

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 29 of 2010 (DLG 20100193)
Heard: Determined on the documents
Considered: 6 April 2011
Coram: Mr B. Jolly (Presiding Member)
 Councillor C. Adams (Member)
 Mr J. Lyon (Member)

Complaint SP 29 of 2010

Complainant: (Mayor) Troy Ernest PICKARD

Council member complained about: **Councillor Brian CORR**

Local Government: **City of Joondalup**

Regulation alleged breached: **Regulation 6(2) of the *Local Government (Rules of Conduct) Regulations 2007***

FINDINGS AND REASONS FOR FINDINGS

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.

SUMMARY OF FINDINGS

The Panel found that Councillor Corr:

- (a) has committed a breach of regulation 6(2)(a); and
- (b) did not commit a breach of regulation 6(2)(b) as alleged in the complaint.

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FINDING AND REASONS FOR FINDING

Procedural matters

1. The procedural and other matters mentioned in **Attachment A** are incorporated here as if set out in full.

Available information

2. The information before the Panel in relation to this matter (the available information) is the information and documents described in the table under the heading 'Available information' in **Attachment A**. These documents are referred to below, in italics within square brackets, by the relevant Doc ID in the table for the relevant document – e.g. *[Doc B2]* refers to the document that is Doc ID B2 in the table. Pages in a document described in the table are similarly referred to below by the relevant page/s number followed by the relevant Doc ID – e.g. *[pp3-4Doc B2]* refers to pages 3 - 4 of Doc ID B2.

It is noted, and it is again drawn to Councillor Corr's attention that, in relation to the confidential Council documents provided by Mayor Pickard – i.e. *[Doc F3]*, *[Doc F4]*, *[Doc F5]*, *[Doc F6]*, *[Doc F8]*, and *[Doc F9]*:

- (a) he has asked that these documents be treated as confidential documents which may not be disclosed for any purpose other than as required under Division 9, Part 5 of the Act;**
- (b) the Council does not appear to have waived its confidentiality status conferred on those documents; and**
- (c) except for the purpose of responding to the subject allegations in this matter, Councillor Corr's obligations of confidentiality to the Council and the City in regard to those documents appear to remain unaffected.**

References to sections and regulations

3. In these Reasons (which include each of the Attachments to them), unless otherwise indicated:

- (1) A reference to a regulation is a reference to the corresponding regulation of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations), and a reference to a section is a reference to the corresponding section of the *Local Government Act 1995* (the Act).
- (2) The term '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).

Allegations of minor breach made in the complaint

4. Mayor Pickard's two allegations of minor breach, in a reasonably concise form, made in the complaint as supplemented by his letter dated 26 October 2010 [Doc F1], are as follows:

(1) **allegation (1):**

Mayor Pickard alleges that on 6 July 2010, during the discussion on item JSC06-07/10 at the City of Joondalup's Special Meeting of Council, when it was open to members of the public, Councillor Corr contravened regulation 6(2)(a) in that he disclosed information that he derived from one or more confidential documents (i.e. a document or documents marked by the City's CEO to clearly show that the information in the document was not to be disclosed).

Particulars of information disclosed by Cr Corr, as alleged by Mayor Pickard:

- (i) *"My third concern relates to legal fees and the rehabilitation of sumps and I have to admit that I'm a little bit afraid to say much on this issue but it cost the City a lot of ratepayer's money."*
- (ii) *"Council took the part of litigation against the advice of our lawyers Minter Ellison. Minter Ellison has raised issues about how the contract was handled by the City's staff and in the end it's the ratepayers who've spent a lot of money on this."*
- (iii) *"I commend the City on how it presents the Capital Works Budget to Council for scrutiny, also the same for Fees and Charges but not the Operation Budget There's been no real discussion or scrutiny. The Ocean Reef Marina Project is now costing millions. We need a business plan very soon."*
- (iv) *"The cost of the sumps debacle I'll call it, worries me as we didn't accept the legal advice we paid for and then we litigate and lose."*

Particulars of the said confidential documents, as alleged by Mayor Pickard:

- (a) Mr Garry Hunt's *Report*, in relation to file number 86601 and item JSC5-12/08 of a Special Meeting of Council held on 23 December 2008.
- (b) Mr Garry Hunt's *Report*, in relation to file number 86601 and item CJ067-04/10 of a Meeting of Council held on 20 April 2010.
- (c) Mr Garry Hunt's *Report*, in relation to file number 86601 and item JSC03-06/10 (Legal Matter – Confidential – City of Joondalup Versus Turfmaster Pty Ltd – Supreme Court Action CIV 1101/2009) of a Special Meeting of Council held on 29 June 2010.

(allegation (1))

(2) **allegation (2):**

Mayor Pickard alleges that on 6 July 2010, during the discussion on item JSC06-07/10 at the City of Joondalup's Special Meeting of Council, when it was open to members of the public, Councillor Corr contravened regulation 6(2)(b) in that he disclosed information that he acquired at one or more of 3 closed meetings other than information derived from a non-confidential document (i.e. a document that was not marked by the City's CEO to clearly show that the information in the document was not to be disclosed).

Particulars of information disclosed by Cr Corr, as alleged by Mayor Pickard:

- (i) *"My third concern relates to legal fees and the rehabilitation of sumps and I have to admit that I'm a little bit afraid to say much on this issue but it cost the City a lot of ratepayer's money."*

- (ii) *“Council took the part of litigation against the advice of our lawyers Minter Ellison. Minter Ellison has raised issues about how the contract was handled by the City’s staff and in the end it’s the ratepayers who’ve spent a lot of money on this.”*
- (iii) *“I commend the City on how it presents the Capital Works Budget to Council for scrutiny, also the same for Fees and Charges but not the Operation Budget There’s been no real discussion or scrutiny. The Ocean Reef Marina Project is now costing millions. We need a business plan very soon.”*
- (iv) *“The cost of the sumps debacle I’ll call it, worries me as we didn’t accept the legal advice we paid for and then we litigate and lose.”*

Particulars of the said 3 closed meetings, as alleged by Mayor Pickard:

- (a) That part of a Special Meeting of Council, held on 23 December 2008, in relation to “JSC5-12/08 Confidential Report – Legal Matter”.
 - (b) That part of a Meeting of Council, held on 20 April 2010, in relation to “CJ067-04/10 Confidential Report – Legal Matter”.
 - (c) That part of a Special Meeting of Council, held on 29 June 2010, in relation to “JSC03-06/10 Legal Matter – Confidential – City of Joondalup Versus Turfmaster Pty Ltd – Supreme Court Action CIV 1101/2009”.
- (allegation (2))

Note: In these Reasons, allegation (1) and allegation (2) are collectively referred to as ‘the subject allegations’.

Standing of the subject allegations

5. The Panel notes that:

- (1) The complaint is in the form approved by the Minister for Local Government and was made within time.
- (2) There is an allegation made in the complaint that Councillor Corr, a member of the Council at the time of the alleged incident, has committed a minor breach as defined under section 5.105(1)(a).
- (3) The subject allegations are as mentioned in paragraph 4 above. Regulation 6(2) is a rule of conduct under section 5.104(1) and, in accordance with section 5.105(1)(a), a contravention of regulation 6(2) is a minor breach. Regulation 6(2) is contravened by a breach of regulation 6(2)(a) or 6(2)(b).

Panel’s role - duty to make finding - required standard of proof

6. The Panel notes that:

- (1) Broadly, the Panel is a statutory decision-maker that is required to adjudicate on complaints made in writing, in a form approved by the Minister, that give certain details including the details of the contravention that is alleged to have resulted in the breach.
- (2) Under the Act and the common law the Panel: has no power or duty to carry out any investigation in relation to any complaint before it; and has no power to compel any information to be provided to it.

- (3) Clause 8 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.
- (4) The Panel is required to make a finding as to whether the breach alleged in the complaint occurred [section 5.110(2)]. In order for the Panel to make any finding that any 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 [section 5.106]. This level or standard of proof is the same as in ordinary civil legal proceedings where it is referred to as being a preponderance of probabilities (or, the balance of probabilities).
- (5) The Panel is aware that when it makes a finding of a minor breach, the finding is a serious matter as it may affect individuals personally and professionally.

Accordingly, in determining whether on the evidence the standard of proof - on the balance of probabilities - has been satisfied, the Panel recognises that '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]'¹. Each of these 'considerations' applies in complaint proceedings against a council member. These 'considerations' are referred to in these Reasons as 'the Briginshaw principles'.

- (6) As the High Court of Australia has expressed the position, the significance of *Briginshaw*² is that the seriousness of the matter and of its consequences does not affect the standard of proof but goes to the strength of the evidence necessary to establish a fact required to meet that standard. So much reflects a conventional perception that (relevantly) local government council members do not ordinarily engage in improper conduct generally and in circumstances where to do so is likely to render them liable to a punitive sanction.³
- (7) The following passage (without the authorities) from the High Court's decision in *Bradshaw v McEwans Pty Ltd*⁴ is relevant in complaint proceedings against a council member:

"The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, 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." [Underlining added]

¹ *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J in at 362

² *ibid*

³ *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.

⁴ (1951) 217 ALR 1 at 5

Facts - the context of the subject allegations

7. The Panel notes that:

- (a) the ordinary meaning of the adjective 'relevant' is "bearing on, connected with, or pertinent to the matter in hand"⁵; and
- (b) under the common law, evidence or information is relevant only if it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings.⁶

8. On the available information the Panel is reasonably satisfied (i.e. satisfied to the degree required by the Briginshaw principles) and accordingly finds, that the jurisdictional and other facts relevant in this matter are as follows:

- (1) At all times relevant in this matter Councillor Corr was, and is currently, an elected member of the Council.

- *[p1Doc B2]*

- (2) In May 2006 the City entered into a contract (the contract) with Turfmaster Pty Ltd (Turfmaster) under which Turfmaster agreed to spray drainage sumps for weeds, which it proceeded to do. From September 2006 tree deaths and declines began occurring in and around the sprayed drainage sumps. In early 2007 there was speculation that Turfmaster may have been responsible for the tree deaths and declines through its use of a herbicide with hexazinone as the active ingredient.

- *[p1Doc F8]*

- (3) In or about May 2007 the City engaged Minter Ellison Lawyers (Minter Ellison) to advise on two issues in relation to the tree deaths:

- (a) environmental management and dealings with the Department of Environment and Conservation (DEC); and

- (b) the contract, specifically whether there were grounds to terminate it.

- *[p1Doc F8]*

- (4) In August 2007 the City terminated the contract and, at all times relevant since then, was in dispute with Turfmaster in relation to the terms and effect of the contract (the contractual dispute).

- *[Doc F8]; [Doc B2]*

⁵ The Shorter Oxford English Dictionary (6th ed)

⁶ *Washer v Western Australia* (2007) 234 CLR 492 at [5], n 4.

- (5) A Special Meeting of the Council was held on 23 December 2008 (the December 2008 Special Meeting). The relevant business of the meeting was the consideration of item “JSC5-12/08 – Confidential Report – Legal Matter”, which was the City’s CEO’s confidential *Report* to the Council members (the CEO’s Options Report) in relation to the City’s possible options in the contractual dispute. Attached to the CEO’s Options Report was a copy of legal advice, being an undated 3-page legal advice and Briefing Note to Elected Members prepared by Minter Ellison (the Options Briefing Note)

- [Doc B7]; [Doc F8]

- (6) Each page of the CEO’s Options Report has the embedded watermark “CONFIDENTIAL”. The CEO’s Options Report includes the following statements or comments:

“... it is timely now for the Council to consider the approach to be taken in regard to pursuing a claim against Turfmaster. Attached is a Briefing Note to guide Council’s decision-making in this matter. Elected Members are again reminded of the importance of maintaining confidentiality. Confidentiality is critical to retaining the best case for the City when it issues a claim against the contractor: If Turfmaster is aware of the City’s case or if it has copies of confidential material which could be used against the City, this will be detrimental to the City’s best prospects of success. All advice provided by the City’s solicitors continues to be the subject of legal professional privilege, including this report and its attachments.

This report outlines the strengths and weaknesses of the City’s case against Turfmaster initially. The paper then identifies six objectives or priorities the Council may have which will also influence the course of action chosen. Finally, the report presents three distinct courses of action: one with two sub-options.

The essential elements of Minter Ellison’s recommendation as documented in the Briefing Note is that the City first negotiate with Turfmaster to attempt to resolve the dispute by meeting and mediation before contemplating commencing legal action. On the basis of the legal advice, it is recommended that Council authorises the Chief Executive Officer to initially seek a meeting with Turfmaster’s Managing Director with a view to obtaining agreement to refer the dispute to mediation.

Representatives from Minter Ellison Lawyers will be present at the Special Council Meeting to discuss with Elected Members the matters articulated in the attached Briefing Note, including outlining an estimate of the costs the City has incurred to date as well as potential cost implications for the options identified.”

- [pp2-3Doc F8]

[As part of the “Weaknesses” of the City’s case]

“The terms of the contract are not clearly drafted particularly in specifying the detail of the contractor’s responsibilities and liabilities

...

Supervisory issues – there is evidence that the City did not discharge its supervisory obligations under the contract”

- [p7Doc F8]

(7) In the Options Briefing Note:

- (a) at the beginning, it states in effect that Minter Ellison's advice is on:
 - (i) the strength of the City's claim against Turfmaster for damages generally; and
 - (ii) whether particular expenditure incurred by the City can be recovered from Turfmaster;and that such advice is "preliminary in nature";
- (b) comments are made on the City's "arguable claim against Turfmaster" for damages for a breach of the contract;
- (c) paragraphs 2.2 to 2.3 read:

"2.2 There is some doubt that the misapplication of *hexazinone* was the sole cause of the deaths of trees and shrubs. Turfmaster had apparently applied *hexazinone* in previous years without adverse effect. An expert report suggests that the extreme drought that occurred in 2006 may also have been a catalyst. The City will need further evidence about the major cause of the deaths if it proposes to commence action in court.

2.3 If the City were successful in establishing that Turfmaster's breaches caused the deaths of trees and shrubs the City may be able to recover varying percentages of the different classes of costs it has incurred.

2.4 We recommend that the City first negotiate with Turfmaster to attempt to resolve its dispute before it contemplates commencing action, by meeting and mediation.

2.5 If negotiations fail, the City must obtain further evidence, particularly of the impact of misapplication of *hexazinone*, as opposed to the impact of climate change and should also seek pre-action discovery from Turfmaster before the City decides whether to commence action."

- (d) comments are made about the City's chances of success if it were to commence litigation proceedings against Turfmaster – in particular, paragraph 3.3 reads, relevantly:

"The issue of the City's supervisory obligations will be raised in any action. A lack of supervision (if established) may, however, have the effect of reducing the amount of any damages awarded to the City."

and

- (e) comments are made on the recoverability of the City's expenses as loss and damage

- [Doc F9]

(8) The officer recommendation in the CEO's Options Report was as follows:

"That Council:

- 1. AUTHORISES the Chief Executive Officer to seek a meeting with the Managing Director of Turfmaster Pty Ltd ('Turfmaster') to undertake the following actions:
 - a) outline the City's basis for a claim against Turfmaster;*
 - b) seek Turfmaster's agreement to a negotiated, confidential reimbursement of the City's costs; and*
 - c) seek Turfmaster's agreement to mediation of the dispute with the cost of mediation being shared equally by the parties.**
- 2. In the event an agreement as outlined in paragraph 1 is reached at the meeting, AUTHORISES the Chief Executive Officer to approach the Institute of Arbitrators and Mediators Australia with a view to appointing an accredited mediator to mediate the dispute between the City and Turfmaster;*
- 3. At the mediation, AUTHORISES the Chief Executive Officer to negotiate a confidential outcome affirming the actions to be taken by the parties to the mediation and restitution of the City's costs;*
- 4. AUTHORISES the the Chief Executive Officer to undertake all measures necessary to effect any outcome agreed upon at the mediation.*
- 5. AUTHORISES the Chief Executive Officer, in the course of the negotiations with Turfmaster, consider the future engagement of Turfmaster for non-herbicide related contracts, including the supply and application of fertiliser or turf maintenance;*
- 6. REQUESTS the Chief Executive Officer to prepare a report on the outcome of any negotiations or mediation with Turfmaster."*

- *[p14Doc F8]*

(9) At the December 2008 Special Meeting, as recorded in the publicly available minutes of the meeting:

- (a) the relevant item, denotation "JSC5-12/08", was a Council confidential matter that was considered during a part of the meeting that was closed to members of the public;
- (b) Minter Ellison's representatives, Mr Michael Ferguson (Partner) (Mr Ferguson), Mrs Cheryl Edwardes (Special Counsel) and Ms Margie Tannock (Senior Associate), were present when the item was considered and voted on;

- (c) the Council's resolution on the item was carried 6/5, and was:

"That Council:

- 1. AUTHORISES the Chief Executive Officer to commence legal proceedings in the Supreme Court of Western Australia against Turfmaster Pty Ltd for breach of contract;*
- 2 In taking the legal action, seek a determination from the Supreme Court of Western Australia that Turfmaster Pty Ltd should replace significant native trees on a 'like for like' basis.";*

- (d) Mayor Pickard provided the following reasons for his departure from the Officer's Recommendation:

- It is incumbent on the City to seek restitution from the contractor in a public forum which allows the inappropriate behaviour to be exposed.
- The significant damage caused to the City's property and native flora.
- The potential damage to the reputation of the City of Joondalup.

- (e) the 6 Council members who voted in favour of the resolution were Mayor Pickard, and Councillors Amphlett, Hollwood, John, Macdonald and Norman; and

- (f) The 5 Council members who voted against the resolution were Councillors Corr, Fishwick, Hart, McLean and Young.

- *[Doc B7]*

- (10) By a Writ of Summons dated and filed on 15 January 2010, the City commenced legal proceedings (the Supreme Court action) in the Supreme Court of Western Australia against Turfmaster for breach of the contract.

- *[pp73-74Doc l2]*

- (11) A Special Meeting of the Council was held on 29 June 2010 (the June 2010 Special Meeting). The relevant business of the meeting was the consideration of two legal matters, one of which was the Supreme Court action.

- *[Doc B5]*

- (12) At the June 2010 Special Meeting, as recorded in the publicly available minutes of the meeting:

- (a) the relevant item, denotation "JSC03-06/10", was a Council confidential matter that was considered during a part of the meeting that was closed to members of the public;
- (b) Minter Ellison's representative, Mr Ferguson, provided a presentation and comments to the meeting in relation to the item before it was voted on, and was present when the item was voted on;

- (c) the Council resolution on the item was carried 9/2, and was:

“That Council, having considered the advice provided by Minter Ellison, the City’s legal representatives, AUTHORISES the Chief Executive Officer to instruct Minter Ellison to settle the proceedings by accepting the offer by Turfmaster Pty Ltd in the Supreme Court mediation session on 23 June 2010.”

- (d) the 9 Council members who voted in favour of the resolution were Councillors Amphlett, Chester, Corr, Fishwick, Hamilton-Prime, Hollwood, McLean, Taylor and Young; and
- (e) The 2 Council members who voted against the resolution were Mayor Pickard and Councillor Norman.

- [Doc B5]

- (13) On 28 June 2010 the City’s CEO sent a Memorandum of that date to Mayor Pickard and the other Council members. The text of the Memorandum, relevantly, reads

“Further to my memo of 25 June 2010, I am now providing the following, additional information to give background and context to the two matters listed for the Special Council meeting tomorrow evening.

JSCO3-06/10 Legal Matter - Confidential - City Of Joondalup Versus Turfmaster Pty Ltd - Supreme Court Action CIV 1101/2009

I have had prepared a Chronology of key events in relation to this issue, which is attached for your information.

As outlined to Elected Members on a number of previous occasions, the City has been guarded from the outset in all its communications to Elected Members, so as not to breach legal privilege in this matter. The City’s lawyers, Minter Ellison, have continuously stressed the need for careful and considered release of information, to prevent third parties accessing information which may form part of the City’s documentation in the Supreme Court action.

Advice from Minter Ellison today however has endorsed the proposal to release the Chronology of Events. Again, I reiterate this is merely by way of background information, and the City’s lawyers, who will be in attendance tomorrow evening, will respond to any questions that you may have.

...

Also attached to this memo are papers previously provided to you under confidential cover for the Council meeting on 20 April 2010, which were collected at the conclusion of that meeting.

At the conclusion of tomorrow night’s meeting, this information will once again, need to be collected from you.”

- [Doc B13]

(14) On 6 July 2010, a few hours before the Council's special meeting later on that date, the City's CEO verbally cautioned Councillor Corr against making any statements in relation to the Turfmaster issue as:

- (a) the settlement agreement between the City and Turfmaster had not been signed; and
- (b) the matter was still confidential and the settlement proposal was confidential.

- [p2Doc B14]; [p2Doc I1]

(15) A Special Meeting of the Council was held on 6 July 2010 (the 2010/11 Budget Meeting). The relevant business of the meeting was the consideration of: a proposal for levying differential rates for the 2010/11 financial year; and a draft of the City's budget for that year (the draft budget).

- [Doc B4]

(16) At the 2010/11 Budget Meeting, during the debate on the draft budget – when the meeting was open to members of the public, and 3 members of the public and one member of the Press were present – Councillor Corr said things that included the following statements or comments (the relevant passage):

"My third concern relates to legal fees and the rehabilitation of sumps and I have to admit that I'm a little bit afraid to say much on this issue but it cost the City a lot of ratepayer's money. Council took the part [? path] of litigation against the advice of our lawyers Minter Ellison. Minter Ellison has raised issues about how the contract was handled by the City's staff and in the end it's the ratepayers who've spent a lot of money on this. I commend the City on how it presents the Capital Works Budget to Council for scrutiny, also the same for Fees and Charges but not the Operation Budget. There's been no real discussion or scrutiny. The Ocean Reef Marina Project is now costing millions. We need a business plan vet', soon. The cost of the stamps debacle I'll call it, worries me as we didn't accept the legal advice we paid for and then we litigate and lose."

- [Doc B4]

General views in relation to regulation 6

9. Attachment B sets out general views and material in relation to regulation 6, which the Panel hereby adopts for the purposes of its dealing with the subject allegations.

Issues arising in dealing with the subject allegations

10. On the available information and in light of the views and material set out in Attachment B, it is the Panel's view that:

- (1) In light of regulation 6(3), the issues which arise in dealing with allegation (1) are:
 - (a) did Councillor Corr disclose information?
 - (b) if issue (a) is answered in the affirmative, was the disclosed information information that Councillor Corr derived from a document marked by the City's CEO to clearly show that the information in the document was not to be disclosed?
 - (c) if issue (b) is answered in the affirmative, was Councillor Corr's disclosure of information that was not in the public domain at the time of his disclosure, and did not occur in any of the ways identified in regulation 6(3)?
- (2) In light of regulation 6(3), the issues which arise in dealing with allegation (2) are:
 - (a) did Councillor Corr disclose information?
 - (b) if issue (a) is answered in the affirmative, was the disclosed information information Councillor Corr acquired at a council or committee meeting, or a part of a council or committee meeting, that was closed to members of the public under section 5.23(2)?
 - (c) if issue (b) is answered in the affirmative, was the information Councillor Corr disclosed information that was not derived from a document that was not marked by the City's CEO to clearly show that the information in the document was not to be disclosed?
 - (d) if issue (c) is answered in the affirmative, was Councillor Corr's disclosure of information that was not in the public domain at the time of his disclosure, and did not occur in any of the ways identified in regulation 6(3)?

Councillor Corr's response to the subject allegations

11. The Panel notes that:

- (1) As indicated in paragraph 3(16) of Attachment A, Councillor Corr's response to the subject allegations (Councillor Corr's formal response) consists of: his 27-page letter, dated 16 February 2011 [Doc I1], and its 13 Appendices of 107 pages of material [Doc I2]; and a 2 minute CD recording [Doc I3] purportedly of questions asked by Councillor Corr, and responded to by the City's CEO, at the Council's ordinary meeting on 18 March 2008.
- (2) In Councillor Corr's formal response, in relation to each of the subject allegations: he admits or does not dispute the truth of the contents of paragraph 8(16) above; and he asserts his defence is that all of the information in the passage reproduced in that paragraph was information that was already in the public domain - i.e. was already public knowledge - at the time of his disclosure of it at the 2010/11 Budget Meeting (Councillor Corr's defence).
- (3) As mentioned in paragraph 4 of Attachment B, in the context of confidentiality obligations the term 'in the public domain' means "public knowledge" and, accordingly, for the purposes of regulation 6 the term 'in the public domain' means "public knowledge".

Panel's views on "public knowledge"

12. In the context and for the purposes of regulation 6:

- (1) In the Panel's view the term 'public knowledge' refers to knowledge, facts or data that is available to any person, where: the noun 'knowledge' refers only to an organized body of factual information (i.e. it does not refer to knowledge that is the comprehension and understanding consequent on having acquired and organized a body of facts); the noun 'fact' refers to a true detail concerning any circumstance past or present; and the noun 'data' refers to a collection of facts, figures and statistics related to an object or a subject, and includes any component of that collection.
- (2) The Panel notes the following comments on the words 'notoriety' and 'notorious':

"Notoriety is the quality or the state of things that are notorious; whatever is so fully or officially proved, that it may and ought to be held as certain without further investigation, is notorious. Ordinarily it is equivalent to public, manifest, evident, known; all these terms have something in common, they signify that a thing, far from being secret, may be easily known by many. Notoriety, in addition to this common idea, involves the idea of indisputable proof, so that what is notorious is held as proved and serves as a basis for the conclusions and acts of those in authority, especially judges. To be as precise as is possible, "public" means what any one may easily prove or ascertain, what is done openly; what many persons know and hold as certain, is "manifest"; what a greater or less number of persons have learnt, no matter how, is "known"; what is to be held as certain and may no longer be called in question is "notorious".⁷

⁷ Extracted from the article on 'Notoriety, Notorious' in the on-line Catholic Encyclopedia at <http://www.newadvent.org/cathen/11126b.htm>, as accessed on 18 March 2011.

- (3) In the Panel's view a matter is public knowledge, and a notorious fact, if it is a fact (i.e. a true detail concerning any circumstance past or present) that is easily shown and is known by a sufficient number of persons to be free from reasonable doubt.

Issues in dispute in dealing with the subject allegations

13. In light of Councillor Corr's formal response to the subject allegations:

- (a) the issues that he disputes, or which otherwise are live, in relation to allegation (1) are the issues identified in paragraph 10(1)(b) and (c) above; and
- (b) the issues that he disputes, or which otherwise are live, in relation to allegation (2) are the issues identified in paragraph 10(2)(b), (c) and (d) above.

Manner of dealing with the issues in dispute

14. In dealing with the live issues mentioned in paragraph 13 above, it is convenient that each of them be dealt with by considering them in relation to Councillor Corr's 4 statements or comments that are complained about in this matter (i.e. in the particulars of information mentioned in paragraphs 4(1) and 4(2) above), in two batches with:

- (a) the first batch consisting of Councillor Corr's statements or comments reproduced in particulars (i) and (iii) of such particulars; and
- (b) the other batch consisting of Councillor Corr's statements or comments reproduced in particulars (ii) and (iv) of such particulars:

Panel's dealings with the statements complained about

15. In relation to Councillor Corr's statements or comments at the 2010/11 Budget Meeting, that:

- *"My third concern relates to legal fees and the rehabilitation of sumps and I have to admit that I'm a little bit afraid to say much on this issue but it cost the City a lot of ratepayer's money.";* and
- *"I commend the City on how it presents the Capital Works Budget to Council for scrutiny, also the same for Fees and Charges but not the Operation Budget. There's been no real discussion or scrutiny. The Ocean Reef Marina Project is now costing millions. We need a business plan very soon."*

- (1) On the available information it is the Panel's view that information, that was already in the public domain when Councillor Corr disclosed it at the 2010/11 Budget Meeting, was that as at 6 July 2010, as a consequence of the contract, the City had spent a substantial amount of money on legal fees and the rehabilitation of sumps that had been sprayed by Turfmaster pursuant to the contract.
- (2) It is the Panel's view that Councillor Corr's statements or comments reproduced in the second or last bulleted point immediately above are Councillor Corr's views only, and do not disclose any of the Council's confidential information.

- (3) By virtue of regulation 6(3) and in light of the contents of paragraphs 15(1) and 15(2) above, Councillor Corr was not prevented by regulation 6(2) from disclosing any information in those identified statements or comments, when he did so at the 2010/11 Budget Meeting.
- (4) In light of the contents of paragraphs 15(1), 15(2) and 15(3) above;
- (a) there is no need to consider any of the other issues in dispute in regard to those identified statements or comments; and
 - (b) the Panel is reasonably satisfied, and finds, that Councillor Corr did not contravene regulation 6(2) when he made those identified statements or comments.

16. In relation to Councillor Corr's statements or comments at the 2010/11 Budget Meeting, that:

- *"Council took the part of litigation against the advice of our lawyers Minter Ellison. Minter Ellison has raised issues about how the contract was handled by the City's staff and in the end it's the ratepayers who've spent a lot of money on this.";* and
 - *"The cost of the sumps debacle I'll call it, worries me as we didn't accept the legal advice we paid for and then we litigate and lose."*
- (1) On the available information the Panel is reasonably satisfied that, viewed objectively and relevantly in regard to the subject allegations only, the critical information in this matter that Councillor Corr disclosed at the 2010/11 Budget Meeting when he made those statements or comments (herein referred to as the critical information) was:
- (a) *"Council took the part of litigation against the advice of its lawyers Minter Ellison";*
 - (b) *"Minter Ellison has raised issues about how the contract was handled by the City's staff";* and
 - (c) *"we [Council] didn't accept the legal advice we paid for".*
- (2) On the available information the Panel is reasonably satisfied that:
- (a) viewed objectively, the critical information is and was Councillor Corr's understanding of information that he derived from the CEO's Options Report; and
 - (b) the CEO's Options Report is and was a document marked by the City's CEO to clearly show that the information in it is and was not to be disclosed.

17. In Councillor Corr's formal response he asserts that prior to the 2010/11 Budget Meeting the critical information was information in the public domain. The Panel notes that Councillor Corr's reasoning in support of this assertion, at [p12Doc 11], is in effect as follows:

- (1) It is public knowledge that the minutes of the December 2008 Special Meeting includes the found facts mentioned in paragraphs 8(9)(c) and 8(9)(d) above – in particular that:

“Mayor Pickard provided the following reasons for his departure from the Officer's Recommendation:

- *It is incumbent on the City to seek restitution from the contractor in a public forum which allows the inappropriate behaviour to be exposed.*
- *The significant damage caused to the City's property and native flora.*
- *The potential damage to the reputation of the City of Joondalup.”*

- (2) Given that the minutes of the December 2008 Special Meeting are in the public domain, since that meeting it was public knowledge that the City was commencing legal action against Turfmaster.

- (3) The particular extract from the minutes of the December 2008 Special Meeting, reproduced in paragraph 17(1) above, also identifies a departure from the Officers' recommendation.

- (4) It is public knowledge, and thus notorious facts, that:

- (a) Minter Ellison was providing legal advice to the City on this matter;
- (b) on legal matters, the Officer's Report and Recommendation(s) rely on the legal advice provided, and going against the recommendation(s) is going against the legal advice, because the two are intrinsically linked and inseparable; and
- (c) the Officers' reports to council generally always concur with legal advice provided to them.

- (5) Councillor Corr alleges that on 11 February 2011, following a question from him, CEO Garry Hunt stated to him: *“I draw your attention that, at the time, the decision made by the Council was different to that recommended to the Council by the Chief Executive Officer based on legal advice.”*

18. The Panel does not share Councillor Corr's views that the matters mentioned in both or either of paragraphs 17(4)(b) and / or 17(4)(c) above is or are public knowledge, and thus a notorious fact or facts, on the basis that:

- (1) The overriding role of the Council is (as set in section 2.7(1)) is to govern and control the City's affairs, and to be responsible for the performance of the City's functions. Accordingly, while any view or recommendation expressed or made to Council by the City's CEO or the City's advisors (legal or otherwise) is not to be treated lightly, ultimately the situation is that Council is not bound to accept any such view or recommendation – particularly where a majority of its members acting in good faith consider that while the view or recommendation concerned has or may have merit, another view or course of action is more appropriate in the good governance and control of the City's affairs or in the performance of the City's functions.
- (2) Where a matter involves a local government's affairs and legal advice has been obtained on the matter by the local government, an officer's report to council in relation to the matter would be remiss if it did not incorporate or refer to that legal advice and any recommendation made in it. However, it does not follow, logically or in practice that any recommendation on the matter by the officer in his/her report will be the same as or in accordance with any recommendation made in the legal advice. That this is so is acknowledged in part by Councillor Corr by his assertion that "the Officers' reports to council generally always [i.e. usually] concur with legal advice provided to them".
- (3) In this matter, viewed objectively, it is reasonable to infer from the available information, as the Panel does infer, that when item "JSC5-12/08 – Confidential Report – Legal Matter" was before Council at the December 2008 Special Meeting, it is more likely than not that the matters considered by the Council members present included:
 - (a) written material, which was or included the CEO's Options Report and Minter Ellison's Briefing Note to Elected Members;
 - (b) the 6 objectives or priorities identified in the CEO's Options Report that the Council may have (and, which the City's CEO indicated "which will also influence the course of action chosen"), and the 3 distinct courses of action identified in the CEO's Options Report;
 - (c) as one of those objectives or priorities, whether it was appropriate that the contractual dispute between the City and Turfmaster be dealt with:
 - (i) in a private forum, by a mediation process to be agreed with Turfmaster should it be so minded; or
 - (ii) in a public forum, by commencing proceedings in the Supreme Court.
 - (d) the responses of any of Minter Ellison's representatives present to questions from the Council members;
 - (e) any advice given, and any comments made, by any of Minter Ellison's representatives present; and

- (f) the views and comments of the Council members who contributed in the discussion that ensued.
- (4) In the event, the Panel is not reasonably satisfied that the matters mentioned in paragraphs 17(4)(b) and 17(4)(c) above were public knowledge, and were notorious facts, when Councillor Corr disclosed the critical information at the 2010/11 Budget Meeting, on the basis that:
 - (a) Councillor Corr has not provided any information to support the conclusion that such matters were true details concerning circumstances before 6 July 2010 that were easily shown and were known by a sufficient number of persons to be free from reasonable doubt; and
 - (b) in the Panel's view such matters were not true details concerning circumstances before 6 July 2010 that were easily shown and were known by a sufficient number of persons to be free from reasonable doubt.

19. The Panel is reasonably satisfied, for the reasons mentioned in paragraphs 16 and 18 above, that the critical information was not information that was in the public domain when Councillor Corr disclosed it at the 2010/11 Budget Meeting.

Panel findings on the subject allegations

Panel finding on allegation (1)

20. On the available information, for the above reasons – in particular in paragraphs 8(6), 8(7) and 16 above – and as required by section 5.110(2), the Panel is reasonably satisfied (i.e. satisfied to the degree required by the Briginshaw principles), and hereby finds, that:

- (a) on 6 July 2010, during the discussion on item JSC06-07/10 at the City of Joondalup's Special Meeting of Council, when the meeting was open to members of the public, Brian Corr, a person who is a member of that Council, disclosed information that he derived from a document marked by the City's CEO to clearly show that the information in it was not to be disclosed.
- (b) the information that the said Brian Corr so disclosed was:
 - (i) *"Council took the part of litigation against the advice of its lawyers Minter Ellison"*;
 - (ii) *"Minter Ellison has raised issues about how the contract was handled by the City's staff"*; and
 - (iii) *"we [Council] didn't accept the legal advice we paid for"*;and was information that was not in the public domain when he disclosed it; and
- (c) by virtue of the contents of the within (a) and (b) above, the said Brian Corr committed a minor breach as defined in section 5.105(1) in that he committed a breach of regulation 6(2)(a) of the *Local Government (Rules of Conduct) Regulations 2007*.

Panel finding on allegation (2)

21. On the available information, for the above reasons – in particular in paragraph 16(2) above – and as required by section 5.110(2), the Panel finds that Councillor Corr did not commit a breach of regulation 6(2)(b) as alleged in the complaint.

.....
Brad Jolly (Presiding Member)

.....
Carol Adams (Member)

.....
John Lyon (Member)

Attachment A

PROCEDURAL MATTERS

Details of the complaint

1. Mr Garry Hunt (Mr Hunt, or, the City's CEO), the Chief Executive Officer of the City of Joondalup (the City), in his capacity as the City's Complaints Officer (the Complaints Officer), has sent to the Panel a formal complaint (the complaint) made by Mayor Troy Ernest Pickard (Mayor Pickard, or, the complainant) about alleged conduct of Councillor Brian Corr (Councillor Corr), a current member of the City's Council (the Council). The complaint consists of:

- a 2-page *Complaint of Minor Breach* dated 20 July 2010 [Doc B1];
- a 2-page statement by Mayor Pickard [Doc B2]; and
- its attachments [Doc B3], [Doc B4], [Doc B5], [Doc B6], [Doc B7], [Doc B8], [Doc B9], [Doc B10], [Doc B11], [Doc B12], [Doc B13], [Doc B14], [Doc B15] and [Doc B16].

Panel to afford procedural fairness to the council member complained about

2. The Panel is required by the common law to afford procedural fairness (or, natural justice) to the council member complained about in a complaint before it, according to the circumstances of the matter. The importance of procedural fairness has been explained as follows:

*"It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious', they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."*⁸

Councillor Corr's formal response sought and received

3. The following matters are noted in regard to Councillor Corr being afforded procedural fairness in the circumstances of this matter:

- (1) On or about 25 August 2010 the Presiding Member sent a *Notice of Complaint* [Doc C], with copies of the documents being [Doc A] and [Doc B1] to [Doc B16], to him advising, among other things, the allegations of minor breach that the Panel will consider in this matter, and inviting him to respond to those allegations.

⁸ *John v Rees* [1970] Ch 345 per Megarry J at 402

- (2) Councillor Corr's initial response was his email of 14 September 2010 [Doc D] in which, relevantly, he advised that prior to him formally responding to the complaint:
 - (a) he "required" Mayor Pickard *"to clarify, and precisely specify, which part, or parts, is the breach. The documents, including the transcript, are too broad in nature"*; and
 - (b) he noted that a specific document – namely, a memo described in [Doc B14] as 'Advice provided by the Principal Legal Officer "Breach of Local Government Conduct Rules" dated 8/7/10' (the Overview of the Minor Breach Complaint Process) – had not been sent to him, and he asked for a copy of it.
- (3) On or about 7 October 2010 the Presiding Member sent a letter [Doc E] to Mayor Pickard requesting him, among other things, to clarify his allegations in the complaint and to provide further information in this matter – including a copy of the Overview of the Minor Breach Complaint Process.
- (4) Mayor Pickard responded with his letter dated 26 October 2010 [Doc F1] and its attachments [Doc F2] to [Doc F9]. However, Mayor Pickard did not provide a copy of the Overview of the Minor Breach Complaint Process.
- (5) On or about 17 November 2010 the Presiding Member sent a letter [Doc G] to Councillor Corr, responding to his said email of 14 September 2010 [Doc D], advising him of the events mentioned in paragraphs 3(3) and 3(4) above, and attaching copies of the relevant correspondence and copies of the additional information provided by Mayor Pickard. The Presiding Member's letter [Doc G] concluded with the following words:

"In the circumstances, it appears that:

- (a) *the complaint, as supplemented by Mayor Pickard's letter dated 26 October 2010 and its attachments, alleges conduct which, if proven on the balance of probabilities, could amount to a minor breach; and*
- (b) *the material and information that I have sent to you in this matter provide sufficient details to give you both notice of the two allegations in this matter and the ability to reasonably and effectually prepare your case in response to those allegations, should you wish to do so.*

As the Panel wishes for complaints to be dealt with in a timely manner please respond within 21 days. In this regard I draw your attention to the second last paragraph of my letter of 25 August 2010."

- (6) Councillor Corr's next response was his email of 23 November 2010 [Doc H1] in which, relevantly, he again advised that prior to him formally responding to the complaint he "required" a copy of the Overview of the Minor Breach Complaint Process.
- (7) To expedite the Panel's dealing with the complaint, the City's Complaints Officer was requested by letter [Doc H2] to provide a copy of the Overview of the Minor Breach Complaint Process [Doc H4], and he as the City's CEO provided it under cover of his letter dated 4 January 2011 [Doc H3].

- (8) On or about 11 January 2011 the Presiding Member sent to Councillor Corr a letter [Doc H5] and a copy of the Overview of the Minor Breach Complaint Process [Doc H4].
- (9) Councillor Corr's next response was his email of 15 January 2011 [Doc H6] in which, relevantly:
 - (a) he queried the authenticity of the copy of the Overview of the Minor Breach Complaint Process, on the basis that it: was not dated 8/7/10; was not signed; and was not stamped as being part of the City's records system;
 - (b) he maintained that he had not been provided with a copy of the actual document that he had 'requested'; and
 - (c) again advised in effect that prior to him formally responding to the complaint he "required" a copy of that actual document.
- (10) Further clarification was then sought from the City's Principal Legal Officer, who advised in his email of 17 January 2011 [p4Doc H6] that *"the document provided with the CEO's letter dated 4 January 2011, is the same document referred to in the CEO's memo to the Mayor dated 9 July 2010. The document in question, which was provided to the CEO by email on 8 July 2010, consisted of a one-page note and was not formatted as a formal memo"*.
- (11) On 17 January 2011 a copy of the City's Principal Legal Officer said email was emailed to Councillor Corr. His response was his email of 19 January 2011 [p5Doc H6] in which he again maintained in effect that he had not been provided with a copy of the actual document that he had 'requested', before he concluded with the words:

"In order to move forward with this matter, I again request the Panel provide a copy of all outstanding documentation, without fetter, (including emails, attachments, memos, letters etc), properly authenticated as being part of the City's records system, in order to ensure my rights are properly preserved, including those of procedural fairness.

If the documentation in question cannot be provided, I may need to consider what alternative legislative options are available, be it under the FOI Act or other."
- (12) At its meeting on 2 February 2011 the Panel did not consider the merits of the complaint. However, in relation to Councillor Corr's request mentioned in italic in paragraph 3(11) above, it noted the email correspondence in [Doc H6], and issued its direction that:
 - (a) he be given a copy of Mr Hunt's letter dated 4 January 2011 [Doc H3] and its attached material [Doc H4] on making a complaint; and
 - (b) he be advised that he has a further 7 days to send his response to the subject allegations.

- (13) The Panel's direction mentioned in paragraph 3(12) above was complied with.
- (14) Councillor Corr's response was to send his email of 9 February 2011 [pp9-10Doc H6] in which:
- (a) he advised he had lodged an FOI application with the City on 3 February 2011; and
 - (b) he requested an extension of time to provide a response to the complaint until such time as the FOI process is complete.
- (15) On 10 February 2011 Councillor Corr was advised by email [p9Doc H6], relevantly, that
- "The Panel has directed that you not be granted further time to respond to the allegations made ... and that your submission, if you choose to provide one, is to be submitted within 7 days from today."
- (16) Councillor Corr then provided his response to the two subject allegations put to him – such response being his 27-page letter, dated 16 February 2011 [Doc I1], and its 13 Appendices of 107 pages of material [Doc I2] and a 2 minute CD recording [Doc I3] purportedly of questions asked by Councillor Corr, and responded to by the City's CEO, at the Council's ordinary meeting on 18 March 2008.
- (17) The Panel's view of the Overview of the Minor Breach Complaint Process [Doc H4] is that its contents are of no relevance in determining whether or not Councillor Corr committed the alleged minor breaches.
- (18) The Panel's view of Councillor Corr's complaints in relation to the City's record keeping practices is that:
- (a) they are of no relevance in determining whether or not he committed the alleged minor breaches; and
 - (b) he should direct them to the appropriate agency under the *State Records Act 2000*.

Available information

4. The information before the Panel in relation to this matter (the available information) is described in the following table:

Doc ID	Description
A	Copy of (1-page) letter from the City of Joondalup's Complaints Officer, dated 20 July 2010.
B1	Copy of (2-page) <i>Complaint of Minor Breach</i> (Complaint SP 29 of 2010) dated 20 July 2010 – its attachments being [Doc B2] to [Doc B16].
B2	Copy of (2-page) statement by Mayor Pickard.
B3	Copy of (1-page) transcription of alleged statements made by Cr Corr.

B4	Copy of (35-page) minutes of the City's Special Meeting of Council held on 6 July 2010.
B5	Copy of (8-page) minutes of the City's Special Meeting of Council held on 29 June 2010.
B6	Copy of (3-page) pages 1, 86 and 87 of the minutes of the City's Ordinary Meeting of Council held on 20 April 2010.
B7	Copy of (5-page) minutes of the City's Special Meeting of Council held on 23 December 2008.
B8	Copy of (1-page) Memorandum from the City's CEO to the Mayor and all Councillors, dated 16 April 2010.
B9	Copy of (2-page) Memorandum from the City's CEO to the Mayor and all Councillors, dated 16 April 2010.
B10	Copy of (1-page) Memorandum from the City's CEO to the Mayor and all Councillors, dated 22 June 2010.
B11	Copy of (1-page) email from the City's CEO to all Councillors, dated 28 June 2010.
B12	Copy of (1-page) Memorandum from the City's CEO to the Mayor and all Councillors, dated 28 June 2010.
B13	Copy of (2-page) Memorandum from the City's CEO to the Mayor and all Councillors, dated 28 June 2010.
B14	Copy of (2-page) Memorandum from the City's CEO to the Mayor, dated 9 July 2010.
B15	Copy of (1-page) newspaper article headed "Trees dispute settled".
B16	Copy of (1-page) part of a newspaper article headed "City passes rate rise, capital expenditure.
C	Copy of (6-page) Presiding Member <i>Notice of Complaint</i> to Cr Corr, dated 25 August 2010.
D	Copy of (2-page) printout of emails – being an email of 15 September 2010 from Mr Schorer to Cr Corr; preceded by an email of 13 September 2010 from Cr Corr to Mr Schorer.
E	Copy of (5-page) Presiding Member's letter to Mayor Pickard, dated 7 October 2010.
F1	Copy of (2-page) letter from Mayor Pickard, dated 26 October 2010 – its attachments being <i>[Doc F2]</i> to <i>[Doc F9]</i> .
F2	Copy of (9 pages) cover page and pages (i) to (viii) of the Agenda of the Special Meeting of Council held on 29 June 2010.
F3	<u>[Note: See the caution immediately following this table]</u> Copy of (2 pages) Mr Garry Hunt's <i>Report</i> , in relation to file number 86601 and item JSC03-06/10 (Legal Matter – Confidential – City of Joondalup Versus Turfmaster Pty Ltd – Supreme Court Action CIV 1101/2009) of a Special Meeting of Council held on 29 June 2010
F4	<u>[Note: See the caution immediately following this table]</u> Copy of (3 pages) Mr Garry Hunt's <i>Report</i> , in relation to file number 86601 and item CJ067-04/10 of a Meeting of Council held on 20 April 2010 – its attachments being <i>[Doc F5]</i> , <i>[Doc F6]</i> and <i>[Doc F7]</i> ,
F5	<u>[Note: See the caution immediately following this table]</u> Copy of (14 pages) legal advice letter and attached draft estimated costs and timeline, from Minter Ellison to the City, dated 13 April 2010.
F6	<u>[Note: See the caution immediately following this table]</u> Copy of (9 pages) letter from Greenland Legal to Minter Ellison, dated 9 March 2010.

F7	Copy of (2 pages) pages 3 and 4 of the Minutes of a Special Meeting of Council held on 23 December 2008.
F8	<u>[Note: See the caution immediately following this table]</u> Copy of (14 pages) Mr Garry Hunt's <i>Report</i> , in relation to file number 86601 and item JSC5-12/08 of a Special Meeting of Council held on 23 December 2008 – its attachment being <i>[Doc F9]</i> .
F9	<u>[Note: See the caution immediately following this table]</u> Copy of (3 pages) undated Minter Ellison Briefing Note to Elected Members
G	Copy of (7-page) Presiding Member letter (and Attachments A and C (sic, B)) to Cr Corr, dated 17 November 2010.
H1	Copy of (1-page) printout of emails – being an email of 8 December 2010 from Cr Corr; preceded by an email of 23 November 2010 from Cr Corr.
H2	Copy of (1-page) Presiding Member's request letter to the City's Complaints Officer, dated 9 December 2011.
H3	Copy of (1-page) letter from the City's Complaints Officer, dated 4 January 2011 – its attachment being <i>[Doc H4]</i> .
H4	Copy of (1-page) document headed "Breach of Local Government Conduct Rules".
H5	Copy of (1-page) Presiding Member letter to Cr Corr, dated 11 January 2011.
H6	Copies of (14-page) printouts of various emails, of various dates, re the provision to Cr Corr of a document described as "Advice provided by Principal Legal Officer ""Breach of Local Government Conduct Rules" dated 8/7/10".
I1	Copy of (27-page) letter to the Panel from Cr Corr, dated 16 February 2011 – its 13 Appendices being <i>[Doc I2]</i> and <i>[Doc I3]</i>
I2	Copies of (107-page) Appendices 1 to 4, and 6 to 13, to <i>[Doc I1]</i> .
I3	Copy of Appendix 5 to <i>[Doc I1]</i> , being a 2 minute CD recording of Questions asked by Cr Corr, and responded to by the City's CEO (purportedly at the OCM on 18 March 2008).

CAUTION: The City of Joondalup, via its Mayor, claims that the information respectively in *[Doc F3]*, *[Doc F4]*, *[Doc F5]*, *[Doc F6]*, *[Doc F8]*, and *[Doc F9]*, is the City's confidential information.

Attachment B

General views and material in relation to regulation 6

Relevant legislation

Regulation 6 reads:

- “(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.”*

Elements

Regulation 6(2)(a)

In the light of regulation 6(3), the elements of a breach of regulation 6(2)(a) are that:

- a council member
- disclosed information
- that information was information that the council member derived from a document marked by the CEO to clearly show that the information in the document is not to be disclosed
- 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).

Regulation 6(2)(b)

In the light of regulation 6(3), the elements of a breach of regulation 6(2)(b) are:

- a council member
- disclosed information
- that information was information the council member acquired at a council or committee meeting, or a part of a council or committee meeting, that was closed to members of the public under section 5.23(2) of the Act
- the information the council member disclosed was not derived from a document that has not been marked by the CEO to clearly show that the information in the document was not to be disclosed
- 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).

General views

Strict liability

1. 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). No proof of intention, knowledge, recklessness or negligence is required. There are no fault elements for any of the physical elements of the breach.

“information”

2. The noun “information” is relevantly defined in the Macquarie Dictionary as “knowledge communicated or received concerning some fact or circumstance”. The means of communicating information includes expressing views, making statements and comments, and sending communications such as emails and letters.

“document”

3. The noun ‘document’ is defined under section 5 of the *Interpretation Act 1984* as including “any publication and any matter written, expressed, or described upon any substance by means of letters, figures, or marks, or by more than one of those means, which is intended to be used or may be used for the purpose of recording that matter”.

“in the public domain”

4. By virtue of regulation 6(3)(c), regulation 6(2) does not prevent a council member from disclosing information that is already in the public domain. In the context of confidentiality obligations the term ‘in the public domain’ means “public knowledge”. Accordingly, for the purposes of regulation 6 the term ‘in the public domain’ means “public knowledge”.

Information available to the public

5. 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. 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. Regulation 29A(2) of the Administration Regulations is consistent with regulation 6 as 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.

Information not disclosable by a council member

6. 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) any word that is 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.

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 29 of 2010 (DLG 20100193)
Heard: Determined on the documents
Considered: 6 April 2011 and 23 May 2011
Coram: Mr B. Jolly (Presiding Member)
 Councillor C. Adams (Member)
 Mr J. Lyon (Member)

Complaint SP 29 of 2010

Complainant: (Mayor) Troy Ernest PICKARD

Council member complained about: **Councillor Brian CORR**

Local Government: **City of Joondalup**

Regulation found breached: **Regulation 6(2) of the *Local Government (Rules of Conduct) Regulations 2007***

DECISION AND REASONS FOR DECISION

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.

FINDING OF MINOR BREACH

In dealing with the subject complaint the Panel has made a finding of minor breach (herein, the Finding) - namely, that:

- (a) on 6 July 2010, during the discussion on item JSC06-07/10 at the City of Joondalup's Special Meeting of Council, when the meeting was open to members of the public, Brian Corr, a person who is a member of that Council, disclosed information that he derived from a document marked by the City's CEO to clearly show that the information in it was not to be disclosed;
- (b) the information that the said Brian Corr so disclosed was:
 - (i) *"Council took the part of litigation against the advice of its lawyers Minter Ellison"*;
 - (ii) *"Minter Ellison has raised issues about how the contract was handled by the City's staff"*; and
 - (iii) *"we [Council] didn't accept the legal advice we paid for"*;
 and was information that was not in the public domain when he disclosed it; and
- (c) by virtue of the contents of the within (a) and (b) above, the said Brian Corr committed a minor breach as defined in section 5.105(1) in that he committed a breach of regulation 6(2)(a) (herein, **the subject Minor Breach**).

SUMMARY OF DECISION

The Panel's decision was to deal with the subject Minor Breach pursuant to section 5.110(6)(b)(i), by ordering that Councillor Corr be publicly censured as specified in the attached Minute of Order.

DECISION & REASONS FOR DECISION

References to sections and regulations

1. In these Reasons, unless otherwise indicated a reference to a section is a reference to the corresponding section in the Act, and a reference to a regulation is a reference to the corresponding regulation in the Regulations.

Procedural fairness matters

2. The Panel notes that through its Presiding Member it has given to Councillor Corr: notice of the Finding (herein, the notice of finding); a copy of the Panel's *Findings and Reasons for Findings* in this matter (herein, the Reasons for Findings); and a reasonable opportunity for Councillor Corr to make submissions about how the subject Minor Breach should be dealt with under section 5.110(6)⁹.

Material received after the Panel's meeting on 6 April 2011

3. The Panel also notes that:

- (a) subsequent to its meeting on 6 April 2011 its administrative staff received a letter from the Chief Executive Officer of the City of Joondalup (herein, the City's CEO), dated 6 April 2011, and its attached copy file note dated 6 July 2010 (herein, the file note);
- (b) on its face the contents of file note confirms the matters mentioned in paragraph 8(14) of the Reasons for Findings; and
- (c) in his said letter the City's CEO has advised that the City has provided a copy of the file note to Councillor Corr, and that he will provide copies of the letter and the file note to Councillor Corr and to Mayor Pickard.

Councillor Corr's submissions

⁹ Section 5.110(6) reads:

"The breach is to be dealt with by —

(a) dismissing the complaint;

(b) ordering that —

(i) the person against whom the complaint was made be publicly censured as specified in the order;

(ii) the person against whom the complaint was made apologise publicly as specified in the order; or

(iii) the person against whom the complaint was made undertake training as specified in the order; or

(c) ordering 2 or more of the sanctions described in paragraph (b)."

4. Councillor Corr has responded to the notice of finding and the Reasons for Findings by his 25-page letter of 16 May 2011 (herein, Councillor Corr's submissions) and its 95 pages of appendices.

5. In the Panel's view, the contents of Councillor Corr's submissions can be summarised relevantly as: (a) he does not agree with the Finding; (b) he attempts to re-agitate issues which as a matter of substance have already been determined or commented on by the Panel in the Reasons for Findings; and (c) he does not make any submission about how the subject Minor Breach should be dealt with under section 5.110(6).

6. The Panel notes that in Councillor Corr's submissions there are at least 2 passages that are incorrect. The first passage is on page 24 of Councillor Corr's submissions, and reads: *"The Panel is aware that the CEO had withdrawn all Reports marked confidential, and that included copies I had available at the closed-door meetings"*. Until reading Councillor Corr's submissions, the Panel was not aware of any such claimed circumstance. The second passage is on page 8 of Councillor Corr's submissions, and reads:

"As I understand it, the complainant chose not to identify, or clarify, what he believed to be the specific word, or phrase, and how that constituted a breach of confidentiality, but instead placed a significant number of confidential reports before the Panel for its consideration, and left it to the Panel to then select which parts they believed confirmed the alleged breach."

This second passage misrepresents what has in fact occurred in this matter – which, relevantly, is that the Attachment C to the Presiding Member's letter of 17 November 2010 to Councillor Corr clearly identified: the particular information that Mayor Pickard was alleging was disclosed by Councillor Corr; and the particular confidential documents and closed meetings that Mayor Pickard was referring to in his complaint.

The general interests of local government in WA

7. The Panel notes that pursuant to clause 8(6) of Schedule 5.1 to the Act each of its members is to have regard to the general interests of local government in the State.

Panel's views in relation to the Finding

8. There is nothing in the file note or in Councillor Corr's submissions or its appendices that warrants the Panel rescinding the Finding.

The seriousness of the minor breach in this case

9. In *Mazza and Local Government Standards Panel* [2009] WASAT 165 the SAT's then Deputy President, Judge J Pritchard (as her Honour then was), expressed her views in relation to a breach of regulation 6(2), at [97], as follows:

"The maintenance of the confidentiality of a council's closed session discussions is a serious obligation. The unauthorised disclosure of closed session discussions by a council member has the potential to undermine the trust and confidence of council members in each other and in that sense, has the potential to impair the efficacy of a council's deliberations. An unauthorised disclosure of information acquired in a closed session is, therefore, a serious matter."

The Panel concurs with these views.

Panel's views on how the subject Minor Breach should be dealt with under section 5.110(6)

No antecedents

10. The Panel notes that Councillor Corr has not previously been found under Part 5 Division 9 of the Act to have committed any minor breach.

Is a public censure appropriate?

11. A public censure of the kind ordered by the Panel is a significant sanction. It involves a high degree of public admonition of the conduct of the council member concerned.¹⁰

12. A public censure is not only a reprimand aimed at reformation of the offending council member and prevention of further offending acts, but also as a measure in support of the institution of local government and those council members who observe the rules of conduct in the Regulations.

13. The Panel acknowledges that when it makes an order that a Notice of Public Censure be published, the Notice is to be published by the local government's CEO at the expense of the local government, which is a significant expense.

14. In light of the contents of paragraphs 3 to 5, 7 and 9 to 13, above it is the Panel's view that Councillor Yates' conduct in committing the subject Minor Breach warrants the making of an order that he be publicly censured for having committed that conduct.

Is a public apology appropriate?

15. In the Panel's view a public apology of the kind ordered by the Panel is also a significant sanction, as it too involves a high degree of public admonition of the conduct of the council member concerned.

16. In the Panel's view the circumstances that will in almost all occasions deserve the sanction of a public apology to another person include those where a council

¹⁰ *Mazza and Local Government Standards Panel* [2009] WASAT 165 per Judge J Pritchard (Deputy President) (as Her Honour then was) at [107].

member's offending conduct is or conveys a slight or a personal attack on the other person.

17. In this matter, it is the Panel's view that Councillor Corr's conduct in committing the subject Minor Breach was not a personal attack on any person.

18. In light of the contents of paragraphs 3 to 5, 7 and 15 to 17, above, it is the Panel's view that it is not appropriate to deal with the subject Minor Breach by also making an order that Councillor Corr apologise publicly generally or to any person.

Is training appropriate?

19. The Panel notes that its consideration of how a breach should be dealt with under section 5.110(6) must embrace the issue of whether or not it is appropriate for the Panel to order that the council member concerned undertake such training as it may specify.

20. After due consideration of the information available to the Panel when it made the Finding (including Councillor Corr's responses to the then subject allegations), and Councillor Corr's submissions and its appendices, it is the Panel's view that it is not appropriate that the Panel make an order that he undertake training so as to not repeat his conduct in committing the subject Minor Breach.

Is a dismissal of the complaint appropriate?

21. In light of the contents of paragraphs 4, 7, 8 and 14 above, it is the Panel's view that it is not appropriate to deal with the subject Minor Breach by dismissing the complaint.

Panel decision

22. Having regard to: the Reasons for Findings; Councillor Corr's' submissions and its appendices; the reasons above; and the general interests of local government in Western Australia, the Panel's decision on how the subject Minor Breach is dealt with under section 5.110(6) is that, pursuant to subsection (b)(i) of that section, it orders that Councillor Corr be publicly censured as specified in the attached Minute of Order.

.....
Brad Jolly (Presiding Member)

.....
Carol Adams (Member)

.....
John Lyon (Member)

NOTICE TO THE PARTIES TO THE COMPLAINT

RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (the Panel) 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 (the SAT) for a review of the Panel's decision in this matter. In this context, the term "decision" means a decision to dismiss the complaint or to make an order.
- (2) By rule 9(a) of the *State Administrative Tribunal Rules 2004*, subject to those rules an application to the SAT under its review jurisdiction **must be made within 28 days** of the day on which the Panel (as the decision-maker) gives a notice [see the Note below] under the *State Administrative Tribunal Act 2004* (SAT Act) section 20(1).
- (3) The Panel's *Reasons for Finding* and these *Reasons for Decision* constitute the Panel's notice (i.e. the decision-maker's notice) given under the SAT Act section 20(1).

Note:

- (1) This document may be given to a person in any of the ways provided for by sections 75 and 76 of the *Interpretation Act 1984*. [see s. 9.50 of the *Local Government Act 1995*]
- (2) Subsections 75(1) and (2) of the *Interpretation Act 1984* read:
 - "(1) Where a written law authorises or requires a document to be served by post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, **service shall be deemed** to be effected by properly addressing and posting (by pre-paid post) the document as a letter to the last known address of the person to be served, and, **unless the contrary is proved, to have been effected at the time when the letter would have been delivered in the ordinary course of post.** [Bold emphases added]
 - (2) Where a written law authorises or requires a document to be served by registered post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, then, if the document is eligible and acceptable for transmission as certified mail, the service of the document may be effected either by registered post or by certified mail."
- (3) Section 76 of the *Interpretation Act 1984* reads:

"Where a written law authorises or requires a document to be served, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, without directing it to be served in a particular manner, service of that document may be effected on the person to be served —

 - (a) by delivering the document to him personally; or
 - (b) by post in accordance with section 75(1); or
 - (c) by leaving it for him at his usual or last known place of abode, or if he is a principal of a business, at his usual or last known place of business; or
 - (d) in the case of a corporation or of an association of persons (whether incorporated or not), by delivering or leaving the document or posting it as a letter, addressed in each case to the corporation or association, at its principal place of business or principal office in the State."

Attachment

Decision-maker's Title: **LOCAL GOVERNMENT STANDARDS PANEL**
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Coram: Mr B. Jolly (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)

Complaint SP 29 of 2010

Complainant: (Mayor) Troy Ernest PICKARD

Council member complained about: **Councillor Brian CORR**

Local Government: **City of Joondalup**

Regulation found breached: **Regulation 6(2) of the *Local Government (Rules of Conduct) Regulations 2007***

MINUTE OF ORDER

THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Brian Corr, a member of the Council of the City of Joondalup, be publicly censured as specified in paragraph 2 below.
2. Within the period of 29 days to 43 days from the day following the date of service of this Order on him, the Chief Executive Officer of the City of Joondalup arrange the following Notice of Public Censure to be published, in no less than 10 point print:
 - (a) as a one-column or a two-column display advertisement in the first 15 pages of "The West Australian" newspaper; and
 - (b) as a one-column or a two-column display advertisement in the first 15 pages of the "Joondalup-Wanneroo Times" newspaper.

NOTICE OF PUBLIC CENSURE

The Local Government Standards Panel (the Panel) has made a finding to the effect that on 6 July 2010 **Brian Corr, a person who is a member of the Council of the City of Joondalup**, committed a breach of regulation 6(2)(a) of the *Local Government (Rules of Conduct) Regulations 2007* during the discussion on item JSC06-07/10 at the City's Special Meeting of Council when the meeting was open to members of the public, when he disclosed confidential information concerning particular litigation involving the City. That information was derived from a document marked by the City's CEO to clearly show that the information in it was not to be disclosed.

The Panel censures Councillor Corr for this breach of regulation 6(2)(a).

**LOCAL GOVERNMENT
STANDARDS PANEL**