

## LOCAL GOVERNMENT STANDARDS PANEL

Established under section 5.122 of the *Local Government Act 1995* (WA)

Complaint Number	SP 8 of 2016 [DLG 20160023]
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Mr Lloyd Barton</b>
<b>Subject of complaint</b>	<b>Councillor Anthony Taylor</b>
Local Government	<b>Shire of Halls Creek</b>
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mr B Jolly (Presiding Member) Councillor P Kelly (Member) Ms M Strauss (Member)
Heard	21 December 2016 Determined on the documents
Outcome	Two breaches

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### FINDING AND REASONS FOR FINDING

Published 23 January 2017

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#### DEFAMATION CAUTION

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## Summary of the Panel's decision

1. The Panel found that Councillor Anthony Taylor (Cr Taylor), a councillor for the Shire of Halls Creek (the Shire), committed two minor breaches 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 disclosing, on separate occasions, the contents of an anonymous letter to his employee and a Halls Creek Council consultant.

## Jurisdiction

2. The Act provides for the circumstances in which a council member commits a minor breach.<sup>1</sup>
3. On 23 February 2016 the Panel received a Complaint of Minor Breach from the Shire's Corporate Services Manager, Mr Lloyd Barton (the Complainant) alleging that Cr Anthony Taylor (Cr Taylor) had caused detriment to him and the Shire's Chief Executive Officer Mr Rodger Kerr-Newell (the CEO) by disclosing the contents of an anonymous letter to two named people on separate occasions and unnamed people on unspecified dates (the Complaint).
4. The Complainant also alleged that by making these two disclosures Cr Taylor breached section 5.93(b) of the Act. Under section 5.93(b) a councillor commits an offence if he or she makes improper use of information to cause detriment to the local government or any other person. Under the Act the Panel's jurisdiction is confined to dealing with complaints of "minor breaches", which are defined as breaches of the Regulations and any local laws as to conduct. The Panel does not have jurisdiction to consider an allegation that a councillor has committed an offence under section 5.93(b) of the Act.
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<sup>2</sup>.
6. If the alleged conduct may amount to a "recurrent breach", the Panel may instead send the complaint to the Chief Executive Officer of the Department of Local Government and Communities (the Department).<sup>3</sup>
7. On 21 December 2016 the Panel met to consider the Complaint.
8. The Panel considered the documents listed in Attachment A to these Reasons.
9. The Department made several attempts to contact Cr Taylor over a six-month period from April to October 2015 to obtain his response to the Complaint. Cr Taylor didn't reply to the Department and hasn't responded to the Complaint. On 21 December 2016 the Panel decided to consider the Complaint because Cr Taylor had been given a sufficient number of opportunities over a reasonable period to respond.
10. The Panel was satisfied that the Complaint had been dealt with in accordance with the administrative requirements in the Act for dealing with complaints of minor breaches.<sup>4</sup>

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<sup>1</sup> Section 5.105 of the Act.

<sup>2</sup> Section 5.110(2)(a) of the Act.

<sup>3</sup> Sections 5.110(2)(b), 5.111(1) of the Act.

<sup>4</sup> Sections 5.107, 5.108, 5.109 of the Act.

11. The Panel accepted the Department's advice that Cr Taylor was a councillor at the time of the alleged breaches and on 21 December 2016 when the Panel considered the Complaint.
12. Cr Taylor had not previously been found to have committed a minor breach, so the Panel was not required to consider sending the Complaint to the Chief Executive Officer of the Department.<sup>5</sup>
13. Based on the information referred to in paragraphs 2 to 12 above the Panel found it had jurisdiction to determine whether Cr Taylor had committed the two alleged minor breaches of regulation 7(1)(b).

### **Panel's role**

14. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.
15. 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).<sup>6</sup>
16. 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.<sup>7</sup>
17. 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)**

18. A councillor commits a minor breach if he or she breaches Regulation 7(1)(b), which 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.*

*Subregulation (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83."*

<sup>5</sup> Sections 5.110(2)(b), 5.111(1) of the Act.

<sup>6</sup> Section 5.106 of the Act.

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

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

### **The Complaint**

20. Allegation 1 is that Cr Taylor disclosed an undated anonymous letter (the Letter) containing “untrue, disparaging and unjustified statements” about him and the CEO to a named employee of Cr Taylor’s. The Complainant does not specify the date on which Cr Taylor allegedly disclosed the information to the employee, but claims it was before Cr Taylor gave a copy of the Letter to the consultant named in Allegation 2.
21. Allegation 2 is that on 20 August 2015 Cr Taylor gave a copy of the Letter to Mr Mike Fitzgerald, who the Council had appointed to conduct the CEO’s performance Review.
22. Allegation 3 is that Cr Taylor “may have disclosed the contents of (the Letter) to other members of the community and/or colleagues of (his)”.
23. The Complainant provided a copy of the Letter with his Complaint Form. The Letter commences with “I am penning this letter ...”
24. In response to the Department’s request for further information the Complainant provided a number of other documents for the Panel to consider, including the following:
- his email to the Department dated 24 November 2016;
  - a copy of a letter from Civic Legal to the Shire dated 16 September 2015 advising the Shire about the legal implications of the Letter;
  - a signed statement from Mr Mike Fitzgerald dated 8 September 2015 obtained by Civic Legal (Mr Fitzgerald’s Statement); and
  - a signed statement from the CEO dated 14 September 2015 obtained by Civic Legal (the CEO’s Statement).

### **Cr Taylor’s response**

25. As referred to above, Cr Taylor has not responded to the Complaint.

### **Minutes of the ordinary Council meeting on 20 August 2015**

26. Council held an ordinary meeting on 20 August 2015 (the Meeting). The Minutes record that:
- The Meeting commenced at 11.02pm.
  - Cr Taylor, the Complainant and the CEO attended the Meeting.
  - Cr Taylor left the Meeting at 11.06am after declaring a financial interest in the next item to be discussed and returned at 11.10am. The Minutes do not indicate that Cr Taylor left the Meeting at any other time.

- The Meeting was closed to the public at 12.10pm so Council could discuss, in the words of section 5.23 of the Act “a contract entered into, or which may be entered into, by the local government and which relates to matter to be discussed at the meeting and information about the business, professional, commercial or financial affairs of a person ...”.
- Council resolved (the time is not mentioned) that:
  - “1. Council commends the CEO for this excellent result and that Council accepts the Consultant's report as a true and correct reflection of the Council's views of the CEO's excellent performance in his second 12 months with the Shire of Halls Creek.
  2. Council adopts the 4 suggested Halls Creek Specific Performance criteria set out in the report as forming part of the CEOs performance criteria for the coming twelve months.”
- The Meeting was re-opened to the public (the time is not mentioned) then concluded at 12.11pm.

### **Tony's Plumbing**

27. In his Annual Returns for 2014/15 and 2015/16 (available on the Shire's website) Cr Taylor stated his occupation as a plumber and that he was a Director of Tony's Plumbing.

### **Panel's findings of fact**

28. The CEO's and Mr Fitzgerald's Statements are consistent. In the absence of any denials or submissions from Cr Taylor, the Panel makes the following findings of fact based on the information in the Complaint Form signed by the Complainant, the Complainant's email to the Department dated 24 November 2016, the CEO's Statement and Mr Fitzgerald's Statement.
29. There is no direct evidence that Cr Taylor disclosed the contents of the Letter to his employee. However, the Panel can accept hearsay evidence.<sup>8</sup> The Panel takes into account the CEO's statement that the Shire's Executive Services Manager (the ESM) told him about its existence at around 2.00pm on 20 August 2015, and that Cr Taylor had shown the Letter to her partner.
30. The Panel is satisfied to the required standard of proof that:
  - Cr Taylor received the Letter some time prior to the Meeting;
  - At no time did Cr Taylor give the CEO or the Complainant a copy of the Letter or discuss it with them;
  - The CEO didn't know about the Letter until the ESM told him about it at around 2.00pm on 20 August 2015;

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<sup>8</sup> The Panel's Procedures and Practice Guidelines, made pursuant to Schedule 5.1 clause 8(10) of the Act, which allows the Panel to determine its own procedure and practice.

- Cr Taylor employed the ESM's partner in Tony's Plumbing and had shown him the Letter some time before the ESM spoke to the CEO at about 2.00pm on 20 August 2015;
  - The Complainant didn't receive a copy of the Letter until the CEO gave him a copy shortly before he lodged the Complaint on 11 February 2016;
  - The Complainant accepted and understood the reason the CEO didn't give him a copy earlier – that he didn't want the contents of the letter to cause the Complainant to suffer stress; and
  - The Complainant was disappointed and upset to read the “spurious and disparaging statements” made about him and the CEO.
31. In his Statement the CEO said the Meeting was closed to the public at about 11.45pm for the performance review. The Minutes record that the Meeting was closed to the public at 12.10pm. The Panel cannot ascertain the exact time of the performance review (as the Minutes say the Meeting concluded at 12.11pm) but finds that the Complainant, the CEO and Cr Taylor were present for it.
32. Based on the CEO's Statement, the Panel is satisfied to the required standard of proof that:
- Cr Taylor didn't refer to the Letter during the performance review;
  - When the CEO approached Mr Fitzgerald later that afternoon about the Letter Mr Fitzgerald admitted Cr Taylor had given him a copy of it;
  - The CEO didn't know who else, apart from the employee, Cr Taylor may have told about the Letter, or to whom he may have shown the Letter; and
  - the CEO denied the allegations in the Letter and was hurt, distressed and humiliated by the contents and the distribution of the Letter, and felt that the circulation of the Letter in the district would make his job difficult.
33. Based on Mr Fitzgerald's Statement the Panel finds that:
- Mr Fitzgerald was the owner and principal of Fitzgerald Strategies, which specialised in industrial relations, human resource management and recruitment;
  - The Council engaged Mr Fitzgerald to facilitate the CEO's annual performance review;
  - Mr Fitzgerald's attended the part of the Meeting in which Council considered the CEO's performance;
  - outside the Council chamber, before the performance review, after Cr Taylor left the Meeting because of a financial interest, Cr Taylor told Mr Fitzgerald he had received an anonymous letter and didn't know what to do with it;
  - Cr Taylor was referring to the Letter and told Mr Fitzgerald he had not shown the Letter to anyone;

- Mr Fitzgerald told Cr Taylor he should get legal advice about what to do with the letter; and
  - Mr Fitzgerald learnt later that Cr Taylor had shown the letter to his employee despite telling him he hadn't shown it to anyone.
34. According to the Minutes, Cr Taylor was only absent from the Meeting between 11.06am and 11.10am. Mr Fitzgerald's evidence in his Statement is in effect that between 11.06am and when the performance review took place, Cr Taylor told him about the Letter, went to get a copy of the Letter and returned to give Mr Fitzgerald the copy before Mr Fitzgerald went to an office to finish his report before he attended the performance review.
35. The time of day at which Cr Taylor gave Mr Fitzgerald a copy of the Letter is unclear, and the Panel notes the Minutes record that Council took only one minute behind closed doors to deal with the report and make the resolution accepting the report and commending the CEO. The Panel accepts that the times recorded in the Minutes may not be correct. Despite this uncertainty the Panel accepts Mr Fitzgerald's evidence that Cr Taylor gave him a copy of the Letter before he went into the Meeting for the performance review.
36. Based on Mr Fitzgerald's Statement the Panel is also satisfied that:
- The CEO told him after the Meeting that the ESM had just told the CEO about the Letter. Mr Fitzgerald then showed the CEO a copy of the Letter.
  - Mr Fitzgerald's view was that the Letter contained "disparaging comments and serious allegations" about the CEO and the Complainant and that the allegations were "extremely scandalous and potentially defamatory".
  - Mr Fitzgerald formed the view that Cr Taylor was exploiting him in his position as the Shire's independent consultant that Cr Taylor had given him the Letter with the "primary purpose of 'giving legs' to his case against (the CEO), as it became apparent to (him) that Cr Taylor had some sort of 'axe to grind' or grudge against the CEO ..."
  - Mr Fitzgerald suspected Cr Taylor was trying to influence him in relation to the outcome of the CEO's performance review.
37. The Panel has no reason to doubt Mr Fitzgerald's evidence in his Statement that he didn't read the Letter before he completed his report to Council.

### **Allegation 3 unsubstantiated**

38. The Panel does not have enough evidence to make any findings of fact that could reasonably lead to the conclusion that Cr Taylor disclosed the contents of the Letter to any person referred to in Allegation 3. Therefore the Panel finds that Allegation 3 is unsubstantiated.

### **Essential elements for contravention of regulation 7(1)(b)**

39. In order to find that Cr Taylor breached regulation 7(1)(b), the Panel must be satisfied that all of these elements are met, to the required standard of proof for each element:

- Cr Taylor was a councillor at the time of the alleged conduct;
- he used his office as a councillor at the time of the alleged conduct;
- he used his office improperly; and
- he used his office improperly to cause detriment to the local government or any other person.

Was Cr Taylor a councillor at the time of the alleged breaches?

40. The Panel accepts the Department's advice that Cr Taylor has been a Shire councillor since 19 October 2013 and was a councillor when he allegedly disclosed the contents of the Letter to the employee and Mr Fitzgerald.

Did Cr Taylor use his office as a councillor at the time of the alleged breaches?

41. In the first paragraph of the Letter the author refers to the Complainant and the CEO as staff "whom you will be familiar with". In the second paragraph the author urges the Council to conduct independent audits. The author refers to "your Shire" three times in the Report. The Panel finds that it is more likely than not that the Letter was sent to Cr Taylor because he was a councillor, not because he lived and ran a business in the Shire.
42. With this in mind, as well as the fact that the employee's partner was the ESM, the Panel is satisfied that Cr Taylor was motivated to disclose the contents of the Letter to his employee because he was a councillor.
43. The Panel finds that Cr Taylor was at the Shire offices on 20 August 2015 in his capacity as a councillor and that all his dealings with Mr Fitzgerald that day were in that capacity.
44. The Panel is satisfied to the required standard of proof that Cr Taylor made use of his office as a councillor when showing the Letter to his employee and giving a copy to Mr Fitzgerald.

Did Cr Taylor use his office improperly?

45. The dictionary definition of "improper" is "not in accordance with propriety of behaviour, manners, etc.; unsuitable or inappropriate for the purpose or occasion; abnormal or irregular."<sup>9</sup>
46. Whether there is impropriety is to be assessed objectively:
- "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."<sup>10</sup>

<sup>9</sup> Macquarie Dictionary, Revised Third Edition.

<sup>10</sup> *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 9, referring to *Robbins v Harness Racing Board* [1984] VR 641.



47. Under the Act Panel members must have regard to the general interests of local government in Western Australia.<sup>11</sup> 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 and Shire employees.
48. Regulation 3 of the Regulations sets out general principles to guide the behaviour of council members, although contravention of any of any of these does not amount to a minor breach.<sup>12</sup> Regulation 3 provides, among other things, that councillors should act with integrity and treat others with respect and fairness.
49. 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.<sup>13</sup>
50. 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.<sup>14</sup>
51. The Letter contains several serious allegations against the Complainant and the CEO and challenges their honesty and integrity. The Panel has found that Cr Taylor disclosed the contents of the Letter to at least two people – Cr Taylor’s employee and Mr Fitzgerald – and that at least one other person, the ESM, was aware of the Letter.
52. Any reasonable person reading the Letter would conclude that it would severely damage the reputation and careers of the Complainant and the CEO if it were in the hands of anyone other than an appropriate authority, even if the allegations in it were later proven to be false. A reasonable person would consider it inappropriate for Cr Taylor to give a copy of it or show it to anyone other than a person with authority to deal with the Letter through a formal, fair and just process.
53. The Panel finds that Cr Taylor acted highly inappropriately when giving the Letter to the Council consultant. Mr Fitzgerald did not ask to see the Letter. Cr Taylor took it upon himself to go and get a copy of the Letter and seek out Mr Fitzgerald to give it to him, knowing that Mr Fitzgerald would later that day be presenting his report on the CEO’s performance to Council. It is immaterial whether Mr Fitzgerald took the Letter into account when finalising his report or whether he referred to it when presenting his report to Council.
54. If Cr Taylor had concerns about the CEO’s performance he should have raised them at the performance review. The Panel finds that Cr Taylor was not honest with Mr Fitzgerald or his fellow councillors. Cr Taylor’s actions did not meet the standards of conduct required and expected of councillors.

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<sup>11</sup> Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).

<sup>12</sup> Regulation 13.

<sup>13</sup> *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 10, referring to *Treby and Local Government Standards Panel* [2010] WASAT 81 (*Treby 2010*).

<sup>14</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64, referring to *Treby 2010*

55. The Panel finds that Cr Taylor used his office improperly when disclosing the contents of the Letter to his employee and giving a copy to Mr Fitzgerald.

Did Cr Taylor use his office improperly to cause detriment to the local government or any other person?

56. "Detriment" means loss, damage or injury.<sup>15</sup> It can include financial and non-financial loss, humiliation, denigration, intimidation, harassment, discrimination, disadvantage, adverse treatment, and dismissal from, or prejudice in, employment. A person can suffer detriment through others thinking less favourably of them.<sup>16</sup>
57. 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.<sup>17</sup> It is not enough to show that the local government or the person concerned suffered detriment - the Panel must find that there was an intention to cause detriment.
58. It is not the role of the Panel to decide whether the allegations and assertions in the Letter are true. A councillor can breach regulation 7(1)(b) by making a statement about a person even if the substance of the statement turns out to be true. This is because councillors are expected to make their allegations or voice their concerns to the appropriate person or authority, in the appropriate forum or setting.
59. The Panel finds that in showing the letter to his employee Cr Taylor deliberately gave damaging information about the Complainant and the CEO to a person who had no right to receive it and no proper role to play in dealing with it.
60. Mr Fitzgerald did not ask for a copy of the Letter. He offered to arrange for a lawyer to give Cr Taylor legal advice about how to deal with it. Despite this, Cr Taylor took the extra step of seeking out Mr Fitzgerald later in the day to give him a copy of the Letter. Cr Taylor would have known that Council was going to discuss the CEO's performance review after he and Mr Fitzgerald joined the meeting and that Mr Fitzgerald had been preparing a report for Council on the matter.
61. The only inference reasonably open to the Panel is that Cr Taylor told his employee about the Letter and gave a copy to Mr Fitzgerald to discredit the Complainant and the CEO. The Panel finds that Cr Taylor used his office to cause detriment to the Complainant and the CEO.

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<sup>15</sup> Macquarie Dictionary Revised Third Edition, 2001.

<sup>16</sup> *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 32.

<sup>17</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraphs 71,72.

### Panel's finding

62. The Panel finds that Cr Taylor breached regulation 7(1)(b) twice, firstly when disclosing the information in the Letter to his employee (as in Allegation 1) and secondly on 20 August 2015 when giving a copy of the Letter to Mr Fitzgerald (as in Allegation 2).
63. The Panel does not have sufficient evidence to be satisfied that Cr Taylor disclosed the contents of the Letter to other members of the community or any of the Complainant's colleagues, so Allegation 3 is not made out.



Brad Jolly (Presiding Member)



Paul Kelly (Member)



Merranie Strauss (Member)

Date of Reasons – 23 January 2017

## Attachment A

### The Available Information

Doc ID	Description
<b>Attachment B</b>	<b>Statement of Facts</b>
<b>01</b>	Copy of <b><i>Complaint of Minor Breach No. SP 8 of 2016</i></b> and supporting information dated 11 February 2016 made by Mr Lloyd Barton
<b>02</b>	Copy of Request for Comments letter including attachments (Complaint Summary, relevant legislation, Form A) to Councillor Tony Taylor dated 19 April 2016
<b>03</b>	Copy of reminder letter to Cr Taylor dated 5 August 2016 regarding lack of response to previous correspondence
<b>04</b>	Copy of “ <b>anonymous letter</b> ” provided with the complaint
<b>05</b>	Email dated 24 November 2016 from Lloyd Barton responding to a request for further information and evidence (E1652227)
<b>06</b>	Copy of an Investigation Report: “ <i>Conduct of a Councillor</i> ” dated 16 September 2015 by Civic Legal
<b>07</b>	“ <b><i>Statement of Rodger Kerr-Newell</i></b> ” given to Civic Legal
<b>08</b>	“ <b><i>Proof of Evidence of Mike Fitzgerald</i></b> ” statement given to Civic Legal
<b>09</b>	<i>Emails from Mike Fitzgerald to Cr Taylor dated 21, 23 August 2015 and to Rodger Kerr-Newell dated 21 August 2015</i>