

Decision-maker's Title: **LOCAL GOVERNMENT STANDARDS PANEL**
Jurisdiction: Complaints of minor breach by local government council members
Act: *Local Government Act 1995*
File No/s: SP 24 of 2008 (DLGRD 20080141)
Heard: Determined on the documents
Considered: 18 July 2008
Coram: Mr Q. Harrington (Presiding Member)
Councillor C. Robartson (Member)
Mr J. Lyon (Member)

SP 24 of 2008

Complainant: Councillor Christopher MERFIELD

Council member complained about: Councillor John GANGELL

Finding

The Panel finds that, for the following reasons, Councillor Gangell has committed a breach of regulation 6(2)(b).

Reasons for finding

1. In these Reasons unless otherwise indicated:

- (a) a reference to a section is a reference to the corresponding section in the *Local Government Act 1995*; and
- (b) a reference to a regulation or a sub-regulation is a reference to the corresponding regulation or sub-regulation in the *Local Government (Rules of Conduct) Regulations 2007*.

2. Mr Gary Evershed, the complaints officer and Chief Executive Officer ("CEO") of the Town of Bassendean ("Town") has sent to the Panel a complaint dated 14 April 2008 ("the complaint") made by Councillor Merfield about alleged conduct of the Town's Deputy Mayor, Councillor Gangell.

3. The complaint consists of a 3-page *Complaint of Minor Breach Form*, a copy of a 1-page extract from page 3 of the "Eastern Reporter" newspaper published on 8 April 2008 (containing an article by Ms Karen Valenti), a copy of page 24 of the Town's Ordinary Council Meeting ("OCM") of 27 November 2007, a copy of a 4-page Officer Report on the feasibility of using the former Eden Hill Shopping Centre site as a permanent replacement for the Midland Military Markets (marked "Confidential Reports Standing Committee Agenda 18/03/08") ("the Officer Report"), a copy of page 38 of the minutes of the OCM of 25 March 2008, a 1-page copy of an email of 7 April 2008 purportedly from Councillor Gangell to the Town's Chief Executive Officer ("the CEO") and the Town's other Councillors, a 1-page copy of an email of 10 April 2008 purportedly from Councillor Gangell to the CEO and the Town's other Councillors, a copy of a 2-page email of 12 April 2008 purportedly from Councillor Tina Klein (the Town's Mayor) to Councillor Gangell, and a copy of a 1-page email of 14 April 2008 purportedly from Councillor Gangell to the CEO and the Town's other Councillors.

4. By the complaint, Councillor Merfield alleges in effect that:

- (a) between 25 March 2008 and 8 April 2008 Councillor Gangell disclosed confidential Council information, that he acquired at a closed part of the OCM of 25 March 2008, to both or either of Ms Karen Valenti and/or Ms Dominique Menegaldo;
- (b) the information so disclosed was:
 - "... *Council did not want to make an amendment to planning scheme 10 to allow for the site to be used as a market place ...*"
 - "*The number one reason given for Councillors voting against the markets was due to a concern that a market place in Eden Hill would take business away from Old Perth Road.*"; and
- (c) Councillor Gangell's conduct constituted two breaches of regulation 6 and two contraventions of Section 79 of the *Town of Bassendean Standing Orders Local Law 2006*, which section states "*The improper use of information is dealt with in section 5.93 of the Act.*" In other words, Councillor Merfield alleges that Councillor Gangell's alleged conduct is both a minor breach under regulation 6(2) and a serious breach (a breach of section 5.93).

5. Section 5.93 is a purposive provision – that is, the Council member must have made an improper use *for the purpose* (motive or intent) of gaining an advantage or causing a detriment. See the case of *Chew v R* [1992] HCA 18. However, in the present case Councillor Gangell has said that his purpose of disclosing the information was "*merely to notify to people I am elected to represent of the outcome*". In the Panel's view the complaint does not disclose an allegation of a serious breach the subject of section 5.105(3).

6. In these Reasons a reference to:

- (a) "the first allegation" is a reference to the allegation that between 25 March 2008 and 8 April 2008 Councillor Gangell committed a breach of regulation 6(2)(a) by disclosing to both or either of Ms Karen Valenti and/or Ms Dominique Menegaldo: "... *Council did not want to make an amendment to planning scheme 10 to allow for the site to be used as a market place ...*"; and
- (b) "the second allegation" is a reference to the allegation that between 25 March 2008 and 8 April 2008 Councillor Gangell committed a breach of regulation 6(2)(b) by disclosing to both or either of Ms Karen Valenti and/or Ms Dominique Menegaldo: "*The number one reason given for Councillors voting against the markets was due to a concern that a market place in Eden Hill would take business away from Old Perth Road.*"

7. On its own initiative the Panel Administration sent to Councillor Gangell a Panel *Notice of Complaint* dated 22 May 2008 accompanied by: a copy of the complaint, advice that the two allegations of minor breach that are made or arise under the complaint are or appear to be the first allegation and the second allegation; and an invitation to Councillor Gangell to respond to the allegations. Councillor Gangell's response consists of his 3-page letter of 9 June 2008 and a copy of a 1-page newsletter that he says was distributed by another of the Town's Councillors and him in January/February 2008.

8. On the basis of the information in the complaint (and its accompanying material) and in Councillor Gangell's response, it is the Panel's view that it is more likely than not that the relevant facts of this matter are that:

- (1) Councillor Gangell is a Council member and a member of the Town's Standing Committee. Prior to the Standing Committee meeting held on 18 March 2008 ("the Committee Meeting") he received the agenda for that meeting and a copy of the Officer Report marked confidential. However, he sent his apologies and did not attend the meeting.
- (2) The Officer Report was considered by Council during a closed part of the OCM of 25 March 2008. Council's 5/4 carried resolution on Item 14.1 ("Council's resolution") was *"That Council receives the report on the feasibility of using the former Eden Hill Shopping Centre site as a permanent replacement for the Midland Military Markets, and takes no further action in the matter"*. Councillors Klein, Brinkworth, Stubbs, Merfield and Butler voted in favour of the motion, and Councillors Gangell, Elgar, Piantadosi and Pule voted against the motion.
- (3) Subsequent to Council's resolution:
 - (a) Councillor Gangell sent, to the "Eastern Reporter" newspaper, a letter to the editor signed "John Gangell, Resident of Bassendean";
 - (b) Councillor Gangell was then interviewed by Ms Karen Valenti, a reporter with that newspaper;
 - (c) an article by Ms Valenti, that contained the two statements that Councillor Merfield complains about, was published on 8 April 2008 in the "Eastern Reporter" newspaper; and
 - (d) Councillor Gangell made those two statements to Ms Valenti.

9. Regulations 6(1) and (2) of the Regulations read:

- "(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."*

10. Regulation 6 is a rule of conduct under section 5.104(1) and, in accordance with section 5.105(1)(a), a contravention of regulation 6 is a minor breach. Sub-regulation 6(2) is an example of a strict liability provision. This means that a council member who breaches regulation 6(2) will have committed a minor breach, simply by virtue of the proof of the fact of the breach (as the intent or purpose of the disclosure is irrelevant), unless and until the council member can make out a defence under regulation 6(3). By virtue of regulation 6(3), regulation 6(2) does not prevent a council member from disclosing information that is already in the public domain. In the Panel's view, in the context of confidentiality obligations the term "in the public domain" means "public knowledge".

11. The noun “information” is relevantly defined in the Macquarie Dictionary (2nd ed) as “knowledge communicated or received concerning some fact or circumstance”. In the Panel’s view the means of communicating information includes expressing views and making statements and comments.

12. Subject to the defences in sub-regulation 6(3), Councillor Gangell will have committed a minor breach under sub-regulation 6(2)(a) if he disclosed information that he derived from a “confidential document”.

13. The Panel notes that Councillor Gangell’s specific response to the first allegation is:

“Town Planning Scheme 10 is a public document and clearly states the site is a Local shopping zone. When Council voted to take no further action (a motion on the public record), I perceived this as an admission that Council did not want to make the required amendments to the Town Planning Scheme 10 to allow for the site to be used as a market place. This was only my view, and part of ordinary political discourse. It is not information contained in the officer’s report or the subject of Council debate, and therefore cannot be considered confidential information.”

14. The Panel’s view in relation to Councillor Gangell’s statement “... Council did not want to make an amendment to planning scheme 10 to allow for the site to be used as a market place ...” is that:

- (a) there is no such statement in the Officer Report;
- (b) on balance, the statement is Councillor Gangell’s conclusion, view or opinion on a Council decision; and
- (c) Cr Gangell did not commit a breach of regulation 6(2)(a) in making the statement to Ms Valenti.

15. Subject to the defences in sub-regulation 6(3), Councillor Gangell will have committed a minor breach under sub-regulation 6(2)(b) if he disclosed information that he acquired at a closed meeting other than information derived from a non-confidential document.

16. The Panel notes that Councillor Gangell’s specific response to the second allegation relevantly includes the following passage:

“This is not confidential information, as it did not pertain to the report, nor to the debate; it was merely a political comment on the political justification given by Councillors as to why they did not support the site being used as a market place. I accept that the content of the officer’s report is confidential, but not the political reasons asserted by Councillors when voting for or against the proposal I was attempting to put to Council (that is whether the site should be used for the Midland Military Markets).

I refer you to the Minutes of the Ordinary Council Meeting dated 25/03/08 where the votes taken by Councillors on the matter are recorded. The vote taken by each Councillor is recorded publicly; therefore commenting on their reasons is part of the ordinary political discourse and discloses nothing confidential.”

17. While the Panel disagrees with Councillor Gangell’s claim that the “political reasons asserted” were in effect not confidential, it does note that information as to those views is not information that falls under section 5.23(2)(e)(iii) of the Act. It is not information about the business, professional, commercial or financial affairs of a person. However, the alleged breach in the present instance is unrelated to the rationale for closing the meeting to members of the public.

18. The Panel notes that the vote taken by each Councillor on a motion is not required to be recorded unless, pursuant to section 5.21(4), a member of the Council specifically requests that there be recorded his or her vote, or the vote of all members present, on a matter voted on at a Council meeting.

19. The Panel notes that:

- (a) by virtue of section 5.94 a person can attend the office of a local government and, unless it would be contrary to section 5.95, inspect certain described information;
- (b) by virtue of regulation 29A(2) of the *Local Government (Administration) Regulations 1996* ("the Administration Regulations"), information referred to in section 5.94 which deals with anything in respect of which a meeting has been closed under section 5.23, is prescribed as information that is confidential but that, under section 5.95(7), may be available for inspection (by any person) if a local government so resolves; and
- (c) Regulation 29A(2) of the Administration Regulations is consistent with regulation 6 as sub-regulation 6(2)(b) also recognises that the "information" is Council's information, and not the information of any one or more of the Councillors.

20. In the Panel's view, as a consequence of sections 5.23, 5.94 and 5.95, regulations 29 and 29A of the Administration Regulations and regulation 6, and the meaning of the term "in the public domain", the information in relation to a closed part of a Council meeting that by virtue of regulation 6 a Councillor is *not* permitted to disclose publicly (including to any elector or ratepayer) is:

- (a) any information in a document marked by (or on behalf of) the CEO to clearly show that the information in the document is not to be disclosed, except for any information that is public knowledge at the time of the Councillor's disclosure;
- (b) anything said during the closed part of the meeting,
 - (i) except for so much of what is said that is public knowledge at the time of the Councillor's disclosure; and
 - (ii) otherwise, only to the extent specified by Council and subject to such other conditions as Council determines; and
- (c) any information referred to in section 5.94 which deals with anything in respect of which a meeting has been closed under section 5.23, except for such of that information that Council has resolved be available for inspection.

21. On the basis of the information in the complaint (and its accompanying material) and in Councillor Gangell's response, it is the Panel's view that it is more likely than not that:

- (a) Councillor Gangell was a Council member during the period from 25 March 2008 to 8 April 2008;
- (b) Councillor Gangell attended at the OCM of 25 March 2008 and, during a closed part of the meeting, became privy to information being some or all of his fellow Councillors reasons for voting as they did on Item 14.1;
- (c) that information:
 - (i) was information that Councillor Gangell acquired at a closed meeting other than information derived from a non-confidential document;

- (ii) was not information in the public domain;
 - (iii) was information that Council had not resolved be available for inspection by any person; and
 - (iv) was information that Councillor Gangell disclosed to Ms Valenti during the period from 25 March 2008 to 8 April 2008, when he disclosed to her “*The number one reason given for Councillors voting against the markets was due to a concern that a market place in Eden Hill would take business away from Old Perth Road.*”; and
- (d) by that disclosure, Councillor Gangell committed a breach of regulation 6(2)(b).

22. Accordingly, for these reasons, the Panel finds that Councillor Gangell committed a breach of regulation 6(2)(b).

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Quentin Harrington (Presiding Member)

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Clive Robartson (Member)

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John Lyon (Member)

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Act: *Local Government Act 1995*
File No/s: SP 24 of 2008 (DLGRD 20080141)
Heard: Determined on the documents
Considered: 18 July 2008 and 2 October 2008
Coram: Mr Q. Harrington (Presiding Member)
Councillor C. Robartson (Member)
Mr J. Lyon (Member)

SP 24 of 2008

Complainant: Councillor Christopher MERFIELD

Council member complained about: Councillor John GANGELL

Local Government: Town of Bassendean

Decision:

The Panel has made a finding ("the finding") that Councillor Gangell committed a breach of regulation 6(2)(b) of the *Local Government (Rules of Conduct) Regulations 2007* ("the breach") by disclosing information that he acquired during a closed part of a council meeting.

The Panel's decision on how the breach is dealt with under section 5.110(6) of the *Local Government Act 1995* ("the Act") is that pursuant to paragraph (c) of section 5.110(6) of the Act it orders two of the sanctions described in paragraph (b) of section 5.110(6) of the Act, as set out in the attached Minute of Order.

REASONS FOR DECISION

1. The Panel has given to Councillor Gangell:
 - (a) notice of the finding;
 - (b) a copy of the Panel's written *Reasons for Finding* in regard to the finding; and
 - (c) a reasonable opportunity for him to make submissions about how the breach should be dealt with under s 5.110(6) of the Act.
2. Councillor Gangell has not made any such submissions.
3. The Panel notes that it has found that the Council confidential information wrongly disclosed by Councillor Gangell ("the relevant information") was: "*The number one reason given for Councillors voting against the markets was due to a concern that a market place in Eden Hill would take business away from Old Perth Road.*"
4. The Panel views the action of any council member wrongly disclosing Council confidential information as a serious matter.

5. Councillor Gangell has not previously been found under Part 5 Division 9 of the Act to have committed any minor breach.
6. Having regard to the said *Reasons for Finding*, the above matters and the general interests of local government in Western Australia, the Panel's decision in this matter is that pursuant to paragraph (c) of section 5.110(6) of the Act it orders two of the sanctions described in paragraph (b) of section 5.110(6) of the Act, as set out in the attached Minute of Order. Two sanctions are ordered due to the seriousness of the nature of the breach. Councillor Gangell ought to be admonished by the Panel and also ordered to publicly apologise to his fellow Councillors; particularly Councillors Klein, Brinkworth, Stubbs, Merfield and Butler; for his disclosure of information acquired during a closed part of a council meeting.

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Quentin Harrington

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Clive Robartson

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John Lyon

NOTICE TO THE PARTIES TO THE COMPLAINT/S

RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (“the Decision-maker”) hereby gives notice that:

- (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 (“SAT”) for a review of the Panel’s decision in this matter. *In this context “decision” means a decision to dismiss the complaint or to make an order.*
- (2) Generally, an application to SAT under its review jurisdiction must be made within 28 days of the day on which the Decision-maker gives a notice under subsection 20(1) the *State Administrative Tribunal Act 2004* (“SAT Act”).
- (3) The Decision-maker’s *Reasons for Finding* and these *Reasons for Decision* constitute the Decision-maker’s notice given under subsection 20(1) of the SAT Act.