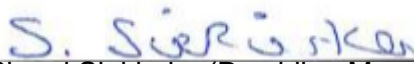
- a. Cr Southwell chose to publish the Facebook Post publicly and put forward the allegations against the former CEO in front of a wide audience (the Facebook Post was subsequently also shared on the Gelorup Gazette Facebook Page). The fact that the former CEO was not a current employee does not change the fact that detriment could be caused to him and the Shire as the Facebook Post clearly concerned matters of local government. It is in the interests of local government that councillors are, and are seen to be, professional and respectful in their dealings with other parties.
- b. The Facebook Post was published two days after the Council Meeting. The Panel finds Cr Southwell had time to give real and actual consideration to what occurred at the Council Meeting and the implications of publishing the Facebook Post. There were other channels open to Cr Southwell to report the various allegations against the former CEO as an alternative.
- c. The Facebook Post includes some very serious allegations against the former CEO and to publish the allegations on social media could be detrimental to both the Shire as well as the former CEO.



- d. The Panel finds it more likely than not that readers of the Facebook Post would look less favourably on the former CEO and the Shire and the clear and reasonable inference is that Cr Southwell, by publishing the Facebook Post, intended to cause detriment to both.

Findings

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


Sheryl Siekierka (Presiding Member)



Elanor Rowe (Member)



Rebecca Aubrey (Member)



Local Government Standards Panel

Complaint Number	SP 57 and 59 of 2018
Legislation	<i>Local Government Act 1995 (WA)</i>
Complainants	Mr Paul Sheedy Councillor Brian Hearne
Respondent	Councillor Michael Southwell
Local Government	Shire of Capel
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct)</i> <i>Regulations 2007 (WA)</i>
Panel Members	Ms S Rizk (Presiding Deputy Member) Ms E Rowe (Deputy Member) Ms R Aubrey (Deputy Member)
Heard	26 April 2019 Determined on the documents
Outcome	Public censure

DECISION AND REASONS FOR DECISION

Published: 14 May 2019

DEFAMATION CAUTION

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Introduction

1. At its meeting on 12 December 2018, the Panel found that Councillor Michael Southwell ("Cr Southwell"), a council member of the Shire of Capel ("the Shire") committed one breach of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) ("the Regulations") when he published a Facebook post on 29 June 2018 in relation to the council meeting held on 27 June 2018.
2. On 20 February 2019 the Panel published its Finding and Reasons for Finding ("Findings") that Cr Southwell had breached regulation 7(1)(b). The Panel reviewed all the evidence presented to it and said:

"60.

- a. Cr Southwell's Facebook Post is several paragraphs long and apart from the first sentence in which Cr Southwell welcomes the new CEO, the post is wholly directed at the alleged wrongful actions of the former CEO during his term in that role. The community looks to councillors to provide leadership and guidance and Cr Southwell uses his position as a councillor and the opportunity to communicate with the community in welcoming the new CEO, to focus on making those allegations. The Panel finds that it was inappropriate, given the occasion, to do so.
- b. An individual undertakes significant public obligations when they become a member of the council of a local government. The standards of conduct that are expected of a councillor include that a person in the capacity of a council member should avoid damage to the reputation of the local government and treat others with respect and fairness. The Facebook Post is clearly negative towards the former CEO and Cr Southwell makes some serious allegations against him including: *arrogance and bullying; breaching confidentiality; threatening and forcing residents to act in a certain way; censorship and affecting the impartiality of council decisions*.
- c. Furthermore, the allegations against the former CEO affect not only him personally, but also have an impact on Cr Southwell's fellow councillors who were also responsible for making the decisions Cr Southwell refers to in the Facebook Post, and the Shire itself. Generally, a council member, has an obligation of loyalty to their local government irrespective of whether they voted for or against the decision or they agreed or not with the decision or the reason or any reasons for the decision. If Cr Southwell had doubts about the lawfulness of a process or decision by council, he should have brought the matter to the attention of council by lodging an appropriate notice of motion, and if council had failed to deal with the notice of motion in a lawful manner or in a way that was not satisfactory to him, to report the matter to the appropriate agency.
- d. Where a council member chooses to communicate with ratepayers and residents on social media and takes it upon them self to make public statements, comments or remarks about the affairs of their local government and report on council matters, they have an obligation to ensure that any statement of fact they mention or rely on is substantially true and that their comments or remarks are not made or delivered with malice. It is likely that some readers of the Facebook Post may simply have read and taken the post at face value.

.....



61.

- a. Cr Southwell chose to publish the Facebook Post publicly and put forward the allegations against the former CEO in front of a wide audience (the Facebook Post was subsequently also shared on the Gelorup Gazette Facebook Page). The fact that the former CEO was not a current employee does not change the fact that detriment could be caused to him and the Shire as the Facebook Post clearly concerned matters of local government. It is in the interests of local government that councillors are, and are seen to be, professional and respectful in their dealings with other parties.
- b. The Facebook Post was published two days after the Council Meeting. The Panel finds Cr Southwell had time to give real and actual consideration to what occurred at the Council Meeting and the implications of publishing the Facebook Post. There were other channels open to Cr Southwell to report the various allegations against the former CEO as an alternative.
- c. The Facebook Post includes some very serious allegations against the former CEO and to publish the allegations on social media could be detrimental to both the Shire as well as the former CEO.
- d. The Panel finds it more likely than not that readers of the Facebook Post would look less favourably on the former CEO and the Shire and the clear and reasonable inference is that Cr Southwell, by publishing the Facebook Post, intended to cause detriment to both.

Jurisdiction

3. The Panel convened on 26 April 2019 to consider how it should deal with the Minor Breach. The Panel accepted the advice of the Department of Local Government, Sport and Cultural Industries that on this date there was no available information to indicate that Cr Southwell had ceased to be or was disqualified from being a councillor.

Possible Sanctions

4. Section 5.110(6) of the *Local Government Act 1995* (WA) ("the Act") provides that the Panel is to deal with a minor breach by:
 - (a) *dismissing the complaint;*
 - (b) *ordering that —*
 - (i) *the person against whom the complaint was made be publicly censured as specified in the order;*
 - (ii) *the person against whom the complaint was made apologise publicly as specified in the order; or*
 - (iii) *the person against whom the complaint was made undertake training as specified in the order;*
 - or*
 - (c) *ordering 2 or more of the sanctions described in paragraph (b).*



5. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach. The Panel may dismiss a complaint under section 5.110(6)(a), not to reverse the Panel's finding of a breach but to indicate that in all the circumstances the councillor should not be penalised and the breach should not be recorded against the councillor's name.

Councillor Southwell's Submissions

6. 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
7. In a letter dated 25 February 2019, the Department notified Cr Southwell of the Panel's findings, providing him with a copy of its Findings published on 20 February 2019 and inviting him to make submissions on how the Panel should deal with the breach under section 5.110(6).
8. In an emailed letter dated 4 March 2019 the Panel received submissions from Cr Southwell stating that the Finding was unfair and asking that the Complaint be dismissed on the following basis:
 - a. There is a lack of procedural fairness in combining two separate and discrete complaints into a single finding;
 - b. The Panel's Finding is in part based on supposition rather than evidence;
 - c. Both complaints are defective;
 - d. He did not act improperly and was performing his role as a Councillor to the best of his ability by reporting facts to ratepayers, residents and electors and keeping them informed about Council matters; and
 - e. The Facebook posts which contained the allegedly offending remarks were removed as soon as he learned of the complaints. Furthermore, he has removed all offending material from his Facebook page and not repeated this behaviour therefore there is no beneficial purpose in imposing a penalty.

Panel's consideration

9. The Panel found that Cr Southwell committed one breach of regulation 7(1)(b) that related to his conduct when he published a Facebook Post on 29 June 2018 in relation to the Council Meeting on 27 June 2018. Cr Southwell had previously been found to have committed ten minor breaches.
10. The Panel has considered Cr Southwell's submissions as to how the Complaint should be dealt with. Cr Southwell shows no remorse for his actions and he does not apologise. Rather he continues to justify his conduct as being both reasonable and, in fact, commendable. Cr Southwell also takes the opportunity when responding to criticise the decision of the Panel.

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



11. The Panel does not consider that dismissal of the Complaint as requested by Cr Southwell is appropriate because this would indicate that his conduct was so minor that no penalty is warranted.
12. The Panel found that Cr Southwell's Facebook Post was wholly inappropriate. It showed total disregard to the reputation of the Shire's former CEO and a clear lack of respect towards him, and invited only further condemnation of him. The allegations contained in the post were very serious and not only affected the former CEO but also potentially had a damaging effect on Cr Southwell's fellow councillors and the Shire. Cr Southwell chose to publicly make those allegations despite having time to consider the implications of publishing the post.
13. The Panel has considered the options of ordering training and a public apology. With regard to training, the Panel finds that in the circumstances such a sanction is inappropriate and will not be of use to Cr Southwell; he has not acknowledged that he committed a minor breach or expressed a willingness to take responsibility for his actions. The Panel also considers that any public apology would not be sincere so it would not be appropriate to order an apology.
14. The sanction imposed by the Panel must send a message to councillors, local government employees, ratepayers, residents and the wider public that councillors must maintain appropriate standards of conduct.
15. While the Panel notes that when an order that a Notice of Public Censure be published, that Notice is published by the local government's CEO, at the expense of the local government, and such expense is significant where the Notice is to be published in a newspaper or newspapers, the Panel also finds the penalty of a public censure is commensurate with the seriousness of the breach.
16. A censure is a public statement of disapprobation of a councillor's conduct and the Panel considers this to be the appropriate penalty as it will send a message to the community and other councillors that Cr Southwell's conduct was unacceptable and deserving of a serious penalty.

Panel's decision

17. Having regard to the Findings, the matters set out herein, and the general interests of local government in Western Australia, the Panel's decision on how the Minor Breach is to be dealt with under s5.110(6) of the Act, is that pursuant to subsection (b)(i) of that section, Cr Southwell be publicly censured in terms of the attached Order.

Sarah Rizk (Presiding Deputy Member)

Elanor Rowe (Deputy Member)

Rebecca Aubrey (Deputy Member)



Attachment

Complaint Number	SP 57 and 59 of 2018
Legislation	<i>Local Government Act 1995 (WA)</i>
Complainants	Mr Paul Sheedy Councillor Brian Hearne
Respondent	Councillor Michael Southwell
Local Government	Shire of Capel
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i>
Panel Members	Ms S Rizk (Presiding Deputy Member) Ms E Rowe (Deputy Member) Ms R Aubrey (Deputy Member)
Heard	26 April 2019 Determined on the documents
Outcome	Public censure

ORDER

Published: 14 May 2019

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THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor Michael Southwell, a Councillor for the Shire of Capel, be censured as specified in paragraph 2 below.
2. Within the period of 29 days to 43 days from the day following the date of service of this Order on Councillor Southwell, the Chief Executive Officer of the Shire of Capel arrange for the following Notice of Public Censure to be published, in no less than 10 point print:
 - (a) as a one-column or a two-column display advertisement in the first 15 pages of "The West Australian" newspaper;
 - (b) as a one-column or a two-column display advertisement in the first 15 pages of "The Bunbury Herald" newspaper; and
 - (c) as a as a one-column or a two-column display advertisement in the first 15 pages of "The Bunbury Mail" newspaper.



NOTICE OF PUBLIC CENSURE

The Local Government Standards Panel has found that Councillor Michael Southwell, a Councillor of the Shire of Capel, breached:

- (a) regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007 (WA)* by publishing a Facebook post on 29 June 2018 in relation to the council meeting held on 27 June 2018 and the Shire's former CEO.

In engaging in this conduct, Councillor Southwell made improper use of his office as a council member.

The Panel censures Councillor Southwell for a breach of 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."