



Local Government Standards Panel

Complaint Number	SP 62 of 2016 [DLGSC 20160196]
Legislation	<i>Local Government Act 1995</i>
Complainant	Councillor Sandra Smith
Subject of complaint	Councillor Janelle Price
Local Government	City of Albany
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Ms M Strauss (Presiding Member) Ms S Siekierka (Deputy Member) Councillor P Kelly (Member)
Heard	23 June 2017 Determined on the documents
Outcome	One breach of regulation 7(1)(b)

FINDING AND REASONS FOR FINDING

Published 20 July 2017

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Summary of the Panel's decision

1. The Panel found that Councillor Janelle Price, a councillor of the City of Albany (Cr Price) committed a minor 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) when sending an email dated 3 December 2016 to Mr Andrew Sharpe, the City's Chief Executive Officer, and another City of Albany councillor, Councillor Sandra Smith (Cr Smith). The Panel found that Cr Price did not breach regulation 7(1)(b) when sending an email dated 2 December 2016 to Cr Smith.

Jurisdiction

2. The Act provides for the circumstances in which a council member commits a minor breach.¹
3. On 16 December 2016 the Panel received a complaint from the Complaints Officer of the City of Albany (the City) alleging Cr Price had breached regulation 7(1)(b) when sending two emails dated 2 December 2016 and 3 December 2016 with subject titles "PD 128" and "Availability to attend Council sessions" respectively. Cr Price sent the 2 December email to Cr Smith and the 3 December email to the City's Chief Executive Officer, Mr Andrew Sharpe (the CEO) and Cr Smith.
4. Prior to 1 July 2017 the Government Department assisting the relevant Minister to administer the Act was the Department of Local Government and Communities (the former Department). On 1 July 2017 the Department of Local Government, Sport and Cultural Industries became the Department responsible for administering the Act.
5. On 22 March 2017 the former Department sent a copy of the Complaint Form and attached emails to Cr Price inviting her to respond. Cr Price responded in an email to the former Department dated 17 April 2017 (her Response).
6. 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
7. On 23 June 2017 the Panel met to consider the Complaint.
8. The Panel accepted the former Department's advice that Cr Price was a councillor when the Panel met on 23 June 2017 and that, based on information from the Western Australian Electoral Commission, Cr Price was a councillor at the time of the alleged breach, having been elected on 19 October 2013 for a term due to expire on 21 October 2017.
9. The Panel was satisfied the Complaint was made within two years after the alleged breach occurred³, that the Complaint had been dealt with in accordance with the administrative requirements in the Act for dealing with complaints of minor breaches⁴ and that the former Department had provided procedural fairness to Cr Price.

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.

10. 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 instead of considering the Complaint itself.⁵ As Cr Price had not previously committed a minor breach the Panel did not consider sending the Complaint to that Chief Executive Officer.
11. Based on the information referred to in paragraphs 2 to 10 above the Panel found it had jurisdiction to determine whether Cr Price had breached regulation 7(1)(b).

Panel's role

12. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.
13. 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
14. 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 on the evidence that it is more probable than not that the alleged fact, proposition or conduct 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
15. 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(1)(b)

16. Regulation 7(1)(b) provides:

"7. Securing personal advantage or disadvantaging others

(1) A person who is a council member must not make improper use of the person's office as a council member —

...

(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."

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

⁶ Section 5.106 of the Act.

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



17. The Panel decided that the alleged conduct is not conduct that could contravene section 5.93 of the Act or section 83 of *The Criminal Code*.

The Complaint

18. In her Complaint Form dated 12 December 2016 Cr Smith alleges Cr Price sent her “a number of emails” that she found “offensive and detrimental”. She attached copies of the following five emails:

First email

From Cr Price dated 1 December 2016 at 8.14pm. The copy provided does not show the address list or any “Subject” but the body of the email starts with “Hello Andrew”, who the Tribunal infers is the CEO.

Second email

From Cr Smith dated 2 December 2016 at 5.04pm. The copy provided does not show the addressees but the “Subject” is “PD128”.

Third email

From Cr Price to Cr Smith only, dated 2 December 2016 at 6.50.55pm. The “Subject” is “PD128”. The content indicates Cr Price was replying to the second email as there is a reference to Western Australian Local Government Association (WALGA) training.

Fourth email

From Cr Price to Cr Smith only, dated 2 December 2016 at 7.49.31pm. The “Subject” is “PD128”. It is not clear whether Cr Smith sent an email between the third and fourth emails but it is possible she did not, because the fourth email starts “Further ...”

Fifth email

From Cr Price to the CEO, copied to Cr Smith dated 3 December 2016 at 5.57.07am. The “Subject” is “Availability to attend Council sessions”.

19. In her Complaint Form Cr Smith asked that parts of the fourth and fifth emails be “reviewed”. She quoted from the fourth and fifth emails in her Complaint Form and highlighted the same parts of those emails in the copies attached to the Complaint Form.
20. Accordingly, the Panel treated the Complaint as one containing two allegations:

Allegation 1 is that Cr Price breached regulation 7(1)(b) when sending the fourth email to Cr Smith on 2 December 2016 at 7:49:31pm (Email 1).

Allegation 2 is that Cr Price breached regulation 7(1)(b) when sending the fifth email to Cr Smith on 3 December 2016 at 5:57:07am (Email 2).

Email 1

21. Cr Smith used a yellow highlighter and inserted the numbers 1, 2 and 3 in the right hand margin. Email 1 is:



From: Cr Janelle Price <cr.price@albany.wa.gov.au<mailto:cr.price@albany.wa.gov.au>>
Date: 2 December 2016 at 7:49:31 pm AWST
To: Cr Sandie Smith <cr.smith@albany.wa.gov.au<mailto:cr.smith@albany.wa.gov.au>>
Subject: Re: PD128

Further, **It's a pity Sandie that you allow your very obvious ambition to colour your perception of others.** When I was a "new" Councillor there were 12 other people to get to know and understand, such is the moving feast of local govt. I found it very hard for the first two years, and also quite challenging when we found ourselves in difficult decisions. ①

Typically those decisions were worked through in a supportive and collegiate manner. You were not there for the women's refuge issue. Your comprehensive knowledge of it maybe doesn't encompass the stress felt by some of us, nor the disappointment with the outcome. I personally would not like anyone to experience what we did on that occasion, and so am generally trying to suggest ways to avoid "new" Councillors encountering it where it can be averted.

My apologies for that. Of that group of 6, I was the only one with no prior local govt experience or knowledge. And on that matter, its is still scant! Nobody cut me any slack, and it was a torrid time indeed. **By contrast you have been ushered through I note, by the graces of extrinsic political forces.** And what fortuitous timing I add. ②

All I can say is I am on Council for my community. It's nothing complex; other motives are beyond me after what I've been through. So really I give some of what I've seen lately short shrift. I find the behaviours on Council at the mo at once exhausting and nauseating. Perhaps this view is coloured by coming to grips with what matters in life.

In short: I'll be clear - keep going with your ambitions - I enjoy your presidential style speeches immensely. **If being hand held by blokes like Robbie, Greg, and Dennis makes you feel good, then I'll let you have that one!** It certainly doesn't suggest intellectual rigour ... it simply suggests expeditiousness. Unfortunately I'm not after what you're after, so you do seem to have read me all wrong. ③

With my Regards,
Cr. Janelle Price

Email 2

22. Cr Smith used the yellow highlighter. Email 2 is:

From: Cr Janelle Price <cr.price@albany.wa.gov.au<mailto:cr.price@albany.wa.gov.au>>
Date: 3 December 2016 at 5:57:07 am AWST
To: Andrew Sharpe <andrews@albany.wa.gov.au<mailto:andrews@albany.wa.gov.au>>
Cc: Cr Sandie Smith <cr.smith@albany.wa.gov.au<mailto:cr.smith@albany.wa.gov.au>>
Subject: Availability to attend Council sessions

Andrew,

I am thoroughly sick to death of the "if you had been there" line from other Councillors. Not all of us are so fortunate as to be available for everything going at CoA. The email from Cr. Smith had echoes of Dennis' similar comment.

My situation is this; my husband died, I have three young adults, one who is severely damaged and who has fallen into some bad habits, one doing ATAR, and one about to join the dole queue. I did have my 21 year under house arrest for 6 weeks recently due to his sleep and mental trauma after witnessing his father starve to death. I run a farm and a medium sized not for profit which provides support for very damaged youth.

Sorry if I can't come to as much stuff as Cr. Smith. I just don't have the support frankly. I now am on one income and have to pay off my farm, alone. **That means no spray tans, sequin dresses and photo ops for me I guess. Please kindly inform Cr. Smith she can go shove and that she's clueless.** Thanks. ④

With my Regards,
Cr. Janelle Price



Response

23. In her Response Cr Price denied breaching regulation 7(1)(b). She submitted the Complaint is not substantiated and should be dismissed and that Cr Smith has not shown that Cr Price gained any advantage or that Cr Smith had experienced any actual disadvantage. Cr Price also said:

“(3) The email exchange was a routine if not typical occurrence of poor interpersonal relations between Local Government sitting members; and

(4) If it is deemed by the Standards Panel that a breach has occurred, as the Respondent I would have equivalent justified and sufficient cause to counter file against the Complainant given the counter-exchange.”

24. Cr Price did not put any details of the “counter-exchange” or other communications before the Panel.

Elements of 7(1)(b)

25. In order to find that Cr Price breached regulation 7(1)(b) the Panel must be satisfied to the required standard of proof that:

- Cr Price was a councillor when she sent Emails 1 and 2 (first element);
- she used her office as a councillor when sending the Emails (second element);
- she used her office improperly (third element) ; and
- she used her office improperly to cause detriment to the local government, Cr Smith or any other person (fourth element).

First and second elements satisfied

26. Clearly Cr Price was acting as a councillor when sending the Emails, thus using her office as a councillor at the time of the alleged breaches. The first and second elements of regulation 7(1)(b) are satisfied for both alleged breaches.

Meaning of “to make improper use of ... office”

27. 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.”⁸ The Shorter Oxford dictionary definition is “irregular, wrong; unsuitable, inappropriate; unbecoming, unseemly.”⁹

⁸ Macquarie Dictionary, Revised Third Edition.

⁹ Shorter Oxford English Dictionary, Sixth Edition.



28. Whether there is impropriety is to be assessed objectively: would a reasonable person with knowledge of the duties, powers and authority of a councillor, and all the circumstances of the particular case, form the view that the councillor had breached the standards of conduct expected of a councillor?¹⁰ “For behaviour to be improper it must be such that a right-thinking person would regard the conduct as so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty.”¹¹
29. Under the Act Panel members must have regard to the general interests of local government in Western Australia.¹² 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.
30. 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.¹³ Regulation 3 provides, among other things, that councillors should act with reasonable care, diligence and integrity and treat others with respect and fairness.
31. 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.¹⁴ 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.
32. 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.¹⁵
33. Judge Sharp in *Yates and Local Government Standards Panel* [2012] WASAT 59 recognised a fiduciary relationship in saying that the standards of conduct that would be expected of a councillor can also be discerned from the fiduciary obligations (the duty to act in good faith) which councillors owe to their councils and individual councillors

Meaning of “to cause detriment to the local government or any other person”

34. “Detriment” means loss, damage or injury.¹⁶ 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.¹⁷

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

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

¹² Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).

¹³ Regulation 13.

¹⁴ *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 10, referring to *Treby and Local Government Standards Panel* [2010] WASAT 81 (*Treby* 2010).

¹⁵ *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64, referring to *Treby* 2010.

¹⁶ Macquarie Dictionary Revised Third Edition, 2001.

¹⁷ *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraphs 31, 32.



35. 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.¹⁸ And it is not enough to show that the local government or the person concerned suffered detriment, or could have suffered detriment. The Panel must find that it is more likely than not that the councillor believed that his or her actions would cause detriment and intended to cause detriment.¹⁹ “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.²⁰ There can be a finding of intent if, after considering all the evidence, the only reasonable inference is that the councillor intended to cause detriment.²¹

Context of Emails 1 and 2

36. The Emails must be considered in their context. The first four emails attached to the Complaint Form appear to arise out of a planning application (PD128) that had been resubmitted for approval and was to be discussed at an ordinary council meeting later in December 2016. The fifth email is more general and relates to Councillors attending City or Council events.
37. In the first of the five emails Cr Price said she was not inclined to approve the application but wanted more information about the implications of the applicant appealing to the State Administrative Tribunal (SAT) if Council rejected the application. Cr Price suggested to the CEO that “new” councillors who had not been exposed to a planning item being taken to SAT be briefed on the implications if Council refused the application.
38. The second email shows that Cr Smith was irritated by Cr Price’s reference to “new Councillors”. Cr Smith said councillors were “tired of this label”, had attended WALGA training and had a good understanding of SAT’s role, but also the principle that Council should never make a decision based on whether a project proponent may appeal to SAT.
39. In the third email Cr Price is abrupt: “Gee thanks Sandie. Where would we all be without WALGA training? Thank GOD you had the time to do it hey?? ...”
40. The fourth and fifth emails (Emails 1 and 2 respectively) are set out in full above.

Findings in relation to Email 1

Whether Cr Price acted improperly (third element)

41. Cr Price said she wanted to help “new” councillors avoid some of the difficulties she herself faced as a new councillor, however she starts to challenge Cr Smith’s style and her entry into local government. Cr Price’s communication with Cr Smith became more personal in this Email and the Panel appreciates that this upset Cr Smith.
42. Cr Price’s tone in parts of this Email is unpleasant. She showed poor judgment in using the words and expressions highlighted by Cr Smith. However, councillors have different styles, backgrounds and personalities and are entitled to have robust communications, and Cr Price sent this Email only to Cr Smith.

¹⁸ *Treby* 2010, paragraph 96, referring to *Chew v The Queen* 1992 CLR 626 (*Chew* 2010).

¹⁹ *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.

²⁰ *Chew* 2010.

²¹ *Treby* 2010.

43. The Panel can see Cr Smith's point of view but it must apply the tests for impropriety set by the courts. Considering the contents of this Email in the context of inter-councillor communications across the local government sector, the Panel is not satisfied to the required standard of proof that the Email meets the tests for improper behaviour under the Regulations. That is, the Panel is not satisfied that it is more likely than not that a reasonable person looking at the Email and its context would form the view that Cr Price breached the standards of conduct expected of a councillor.²² Neither is the Panel satisfied that it is more likely than not that a right-thinking person would judge Cr Price's communication to be so unpleasant that Cr Price should be penalised for it.²³
44. The Panel finds that this element is not established for Email 1.

Whether Cr Price intended to cause detriment to the local government, Cr Smith or any other person (fourth element)

45. As the Panel finds that the impropriety element is not established it does not need to consider this element.

Findings in relation to Email 2

Whether Cr Price acted improperly (third element)

46. Cr Price sent this Email to the CEO and Cr Smith.
47. The Panel accepts Cr Smith's assertions that she felt offended and felt her reputation had been damaged by the sentences she highlighted but this alone is not enough to establish that Cr Price behaved improperly.
48. In relation to the first sentence highlighted by Cr Smith, "That means no spray tans, sequin dresses and photo ops for me I guess", the Panel does not have enough evidence to form a view about the reason for the statement or to whom it was directed, thus whether in all the circumstances it was improper.
49. However, Cr Price crossed the impropriety line with the sentence, "Please kindly inform Cr Smith she can go shove and that she's clueless." The Panel considers this to be abusive and offensive towards Cr Smith and, as it was also sent to the CEO, likely to embarrass Cr Smith and also offend the CEO who was being asked to pass on an offensive message. This language meets the tests for impropriety referred to above. It clearly is not the way a reasonable person would expect a councillor to communicate with a fellow councillor or a local government officer.
50. The Panel does not accept Cr Price's submission in her Response that this Email was an acceptable routine or typical way that councillors with poor relationships communicate. Even if councillors do not get on well it is highly improper for them to communicate in this sort of language. Cr Price breached her duty to treat her fellow councillor fairly and with respect and to show respect for the role of the CEO and the professional relationship between councillors and officers.
51. The Panel finds that this element is established for Email 2.

²² *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 27, referring to *R v Byrnes* (1995) 183 CLR 501.

²³ *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 9, referring to *Robbins v Harness Racing Board* [1984] VR 641.




Whether Cr Price intended to cause detriment to the local government, Cr Smith or any other person (fourth element)

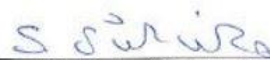
52. Cr Price took time to write the Email. She chose to send it to the CEO as the primary addressee after having sent the previous two emails only to Cr Smith. Although she directed this Email to the CEO she decided to include Cr Smith. This was not a spontaneous communication. She asked the CEO to take action – to pass on a crude and insulting message.
53. The Panel finds the message, “Please kindly inform Cr Smith she can go shove and that she’s clueless”, and serves no other purpose than to damage Cr Smith. The Panel is satisfied to the required standard of proof that Cr Price intended to cause detriment to Cr Smith, so this element is established.

Panel’s finding

54. The Panel finds that Cr Price did not breach regulation 7(1)(b) when sending Email 1 but committed a minor breach under regulation 7(1)(b) when sending Email 2 to Cr Smith and the CEO.


Merranie Strauss (Member)


Paul Kelly (Member)


Sheryl Siekierka (Deputy Member)

Date of Reasons – 20 July 2017