

LOCAL GOVERNMENT STANDARDS PANEL

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

Complaint Number	SP 21 of 2014 DLG 20140160
Legislation	<i>Local Government Act 1995 (WA)</i>
Complainant	Councillor Norm Karafilis
Subject of complaint	Councillor Malcolm Cullen
Local Government	Shire of Coolgardie
Regulation	Regulation 6(2)(a) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mr B Jolly (Presiding Member) Councillor P Kelly (Member) Mr P Doherty (Deputy Member)
Heard	3 February 2015 Determined on the documents
Outcome	Breach of Regulation 6(2)(a)

FINDINGS AND REASONS FOR FINDING

DEFAMATION CAUTION

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1. **Summary of the Panel's Finding**

- 1.1 The Panel finds that Cr Cullen breached regulation 6(2)(a) of the *Local Government (Rules of Conduct) Regulations 2007* as alleged in the Complaint.

2. **Introduction**

- 2.1 In these Reasons unless otherwise indicated:

- (a) a reference to a regulation is a reference to the corresponding regulation of the *Local Government (Rules of Conduct) Regulations 2007* (**Regulations**), and a reference to a section is a reference to the corresponding section of the *Local Government Act 1995* (**Act**);
- (b) "viewed objectively" means "as viewed by a reasonable person" (the reference to a reasonable person being a reference to a hypothetical person with an ordinary degree of reason, prudence, care, self-control, foresight and intelligence, who knows the relevant facts);
- (c) "CEO" means the Shire's Chief Executive Officer;
- (d) "Complainant" means Cr Norm Karafilis;
- (e) "Council" means the Shire's Council;
- (f) "Department" means the Department of Local Government;
- (g) "OCM" means Ordinary Council Meeting;
- (h) "Panel" means the Local Government Standards Panel; and
- (i) "Shire" means the Shire of Coolgardie.

3. **Jurisdiction**

- 3.1 On 30 September 2014 the Complainant, a Councillor of the Shire, signed a complaint concerning alleged conduct by Cr Malcolm Cullen on 23 September 2014 (**Complaint**).
- 3.2 By letter dated 1 October 2014 the CEO of the Shire sent the Complaint to the Panel, which the Panel received on or about 3 October 2014, in accordance with the requirements of section 5.107.
- 3.3 The Complainant alleges that on or about 23 September 2014, Cr Cullen disclosed information he obtained from a confidential document in breach of regulation 6(2)(a).
- 3.4 The *Regulations* are rules of conduct for the purposes of section 5.104(1) of the *Act*.
- 3.5 The CEO is the "complaints officer" for the Shire under section 5.120.
- 3.6 Pursuant to section 5.110(2), the Panel is required to make a finding as to whether the breach alleged in the Complaint occurred or to send the Complaint to the Department's Chief Executive Officer under section 5.111.
- 3.7 The Panel had been informed by the Department, and so finds that Cr Cullen:
- (a) was at the relevant time (i.e. 23 September 2014) and remains currently, elected as a member of the Council; and

- (b) satisfies the requirements of being an elected member of the Council as:
 - (i) he is qualified to be an elector of the district under section 2.19(1)(b);
 - (ii) there is no evidence to indicate that he is disqualified for Council membership under sections 2.21, 2.22, 2.23 or 2.24; and
 - (iii) he is not disqualified from continuing his membership of the Council under section 2.25.

3.8 The Panel also finds that:

- (a) the Complaint is made in writing in the form approved by the Minister pursuant to section 5.107(2);
- (b) the Complaint was made to the CEO as the Complaints Officer of the Shire within two years after the breach alleged in the Complaint occurred, as required by section 5.107(4);
- (c) the Complaint is not one that ought to be sent to the Department's Chief Executive Officer under section 5.111; and
- (d) it has jurisdiction to determine whether the breach of regulation 6(2)(a) alleged in Complaint occurred.

4. **Legislative background**

4.1 Regulation 6 provides as follows:

- “(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 section 5.23(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; or
 - (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 the 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.”

5. The Panel’s Role

5.1 The Panel observes that:

- (a) clause 8(6) of Schedule 5.1 of the Act requires the Panel’s members to have regard to the general interests of local government in Western Australia;
- (b) a finding of a minor breach is a serious matter as it may affect an individual both personally and professionally;
- (c) by section 5.106, in order for the Panel to make a finding that a minor breach has been committed by a council member, the finding is to be “based on evidence from which it may be concluded that it is more likely that the breach occurred than that it did not occur”;
- (d) when making this determination:
 - (i) the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the [determining body]”, such as the Panel: *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J at 362; and
 - (ii) where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture. But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise: *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5.

6. The Response

6.1 By letter dated 18 November 2014, the Department sent a copy of the Complaint (together with a Complaint Summary) to Cr Cullen and asked him if he wished to make any comments in relation to the Complaint.

6.2 The Complaint Summary recited that:

“Minor breach allegation

It is alleged that:

1. On 19 September 2014 Mr Paul Webb ('CEO'), the Chief Executive Officer of the Shire of Coolgardie ('Shire'), or his representative gave you, Councillor (Shire President) Malcolm Cullen, a member of the Shire's Council, copies of a Notice of Ordinary Meeting, the agenda, and papers - in particular, his

confidential Officer Report dated 18 September 2014 regarding the then proposed item 14.1, Intractable Waste Facility - for the Ordinary Council Meeting held on 23 September 2014; and

2. The said Officer Report was a document marked by the CEO or at his direction to clearly show that the information in it was not to be disclosed; and
3. On or about 22 September 2014 you said to Mr Michael Dulaney, a journalist with the Kalgoorlie Miner, the words or words to the effect that:
 - (i) "The Shire would put its hat in the ring"; or
 - (ii) alternatively, "We'll be putting our hat in the ring"; and
 - (iii) I don't think it's just monetary return we're looking at – its about utilising the facilities we have to be sustainable"; and
4. By virtue of the matters referred to in paragraphs 1, 2, and 3, above you disclosed information that you derived from a confidential document, in contravention of regulation 6(2)(a) of the *Local Government (Rules of Conduct) Regulations 2007*."

(Complaint Summary)

- 6.3 Cr Cullen responded by a completed Elected Member's Response (**Elected Member's Response**) and an email to the Department dated 3 December 2014 (**3 December 2014 Email**), together referred to as the "Response".
- 6.4 In the Elected Member's Response Cr Cullen said, in relation to the matters set out in the Complaint Summary, that he:
 - (e) accepted the matters set out in paragraphs 1, 2, and 3 (iii) of the Complaints Summary;
 - (f) did not accept the matters set out in paragraphs 3(i), 3(ii) or 4 of the Complaints Summary; and
 - (g) contended that the information that was set out in the "K/Miner Sept 23rd¹ is covered by regulation 6(3)(c) in that the Mount Walton Intractable Waste Facility has been operating in the Shire of Coolgardie since 1990".
- 6.5 In the 3 December 2014 Email Cr Cullen said:

"Response to COMPLAINT NO.SP 21 of 2014.
In response to the allegations that I disclosed information derived from a confidential document, I wish to clarify the following:

 1. 3(i)(ii) I do not recall I said any of the words in the opening paragraph of the articule (sic) in the Kalgoorlie Miner 23rd September dealing with the Shire of Coolgardie.

¹ The Panel considered this to be a reference to the "Article" as defined in paragraph 7.1 (below).

I believe Mr Dulaney wrote that paragraph (sic) the Shire was expressing an interest, and also used the word "confirming" to put more interest into the article (sic).

I believe my words to Mr Dulaney were that the Shire would be considering an interest in a radioactive site, and that we would put it on the table and see what comes of it, which was actually printed!

2. The remainder of the article (sic) reported about the Mt Walton Intractable radioactive waste disposal site, which is located in the Shire of Coolgardie, 100km west of the Coolgardie townsite. This site has been in operation since 1990, and as the Shire President, I have chaired the annual Mt Walton Committee meetings for the past four years. This committee comprises various Government and community members, and the operation of the facility is open to public scrutiny and has been in the public domain at all times since it's (sic) inception.

3. I have attached the letter I received from Mr Rick Wilson, Federal Member for O'Connor in which he wrote that the Federal Government was seeking support to consider a nationwide process to identify suitable sites for Australia's radioactive waste disposal.

The Council Resolution 184/14 reflects the fact that Council support the Australian Government in the above process and investigate further the current facility within the Shire.

During debate on this item 14.1, I explained to Councillors that a facility already existed in the Shire, therefore we were not expressing an interest to be considered as a possible location for a site, and upon being questioned regarding the newspaper article (sic), I pointed out that I thought what had been printed, had mis-quoted what I had actually said to the journalist.

There have been several instances recently where the Editor of the Kalgoorlie Miner has had to retract the content of articles (sic) printed in the newspaper.

I hope this explanation is satisfactory."

7. The Documents

7.1 Save for the information provided to the Panel by the Department (as set out under the heading "Jurisdiction" above), the Panel determined the Complaint after considering copies of the following documents:

- (a) the Complaint which included:
 - (i) copy article headed "Group speaks out on nuclear dump" by Mr Michael Dulaney, which the Complainant alleges was published in the Kalgoorlie Miner newspaper on the morning of Monday 23 September 2014 (**Article**); and
 - (ii) copy report by the CEO dated 18 September 2014 and entitled "Confidential Item, Intractable Waste facility" in relation to Agenda Item 14.1 for the OCM of the Council on 23 September 2014 together with a cover sheet marked "Private & Confidential Item 14.1 Ordinary Meeting of Council, 23 September 2014, 6.00 pm" (**CEO's Report**);
- (b) the Complaint Summary;
- (c) copy Agenda for the Shire's 23 September 2014 OCM (**Agenda**);

- (d) copy Minutes of the Shire's 23 September 2014 OCM (**Minutes**);
- (e) email from the CEO's Executive Assistant to the Department dated 17 November 2014 [in which she advised that the Agenda and attachments were sent to Councillors on 19 September 2014].

8. Factual Findings

8.1 On the evidence available to the Panel, it is satisfied that it is more likely than it is not that:

- (a) on 19 September 2014 the CEO or his representative gave Cr Cullen copies of²:
 - (i) a Notice of Ordinary Meeting for the OCM to be held on 23 September 2014 at 6:00 pm;
 - (ii) the Agenda for that meeting; and
 - (iii) the CEO's Report;
- (b) the Agenda included, at par 14.1, "Confidential Item, Intractable Waste Facility";
- (c) the CEO's Report was a document marked by the CEO or at his direction to clearly show that the information in it was private and confidential and not to be disclosed³;
- (d) the CEO's Report recorded that:
 - (i) a member of Federal Parliament has enquired of the of the Shire to "gauge interest from the Shire in hosting a radioactive waste management facility" (**Facility**);
 - (ii) nominations from interested parties would close of 10 September 2014;
 - (iii) the Shire could tentatively be considered for construction of the Facility;
 - (iv) the Shire currently hosts the "Mt Walton facility, Reserve 42001 being an Intractable Waste Storage Site";
 - (v) "[w]ilst the proposal would appear in principle to meet the directions of Council to staff, the officer believes that the matter will be of such significance to the Community, that an direction is sought from Council prior to expressing **an** interest in the project"; and
 - (vi) "Council will need to weigh the future benefits of this facility against current community concerns";

with the CEO recommending "[t]hat Council instruct the Chief Executive Officer or his nominated representative to pursue an interest in a National Radioactive Waste Facility to the Department of Industry, Canberra, and if successful report to Council for direction";

² Accepted by Cr Cullen in the Elected Member's Response.

³ Accepted by Cr Cullen in the Elected Member's Response.

- (e) on or about 22 September 2014 (but before the 23 September 2014 OCM) Cr Cullen said to Mr Michael Dulaney, a journalist with the Kalgoorlie Miner, words to the effect that:

"[T]he Shire would be considering an interest in a radioactive site, and that we would put it on the table and see what comes of it"⁴

"I don't think it's just monetary return we're looking at – its about utilising the facilities we have to be sustainable"⁵;

(Statement)

- (f) the 23 September 2014 edition of the Kalgoorlie Miner included an article (on page 3) by Michael Dulaney entitled "Group speaks out on nuclear dump" which provided as follows:

"Nuclear-free activists say the Shire of Leonora is likely to face "fierce" opposition from local Aboriginal groups if it goes ahead with its expression of interest to host a Federal nuclear waste dump.

Last week the Shire added its voice to the growing number of groups in the Goldfields expressing interest in being the host of the nuclear waste repository, which will store Australia's low and intermediate-level nuclear waste.

WA Nuclear Free Alliance chairman Kado Muir said he was surprised by the comments given the anti-nuclear presence in the area.

The group holds the annual Walkatjarra Walkabout from Yeelirrie to Leonora to protest uranium mining in the region.

Mr Muir said there was a strong nuclear-free presence in Leonora.

"It comes as a bit of a surprise that members of the community would think we'd tolerate having a nuclear waste dump in our back-yard," he said. "The Shire's operating under a false assumption and may be out of touch with the reality of the fierceness of the opposition they're going to find on the ground."

Mr Muir said community resistance in Leonora would be greater than that seen in the wake of Ngaanyatjarra Lands traditional owner Preston Thomas' proposal to host the site at the Kanpa Community.

"What happened out there (Ngaanyatjarra Lands) is nothing compared to what will happen if the Shire of Leonora or other Goldfields shires put in expressions of interest to get a nuclear waste facility," he said.

⁴ Accepted by Cr Cullen in par 3 of his 3 December 2014 Email.

⁵ Accepted by Cr Cullen in the Elected Member's Response.

Meanwhile, the Shire of Coolgardie is the latest to join the list of Goldfields councils expressing interest in the facility with president Mal Cullen confirming yesterday the Shire would put its hat in the ring.

The Shire already hosts the Mount Walton facility, which stores WA's low-level nuclear waste. ***Mr Cullen said the site was connected to rail and road infrastructure and could be expanded to accommodate the facility.***

"We'll put it on the table and see what comes of it," he said.

"I don't think it's just monetary return we're looking at — it's about utilising the facilities we have to be sustainable." [emphasis added]

- (g) at the OCM of 23 September 2014, the Council unanimously resolved to make the CEO's Report "open to the public"⁶ and then unanimously resolved "[t]hat Council instruct the Chief Executive Officer or his nominated representative to support the Australian Government to have a nation wide process to identify suitable sites and to investigate the potential radioactive waste facility within the Shire of Coolgardie and to report back to Council on the finding of that investigation."⁷

9. Elements of the offence and determination

- 9.1 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.
- 9.2 In light of regulation 6(3), the essential elements or issues of a breach of regulation 6(2)(a) are that it is more likely than not that:
- (a) a person who is currently a council member;
 - (b) disclosed information to someone who at the time was not also a council member;
 - (c) that information was information that the council member derived from a document marked by the local government's CEO, or at his or her direction, to clearly show that the information in the document is not to be disclosed;
 - (d) the disclosure was not of information that was public knowledge at the time of the member's disclosure, and did not occur in any of the ways identified in regulation 6(3).

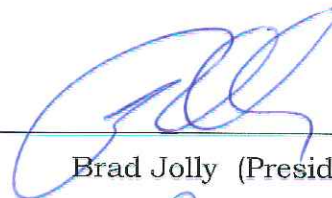
⁶ Council resolution 183/14; see Minutes at p 197.

⁷ Council resolution 184/14; see Minutes at p 197.

9.3 On the information to the Panel it is satisfied that it is more likely than not that:

- (a) Cr Cullen is currently a member of the Council of the Shire;
- (b) Cr Cullen made the Statement to Michael Delaney (who was not a member of the Council of the Shire) on or about 22 September 2014;
- (c) by making the Statement to Michael Delaney, Cr Cullen disclosed information from the CEO's Report (being a document marked by the CEO, or at his direction, to clearly show that the information in the document was not to be disclosed) that information being that the Shire was considering expressing interest in being considered as a site for a Federal nuclear waste disposal facility (**Information**);
- (d) the Information was not information that was public knowledge or in the public domain at the time when Cr Cullen made the Statement to Michael Dulaney. In this regard:
 - (i) the Agenda, when referring to the Confidential Item, "Intractable Waste Facility" did not disclose that the Shire was considering expressing an interest in being considered as a site for a Federal nuclear waste disposal facility; and
 - (i) the fact that the Shire then hosted an Intractable Waste Storage Site at the "Mt Walton facility, Reserve 42001" provided no basis for concluding that the Shire was also considering expressing an interest in being considered as a site for a Federal nuclear waste disposal facility.

9.4 **Accordingly for the above reasons, the Panel finds that that Cr Cullen breached regulation 6(2)(a).**



Brad Jolly (Presiding Member)



Paul Kelly (Member)



Peter Doherty (Member)