

LOCAL GOVERNMENT STANDARDS PANEL

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

Complaint Number	SP 42 of 2015 [DLG 20150189]
Legislation	<i>Local Government Act 1995</i>
Complainant	Mr Ian Hill
Subject of complaint	Councillor Mark Burns
Local Government	City of Subiaco
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) Mr P Doherty (Member)
Heard	29 September 2015 (Determined on the documents)
Outcome	Breach

FINDINGS AND REASONS FOR FINDING

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

1. Summary of the Panel's Decision

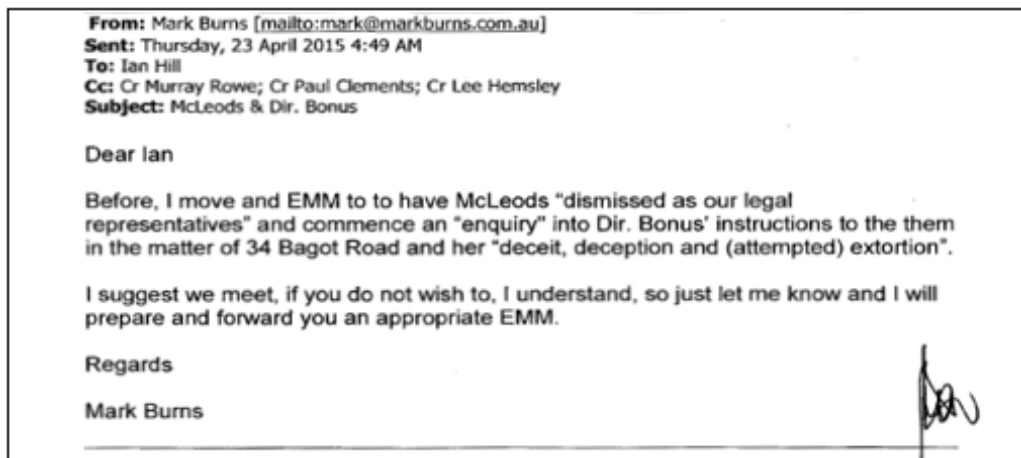
- 1.1 The Panel found that Cr Burns committed a breach of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007 (Regulations)* by sending the Email set out in paragraph 3.1 (below).

2. Jurisdiction

- 2.1 On 22 July 2015 the Panel received a complaint of a minor breach alleging that Cr Mark Burns contravened regulation 7(1)(b) of the Regulations by sending an email to the Complainant (the City's then Chief Executive Officer) and three other Councillors (**Email**), in which he made statements about a City employee (**Complaint**)
- 2.2 A breach of regulation 7(1)(b) is a "minor breach"¹ and the Panel is required to make a finding as to whether the breach occurred or to send the Complaint to the Chief Executive Officer of the Department of Local Government and Communities under section 5.111 of the *Local Government Act 1995 (LG Act)*.
- 2.3 The Panel finds that the Complaint was made and has been dealt with in accordance with the requirements of Division 9 of the *LG Act*, that the Complaint is not one that should be dealt with under section 5.111 and that the Panel has jurisdiction to determine whether the breaches alleged in the Complaints occurred.

3. The Complaints

- 3.1 The Complaint relates to the Email set out below which was copied to Councillors Rowe, Clements and Hemsley:



- 3.2 The Complaint alleges that Cr Burns sent the Email to cause a detriment to Ms Bonus (an employee of the City) in breach of regulation 7(1)(b) of the *Regulations* in that the Email foreshadowed an "EMM" (being an Elected Member's Motion) by Cr Burns, concerning Ms Bonus' conduct and indicated that he would seek to have an "enquiry" held into Ms Bonus' "deceit, deception and (attempted) extortion" regarding a matter involving 34 Bagot Road."

¹ *LG Act*, s 5.101A and s 5.105(1).

4. The Panel's Role

- 4.1 The Panel observes that its members are required to have regard to the general interests of local government in Western Australia²; it is not an investigative body and determines complaints solely upon the evidence presented to it; a finding of a minor breach may affect an individual both personally and professionally and that in order for the Panel to make a finding that a minor breach has been committed by a Councillor, 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”³ **(Required Standard)**.
- 4.2 When assessing whether it is satisfied to the required standard:
- (a) the Panel considers, amongst other things, the seriousness of the allegations made in the Complaint, the likelihood of an occurrence of the given description and the gravity of the consequences flowing from a particular finding; and
 - (b) where direct proof is not available, the Panel considers that it must be satisfied that the circumstances appearing in evidence give rise to a reasonable and definite inference of a breach, not just to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture.

5. Documents

- 5.1 The Documents considered by the Panel **(Documents)** are set out in Attachment “A”.

6. Facts

- 6.1 On the evidence available to the Panel it is satisfied to the Required Standard as follows:
- (a) in February 2012, the City received a Development Application **(DA)** from the owners of 34 Bagot Road Subiaco **(Property)** to extend an existing non-conforming use to encompass a proposed boardroom addition above an existing garage to the rear of the existing two storey building on the Property;
 - (b) the City’s lawyers advised that City that there was no express power in the Scheme to “extend” an existing non-conforming use and further that the owners of the Property appeared to be unlawfully using the first floor of the Property as an office in contravention of the Scheme;
 - (c) by letter dated the 19 December 2012 the City advised the owners’ representative that:
 - (i) it would refuse the DA to build the boardroom above the garage; and
 - (ii) the unlawful office use on the first floor should cease;
 - (d) the Owners were invited to withdraw that DA and did so;

² Clause 8(6) of Schedule 5.1 of the *LG Act*

³ *LG Act*, s 5.1 save for a minor change³, Council resolved in favour of the officer recommendation;

- (e) various meetings then took place between the owners' representative and the City (including Ms Bonus) in an attempt to resolve the matter of the office use on the first floor;
- (f) on 19 July 2014, the owners lodged a fresh DA seeking to extend the non-conforming use of the ground floor as office use to include the first floor;
- (g) this DA was refused by the City on the 9 September 2014;
- (h) on 9 September 2014 the City's Development Services Committee voted unanimously to instruct the City's CEO to prosecute the owners for an offence against s.218 of the *Planning and Development Act 2005* for undertaking a development in contravention of the Scheme (**Alleged Offence**);
- (i) thereafter, the owners instituted proceeding in the State Administrative Tribunal (**Tribunal**) seeking a review of the City's decision to refuse the 19 July 2014 DA;
- (j) on 30 March 2015, the Tribunal determined that the City did have power under its Scheme to consider the owner's 19 July 2014 DA;
- (k) prior to 30 March 2015 the City prosecuted the owners for the Alleged Offence;
- (l) at all material times prior to 23 April 2015 the first floor of the Property was being used for offices, which was a use which was not permitted under the Scheme;
- (m) by email sent 15 April 2015 Ms Bonus advised Cr Clements that:

"With regard to the prosecution, ... the City's lawyers have been instructed to seek an adjournment pending the outcome of the matter before the Tribunal. While the prosecution matter is not reliant on the [Tribunal] process, it is generally an accepted practice that a matter before the Tribunal would usually proceed in advance of a prosecution."

- (n) by email sent 16 April 2015, the City's solicitors advised the owner's solicitors that "[o]ur instructions are that the City will only agree an adjournment if a guilty plea is entered";
- (o) the Email was sent to the Complainant and to Crs Rowe, Clements and Hemsley on 23 April 2015; and
- (p) the Email, when referring to "deceit, deception and (attempted) extortion" is referring to the City's instructions to its solicitors that the City would not agree to adjourn the prosecution unless the owners pleaded guilty.

6.2 The Panel notes (without deciding) that the owners' success before the Tribunal, even if it were to be followed by an approval of the 19 July 2014 DA, would not appear to alter the fact that prior to that approval, the owners used the Property for a use not permitted under the Scheme, which would appear not to alter the factual basis for the Alleged Offence.

- 6.3 In that event, the City was free to set the terms upon which it would agree to the prosecution being adjourned and the owners could have made an application for the prosecution to be adjourned if those terms were unacceptable.

7. The Response

- 7.1 The Department provided Cr Burns with a copy of the Complaint and a Complain Summary and a reasonable opportunity to respond to the allegations made therein.
- 7.2 In his response to the Panel (documents 8, 8A and 8B of Attachment “A”) Cr Burns admits having sent to the Email, but denies having committed the breach set out in the Complaint. and

8. Essential elements of a contravention of regulation 7(1)(b)

- 8.1 Where, as here, the alleged conduct is not conduct that contravenes s 5.93 of the *LG Act* or s 83 of *The Criminal Code*, the following elements must be established, to the Required Standard, before a contravention of regulation 7(1)(b) of the *Regulations* is established:
- (a) first, that the person the subject of the Complaint engaged in the alleged Conduct;
 - (b) secondly, that the person the subject of the Complaint was a council member both at the time of the Conduct and the time when the Panel makes its determination;
 - (c) thirdly, that by engaging in the Conduct, the person the subject of the complaint made use of his or her office as a council member (in the sense that he or she acted in their capacity as a councillor, rather than in some other capacity);
 - (d) fourthly, that when viewed objectively⁴, such use was an improper use of the person’s office as council member in that it:
 - (A) involved a breach of the standards of conduct that would be expected of a person in the position of a councillor by reasonable persons with knowledge of the duties, powers and authority of the councillor and the circumstances of the case (by for example, an abuse of power or the doing of an act which the councillor knows or ought to have known that he or she had no authority to do⁵); and
 - (B) was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty⁶; and
 - (e) fifthly, that the person engaged in the Conduct to cause detriment (or in the belief that detriment would be suffered) by the local government or another person.

⁴ That is, when viewed by a reasonable person (i.e. a hypothetical person with an ordinary degree of reason, prudence, care, self-control, foresight and intelligence, who knows the relevant facts).

⁵ *Treby and Local Government Standards Panel* [2010] WASAT 81 at [26] – [34].

⁶ *Hipkins and Local Government Standards Panel* [2014] WASAT 48 at [9].

9. Findings - regulation 7(1)(b)

- 9.1 On the evidence available to the Panel, it is satisfied to the Required Standard that each of the above elements has been established and that Cr Burns' comments concerning Ms Bonus were made without any justification.
- 9.2 The Panel considers that by threatening in the Email that he would seek to have an "enquiry" held into Ms Bonus' "deceit, deception and (attempted) extortion" regarding a matter involving [the Property], Cr Burns:
- (a) made improper use of his office as councillor of the City as any concerns he had with Ms Bonus' conduct ought to have been raised with the Complainant (as the City's then Chief Executive Officer) and not his fellow councillors; and
 - (b) so acted to cause detriment to Ms Bonus, as an accusation that she had engaged in "deceit, deception and (attempted) extortion" amounted to an egregious (and unfounded) attack on her honesty and the integrity and therefore her fitness to work for the City.

The Panel therefore finds that that Cr Burns committed a breach of regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007*.



Brad Jolly (Presiding Member)



Paul Kelly (Member)



Peter Doherty (Member)

Attachment “A”

Doc ID	Description	Page #
Attachment B	Statement of Facts.	17
	Complaints Officer originating correspondence:	
01.doc	Copy of (1-page) correspondence from Mr Ian Hill, the CEO and Complaints Officer of the City Subiaco dated 16 July 2015.	18
02.doc	Copy of (2-page) completed Council Member Details form dated 16 July 2015, and attached Complainant Details.	19
	Complaint and accompanying information:	
03.doc	Copy of (total of 10-page) Complaint of Minor Breach No. SP 42 of 2015 dated 16 July 2015 made by the CEO, with attachments. (Attachments are also 03A.doc – 03E.doc)	21
03A.doc	<ul style="list-style-type: none"> Copy of an email sent by Cr Burns to the CEO, dated 23 April 2015, to which the (Complaint relates - subject email); Copy of an email from the CEO to Cr Burns dated 24 April 2015; and Copy of an email from Cr Burns back to the CEO, dated 28 April 2015. 	24
03B.doc	Copy of (1-page) Memo from the CEO to Cr Burns dated 4 June 2015.	25
03C.doc	Copy of (1-page) email from Cr Burns to the CEO dated 11 June 2015, in response to the CEO's Memo dated 4 June 2015.	26
03D.doc	Copy of further (1-page) Memo from the CEO to Cr Burns dated 16 June 2015.	28
03E.doc	Copy of (2-page) letter from Cr Burns to the CEO addressing both Memos (4 & 16 June), dated 22 June 2015.	29
	Correspondence with the Complainant:	
04.doc	Copy of (1-page) email from the Department to the CEO requesting further clarification and documents regarding the Complaint.	31
05.doc	Copy of (1-page) email response dated 28 August 2015 from Mr Neil Wilson, on behalf of the CEO, citing attachments.	32
05A.doc	Attachment A: letter (2-page) from the CEO to the Department, dated 13 August 2015.	33
05B.doc	Attachment B: 'Australia Wide Investigations' Report (32-page)	35
05C.doc	Attachment C: City of Subiaco Code of Conduct (12-pages).	67
	Correspondence with the Cr complained about:	
06.doc	Copy of (4-page) Request for Comments letter and attachment to Cr Mark Burns dated 4 September 2015, with attached complaint summary and Form A.	79
07.doc	Copy of (1-page) email correspondence between Cr Burns and Mr David Morris at the Department, dated 10 September 2015.	83
08.doc	Copy of (1-page) correspondence from Cr Burns to the Department.	84
08A.doc	Copy of (1-page) completed Form A.	85
08B.doc	Copy of (1-page) 'Annexure A' to Cr Burns' Form A.	86