



Local Government Standards Panel

Complaint Number	SP2020-109
Legislation	<i>Local Government Act 1995</i>
Complainant	Mr Mark Chester
Respondent	Councillor Murray Scott
Local Government	Shire of Capel
Regulation	Regulation 6(2)(a) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mr Gordon MacMile (Presiding Member) Ms Elanor Rowe (Deputy Member) Councillor Deborah Hopper (Deputy Member)
Heard	20 November 2020 Determined on the documents
Outcome	One breach of Regulation 6(2)(a)

FINDING AND REASONS FOR FINDING

Published 1 February 2021

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 decision

1. The Local Government Standards Panel ("the Panel") found that Councillor Murray Scott ("Cr Scott"), a councillor for the Shire of Capel ("the Shire") committed one breach under the *Local Government Act 1995* (WA) ("the Act") and regulation 6(2)(a) of the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations") when he forwarded an email with confidential documents attached, to a member of the public.

Jurisdiction and procedural fairness

2. The Act makes provision for the circumstances in which a council member commits a minor breach.¹
3. On 21 September 2020, the Department of Local Government, Sport and Cultural Industries ("the Department") received a Complaint of Minor Breach Form dated 21 September 2020 ("Complaint"). The Complaint was signed by Mr Mark Chester ("the Complainant") and contained one allegation of a minor breach of Regulation 6(2)(a) by Cr Scott, when he allegedly forwarded an email with confidential documents attached, to a member of the public.
4. On 23 September 2020, the Department advised Cr Scott of the Complaint and invited him to respond. The Department sent Cr Scott copies of the original Complaint and all the supporting documents provided by the Complainant.
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 20 November 2020 the Panel convened to consider the Complaint.
6. The Panel:
 - (a) accepted the Department's advice, based on information from the Western Australian Electoral Commission, that Cr Scott 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 20 November 2020;
 - (b) was satisfied the Complaint had been made within six months after the alleged breach is said to have occurred³;
 - (c) was satisfied the Complaint had been dealt with in accordance with the administrative requirements in the Act for dealing with complaints of minor breaches⁴; and
 - (d) was satisfied that the Department had provided procedural fairness to Cr Scott.
7. If a councillor has previously committed two or more minor breaches, the Panel may send the complaint to the Chief Executive Officer of the department assisting the relevant Minister at the time instead of considering the Complaint itself.⁵ Cr

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.

⁵ Sections 5.110(2)(b), 5.111(1) of the Act.



Scott had previously been found to have had committed one minor breach. Therefore, the Panel decided not to send the Complaint to the Chief Executive Officer of the Department.

8. Based on the information referred to in paragraphs 2 to 7 above, the Panel found it had jurisdiction to determine whether Cr Scott had breached Regulation 6(2)(a) in connection with the Complaint.

Panel's role

9. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.
10. 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).⁶
11. In order to find the allegation, proposition or conduct has been established, and where direct proof is not available, 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.⁷
12. 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 6(2)(a)

13. 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 s5.23(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;*

⁶ Section 5.106 of the Act.

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

- (b) *information that the council member acquired at a closed meeting other than information derived from a non-confidential document.*
- (3) *Subregulation (2) does not prevent a person who is a council member from disclosing information –*
- (a) *at a closed meeting; or*
 - (b) *to the extent specified by council and subject to such other conditions as the council determines; or*
 - (c) *that is already in the public domain; or*
 - (d) *to an officer of the Department; or*
 - (e) *to the Minister; or*
 - (f) *to a legal practitioner for the purpose of obtaining legal advice; or*
 - (g) *if the disclosure is required or permitted by law.”*

Elements of regulation 6(2)(a)

14. Regulation 6(2)(a) provides that a person who is a council member must not disclose information that the council member derived from a confidential document.
15. In light of regulation 6(3), the essential issues or elements which need to be satisfied in order for a contravention of regulation 6(2)(a) to have occurred are that it is more likely than it is not that:
- a) a Councillor disclosed information⁸; and
 - b) the disclosed information was information the disclosing Councillor derived from a document that was marked by his or her local government’s CEO, or at the CEO’s direction, to clearly show that the information in the document was not to be disclosed; and
 - c) the disclosed information was not already in the public domain (ie it was not generally available to all persons⁹) at the time of the disclosure by the disclosing Councillor, and the disclosure did not occur in any of the ways identified in regulation 6(3).
16. “*Disclose*” is defined as “*make (secret or new information) known*”¹⁰.

Substance of the Complaint

17. A Special Meeting of Council (“SCM”) was held on 31 August 2020, to discuss a confidential matter (“Matter”) and related legal advice that had been sought by the

⁸ The word ‘information’ is given its ordinary meaning, which is knowledge or facts communicated about a particular subject, event etc; Shorter Oxford English Dictionary (6th edition). It is not limited to ‘advice’, legal, strategic or otherwise; *Corr and Local Government Standards Panel* [2012] WASAT 14 at para [50].

⁹ Mazza and Local Government Standards Panel [2009] WASAT 165 at paragraphs [82] – [85]

¹⁰ Oxford English Dictionary online edition



Council". Following the SCM, an email ("Email") was sent to the Shire's councillors that attached both a copy of the confidential minutes ("Confidential Minutes") and the public minutes from the meeting.

18. On 9 September 2020, Cr Scott forwarded the Email and the Confidential Minutes to a third-party member of the public ("Third Party").

Cr Scott's Response

19. In his response, Cr Scott stated that during the week leading up to 10 September 2020 (the week before he sent the Email), he had had two exchanges with the Third Party who he is alleged to have sent the Confidential Minutes to.
20. He received a telephone call on the morning of 8 September 2020, advising that a ratepayer in the Shire may have received the Email that related to Shire business and that person may not have been the intended recipient. However, Cr Scott claimed that:
- a. a disclaimer was included in the Email;
 - b. the Third Party advised that the Email had been deleted immediately; and
 - c. his computer was used by other family members (which he would look at changing).

Panel's Consideration

21. Cr Scott did not dispute that the information in the Complaint was correct or that he had committed the alleged misconduct. Based on the evidence before it, the Panel finds that the essential elements that are required for a breach of Regulation 6(2)(a) to have occurred, have been satisfied and that Cr Scott did commit a breach when he forwarded the Email along with the Confidential Minutes to the Third Party.

Cr Scott disclosed information

22. It is not in dispute that Cr Scott forwarded the Email regarding the SCM along with the Confidential Minutes from the meeting to the Third Party, and thereby disclosed information.

The disclosed information was clearly marked to show that the information in the document was not to be disclosed

23. The Email clearly stated that one version of the Minutes from the SCM (attached to the Email) were confidential. There were also several references within the Confidential Minutes to the information contained therein being of a confidential nature.
24. The Complainant attached copies of both the Confidential Minutes and the public version of the Minutes to the Complaint. It was clear that the Confidential Minutes contained additional sensitive information that was not to be disclosed.

The disclosed information was not already in the public domain



25. Again, it is clear the Confidential Minutes were not already in the public domain. The Panel noted that the Email specifically stated that “*only the public version*” would be placed on the Shire’s website.

26. Finally, the Panel is satisfied that the disclosure did not occur in any of the ways identified in regulation 6(3).

Findings

27. Accordingly, for the above reasons, the Panel finds that Cr Scott did breach regulation 6(2)(a).

Gordon MacMile (Presiding Deputy Member)

Elanor Rowe (Deputy Member)

Deborah Hopper (Deputy Member)



Local Government Standards Panel

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Complainant	Mr Mark Chester
Respondent	Councillor Murray Scott
Local Government	Shire of Capel
Regulation	Regulation 6(2)(a) of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i>
Panel Members for	Mr Gordon MacMile (Presiding Member)
Penalty Consideration	Councillor Deborah Hopper (Deputy Member) Ms Elanor Rowe (Deputy Member)
Heard	20 November 2020 Determined on the documents
Penalty Considered	8 March 2021
Outcome	Monetary Penalty

DECISION AND REASONS FOR DECISION

Delivered 19 March 2021

DEFAMATION CAUTION

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Introduction

1. At its meeting on 20 November 2020, the Panel found that Councillor Murray Scott ("Cr Scott"), a councillor for the Shire of Capel ("the Shire"), committed one minor breach under the Local Government Act 1995 (WA) ("the Act") and regulation 6(2)(a) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) ("the Regulations") when he forwarded an email with confidential documents attached, to a member of the public ("Minor Breach").
2. On 1 February 2021, the Panel published its Finding and Reasons for Finding ("Findings") stating that Cr Scott had breached Regulation 6(2)(a). The Panel reviewed all the evidence presented to it and made the following observations:
 - "22.. *It is not in dispute that Cr Scott forwarded the Email regarding the SCM along with the Confidential Minutes from the meeting to the Third Party, and thereby disclosed information.*
 23. *The Email clearly stated that one version of the Minutes from the SCM (attached to the Email) were confidential. There were also several references within the Confidential Minutes to the information contained therein being of a confidential nature.*
 24. *The Complainant attached copies of both the Confidential Minutes and the public version of the Minutes to the Complaint. It was clear that the Confidential Minutes contained additional sensitive information that was not to be disclosed."*

Jurisdiction and Law

3. The Panel convened on 8 March 2021, 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 ("the Department") that on this date there was no available information to indicate that Cr Scott 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) *ordering that no sanction be imposed; or*
 - (b) *ordering that —*
 - (i) *the person against whom the complaint was made be publicly censured as specified in the order;*
or
 - (ii) *the person against whom the complaint was made apologise publicly as specified in the order;*
or
 - (iii) *the person against whom the complaint was made undertake training as specified in the order;*



or

- (iv) *the person against whom the complaint was made pay to the local government specified in the order an amount equal to the amount of remuneration and allowances payable by the local government in relation to the complaint under Schedule 5.1 clause 9;*

or

- (c) *ordering 2 or more of the sanctions described in paragraph (b).*

5. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach. Under section 5.110(6)(a), the Panel may order that no sanction be imposed; not to reverse the finding of a breach, but to however indicate that in all the circumstances the relevant councillor should not be penalised further.

Cr Scott'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. By a letter dated 1 February 2021, Cr Scott was:
- i. notified of the Panel's Finding of the Minor Breach;
 - ii. provided with a copy of the Panel's Findings; and
 - iii. offered an opportunity to make submissions as to how the Minor Breach should be dealt with under section 5.110(6) of the Act.
8. The Department did not receive a response from Cr Scott within the fourteen-day time frame provided to him.

Panel's Consideration

9. The purpose of the imposition of a sanction under the Act is generally for the protection of the public and the maintenance of standards of council members. Furthermore, it reflects the disapproval of a contravention of the Regulations, dissuades councillors from other local governments from engaging in similar conduct and facilitates the maintenance of appropriate standards of behaviour by councillors. Guidance on the factors which the Panel may consider in determining the appropriate penalty to impose, include, but are not limited to:
- a. the nature and seriousness of the breach;
 - b. the councillor's motivation for the contravention;
 - c. whether or not the councillor has shown any insight and remorse into his / her conduct;
 - d. whether the councillor has breached the Act knowingly or carelessly;

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



- e. the councillor's disciplinary history;
 - f. the likelihood or not of the councillor committing further breaches of the Act;
 - g. the councillor's personal circumstances at the time of the conduct, and at the time of imposing the sanction;
 - h. the need to protect the public through general deterrence and maintain public confidence in local government; and
 - i. any other matters which may be regarded as aggravating conduct or mitigating its seriousness.
10. In this case, the Panel found that Cr Scott breached Regulation 6(2)(a) when he forwarded an email with confidential documents attached, to a member of the public. Cr Scott had been found to be in breach of the Act and Regulations on one other occasion, in connection with an unrelated matter.
11. Matters of confidentiality are of the utmost importance, so as to ensure that members of the public can retain confidence in their elected members. The standards of behaviour expected of elected members are also of a generally higher standard than a member of the public, due to their prominent positions in the community. Therefore, the Panel does not consider it appropriate to impose no sanction in relation to the Minor Breach, as this would indicate that it was so minor that no penalty is warranted.
12. On the other hand, when the Panel makes an order that a Notice of Public Censure be published, the Notice is published by the local government's Chief Executive Officer, at the expense of the local government; such expense is significant where the Notice is to be published in a newspaper or newspapers. In this case, given the fact that Cr Scott had only been found to have committed one minor breach previously and that, while serious, his actions were not especially far reaching or grave, the Panel finds it would not be justified to order such a public reprimand.
13. Therefore, the options left for the Panel to consider are ordering Cr Scott to undertake training; to make a public apology and / or to impose a monetary sanction on him.
14. With regard to training, notably, Cr Scott is an experienced councillor and was also previously the President of the Shire. In light of these factors, the Panel did not consider training to be an adequate or worthwhile penalty. As to ordering Cr Scott to make a public apology, the Panel considers that an apology is not appropriate in the circumstances and it will not particularly help to make amends for his conduct or repair any damage caused.
15. Despite matters of confidentiality being of a serious nature, Cr Scott did not take the opportunity to respond to how the Panel should deal with the Minor Breach. In his initial response to the Complaint, he was also somewhat vague when describing what had occurred, and he failed to provide a clear and reasonable explanation. Furthermore, he has not shown any insight or remorse as to his conduct.
16. When deciding what sanction to impose, the Panel must consider how the penalty will help to guide other councillors and dissuade them from engaging in similar conduct. Sub-section 5.110(6)(b)(iv) (in respect of a monetary sanction) was introduced in 2019



to allow the Panel to require a councillor to personally bear the cost of dealing with a complaint, which in other circumstances, would be paid by the local government concerned. This ensures the cost of a breach is borne by the councillor individually, and not simply passed onto the local government and therefore, ultimately, rate payers.

17. This sanction is appropriate to use where the Councillor's conduct is serious or indicates a wilful or negligent disregard for the standards of conduct expected from local councillors.

18. In this case, the Panel decided that it was appropriate to impose a monetary sanction.

Panel's Decision

19. 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 Cr Scott is ordered to pay to the local government a sum of money to recoup the local government's expenses in dealing with the Complaint, pursuant to subsection (b)(iv) of that section, in terms as set out in the attached Order.

Gordon MacMile (Presiding Member)

Deborah Hopper (Deputy Member)

Elanor Rowe (Deputy Member)



ORDER

Delivered 19 April 2021

DEFAMATION CAUTION

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THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor Murray Scott, a councillor for the Shire of Capel, make the monetary payment set out in paragraph 2.

Monetary Sanction

2. Within two (2) months of being advised of the sum total of the remuneration and allowances payable by the Shire in relation to the Complaint, Cr Scott shall pay to the Shire that amount in full.

Date of Order: 19 April 2021

Gordon MacMile (Presiding Member)

Deborah Hopper (Deputy Member)

Elanor Rowe (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."