



Local Government Standards Panel

Complaint Number	SP 60 of 2018
Legislation	<i>Local Government Act 1995</i>
Complainant	Mr Stephen Cain
Respondent	Councillor Lee-Anne Smith
Local Government	City of Cockburn
Regulation	Regulation 7(1)(a) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mrs Sheryl Siekierka (Presiding Member) Ms Elanor Rowe (Deputy Member) Ms Rebecca Aubrey (Deputy Member)
Heard	22 February 2019 Determined on the documents
Outcome	Training

SANCTION DECISION AND REASONS FOR DECISION

Published 15 March 2019

DEFAMATION CAUTION

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Introduction

1. On 7 December 2018 the Panel found that Councillor Lee-Anne Smith ("Cr Smith"), the Deputy Mayor of the City of Cockburn ("City"), committed one breach of regulation 7(1)(a) of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) when she:
 - a. had discussions and made agreements with an applicant regarding a development application for the installation of electronic signage on land situated in the City; and
 - b. drafted an alternative recommendation for the approval of the Development application and inclusion of certain development approval conditions proposed to be raised at the Ordinary Council Meeting of 10 May 2018.
2. On 10 January 2019 the Panel published its Finding and Reasons for Finding ("Findings") that Cr Smith had breached regulation 7(1)(a). The Panel reviewed all the evidence presented to it and said:
 - "45. In this case it is unclear to what extent Cr Smith had contact with PP. However, the Text Message and, in particular, the use of the words "squeezed" and "out of these guys" indicates that at least some contact was made and that certain negotiations took place.
 46. The role of a councillor includes "representing the interests of electors, ratepayers and residents of the district, providing leadership and guidance to the community in the district". However, in undertaking this role a councillor must act in accordance with their fiduciary duties and any relevant code of conduct.
 47. It is not improper or incorrect for an Elected Member to make an alternative recommendation or to represent the electors in his or her district. Further, the Panel, considers that it is more likely than not that the proposal and drafting of the Alternative Recommendation, in and of itself, was more likely than not to have been undertaken in accordance with the City's relevant Guidelines.
 48. The improper conduct in question relates to the content of such Alternative Recommendation and Cr Smith's actions in so far as they were intended to gain a benefit of a party and specifically:
 - a. negotiating on behalf of the City to gain 10% free advertising (which should properly be an administrative function of the City); and
 - b. contact with, and negotiation on behalf of, MCCC for a 5% share of free advertising.
 49. It is also alleged that Cr Smith's contact with PP was improper as was her failure to disclose such contact.
 50. Meetings and communication between elected members and parties within a community who wish to lobby for a certain outcome will always be considered problematic where any outcome may result in a financial (or other) benefit of some kind for one or more party and this gives rise to a perception of bias.
 51. Local councils therefore create policies and guidelines to assist Elected Members and the Regulations further define Elected Members' obligations.



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54. The Panel finds that the mere fact Cr Smith may have met with or communicated with PP would not be considered improper.
55. However, negotiating the outcome of a 15% share of advertising for the benefit of the City and the MCCC and indicating to PP that such an outcome would likely be agreed by the City is improper.
56. Despite the fact that Cr Smith only considered the same to be for the benefit of the City and the community, this type of conduct is not within the scope of Cr Smith's functions as a councillor.
57. The Panel finds that Cr Smith's actions in negotiating an outcome for the benefit of the Council and the MCCC were improper and were of such a nature that a reasonable individual would consider the same to:
- a. be in appropriate;
 - b. constitute an improper use of Cr Smith's position; and
 - c. be deserving of a penalty.
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60. In this case the approval of the Development Application would have provided a financial benefit to each of the applicant (PP), the City and the MCCC.
61. It is not necessary to find whether any advantage was actually secured and only an intent to secure such advantage must be established.
62. In this case, Cr Smith's response to the Complaint and the Correspondence demonstrate the clear intent of Cr Smith to attract a benefit to both the City and the MCCC.
63. The Panel finds that it more likely than not that Cr Smith undertook the course of action of negotiating with PP and proposing the Alternative Motion in the belief that an advantage would be gained for the City and MCCC.
64. For the purposes of regulation 7(1)(a), it is immaterial whether the benefit was not for Cr Smith personally, or that she as acting ultimately to benefit the City. This type of conduct is expressly prohibited by the Regulations.

Jurisdiction

3. The Panel convened on 22 February 2019 to consider how it should deal with the breach. The Panel accepted the Department's advice that on this date there was no available information to indicate that Cr Smith had ceased to be or was disqualified from being a councillor.

Possible sanctions

4. Section 5.110(6) of the Act provides that the Panel is to deal with a minor breach by —
- “(a) dismissing the complaint; or*

(b) ordering that —

- (i) *the person against whom the complaint was made be publicly censured as specified in the order; or*
- (ii) *the person against whom the complaint was made apologise publicly as specified in the order; or*
- (iii) *the person against whom the complaint was made undertake training as specified in the order; or*

(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.

Cr Smith'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 10 January 2019, the Department notified Cr Smith of the Panel's findings, providing her with a copy of its Findings and inviting her to make submissions on how the Panel should deal with the breach under section 5.110(6).
8. Cr Smith sent her submissions to the Department by email on 8 February 2019, in which she submitted:
- She accepts a breach took place, albeit, under the trusted guidance and support from Council staff;
 - She has learnt from the experience;
 - She has already publicly apologised;
 - Council already paid for additional information / training for all Elected Members;
 - She would like to complete additional training and has contacted the City's Director of Governance regarding which would be the most relevant training course to help improve her learning around the Findings; and
 - She has requested a change to the alternative recommendation guidelines that ensure Elected Members receive advice of a possible breach as soon as possible.

¹ Section 5.110(5) of the Act.



Panel's consideration

9. Cr Smith had not previously been found to have committed any minor breaches.
10. The Panel does not consider that dismissal of the Complaint is appropriate because this would indicate that Cr Smith's conduct was so minor that no penalty is warranted. Although Cr Smith may have acted with good intentions, her conduct, which led to the finding of a breach, is a very serious matter.
11. However, the Panel does not consider it is appropriate to make an order for censure for Cr Smith's actions in this matter. When the Panel makes an order that a Notice of Public Censure be published, that Notice is to be published by the local government's CEO; the expense is borne by the local government and such expense is significant where the Notice is to be published in a newspaper or newspapers.
12. The Panel has therefore weighed up the options of ordering training or a public apology (or both). The Panel notes that Cr Smith states that she has already publicly apologised for her conduct and she acknowledges that training is required. In the circumstances the Panel decides that training in the area of fulfilling elected members' responsibilities to act within the processes and procedures of Local Government whilst leading and supporting their community, is appropriate.

Panel's decision

13. 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)(iii) of that section, Cr Smith is ordered to undertake training.

Sheryl Siekierka (Presiding Member)

Elanor Rowe (Deputy Member)

Rebecca Aubrey (Deputy Member)



ATTACHMENT

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ORDER FOR TRAINING

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THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. By 30 April 2019, Councillor Smith, the Deputy Mayor of the City of Cockburn, shall undertake:
 - (a) the training course for Elected Members "Serving on Council" provided by WA Local Government Association (WALGA) for a period of 7.5 hours; or
 - (b) a training course with substantially similar learning outcomes provided by an alternative registered training organisation for a similar duration, but at least 4 hours.

Sheryl Siekierka (Presiding Member)

Elanor Rowe (Deputy Member)

Rebecca Aubrey (Deputy Member)

NOTICE TO THE PARTIES TO THE COMPLAINT

RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (the Panel) advises:

- (1) Under section 5.125 of the *Local Government Act 1995* the person making a complaint and the person complained about each have the right to apply to the State Administrative Tribunal (the SAT) for a review of the Panel's decision in this matter.

In this context, the term "decision" means a decision to dismiss the complaint or to make an order.

- (2) By rule 9(a) of the *State Administrative Tribunal Rules 2004*, subject to those rules an application to the SAT under its review jurisdiction must be made within 28 days of the day on which the Panel (as the decision-maker) gives a notice [see the Note below] under the *State Administrative Tribunal Act 2004* (SAT Act), section 20(1).
- (3) The Panel's *Breach Findings and these Findings and Reasons for Finding – Sanctions*, constitute the Panel's notice (i.e. the decision-maker's notice) given under the SAT Act, section 20(1).

Note:

- (1) This document may be given to a person in any of the ways provided for by sections 75 and 76 of the *Interpretation Act 1984*. [see s. 9.50 of the *Local Government Act 1995*]
- (2) Subsections 75(1) and (2) of the *Interpretation Act 1984* read:
 - "(1) Where a written law authorises or requires a document to be served by post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, **service shall be deemed** to be effected by properly addressing and posting (by pre-paid post) the document as a letter to the last known address of the person to be served, and, **unless the contrary is proved, to have been effected at the time when the letter would have been delivered in the ordinary course of post.** [Bold emphases added]
 - (2) Where a written law authorises or requires a document to be served by registered post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, then, if the document is eligible and acceptable for transmission as certified mail, the service of the document may be effected either by registered post or by certified mail."
- (3) Section 76 of the *Interpretation Act 1984* reads:

"Where a written law authorises or requires a document to be served, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, without directing it to be served in a particular manner, service of that document may be effected on the person to be served —

 - (a) by delivering the document to him personally; or
 - (b) by post in accordance with section 75(1); or
 - (c) by leaving it for him at his usual or last known place of abode, or if he is a principal of a business, at his usual or last known place of business; or
 - (d) in the case of a corporation or of an association of persons (whether incorporated or not), by delivering or leaving the document or posting it as a letter, addressed in each case to the corporation or association, at its principal place of business or principal office in the State."