



Local Government Standards Panel

Complaint Number	SP 16 of 2018 [DLGSC 20180248]
Legislation	<i>Local Government Act 1995</i>
Complainant	Mr Gary Evershed
Respondent	Councillor Michael Smart
Local Government	Shire of Augusta Margaret River
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Ms S Siekierka (Presiding Member) Ms E Rowe (Deputy Member) Ms Rebecca Aubrey (Deputy Member)
Heard	21 August 2018 Determined on the documents
Outcome	One breach of Regulation 6(2)(a) One breach of regulation 7(1)(b)

FINDING AND REASONS FOR FINDING

Published 25 September 2018

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Summary of the Panel's decision

1. The Panel found that Councillor Michael Smart ("Cr Smart"), a councillor for the Shire of Augusta Margaret River ("the Shire"), committed two minor breaches under the *Local Government Act 1995* (WA) ("the Act") and regulation 6(2)(a) and regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations") when he publicly quoted information derived from confidential documents.

Jurisdiction

2. The Act provides for the circumstances in which a council member commits a minor breach.¹
3. On 8 March 2018 the Panel received a complaint ("Complaint") from the Shire's Complaints Officer, Mr Gary Evershed, who is also the Complainant ("the Complainant"). The Complainant alleged that Cr Smart had breached regulation 6(2)(a) when he disclosed confidential information at the Council Meeting of 28 February 2018 ("the Council Meeting"). It was alleged that the same disclosure of confidential information was also a breach of regulation 7(1)(b).
4. On 22 March 2018 the Department sent email correspondence to Cr Smart attaching a copy of the original complaint form and all the supporting documents provided by the Complainant.
5. Under the Act, the Panel is required to consider a complaint of a minor breach and make a finding as to whether the alleged breach occurred.² On 21 August 2018 the Panel convened to consider the Complaint.
6. The Panel accepted the Department's advice, based on information from the Western Australian Electoral Commission, that Cr Smart was a councillor at the time of the alleged breaches, having been last elected on 17 October 2015, and was still a Councillor when the Panel met on 21 August 2018.
7. The Panel was satisfied the complaint had been made within two years after the alleged breaches are said to have occurred³, that they had been dealt with in accordance with the administrative requirements in the Act for dealing with complaints of minor breaches⁴ and that the Department had provided procedural fairness to Cr Smart.
8. If a councillor has previously committed two or more minor breaches, the Panel may send the complaint to the Chief Executive Officer of the department assisting the relevant Minister at the time instead of considering the Complaint itself.⁵ Although Cr Smart had previously committed two minor breaches the Panel did not find that the Complaint ought to be sent to the Chief Executive Officer of the

¹ Section 5.105 of the Act.

² Section 5.110(2)(a) of the Act.

³ Section 5.107(4) of the Act

⁴ Sections 5.107, 5.108, 5.109 of the Act.

⁵ Sections 5.110(2)(b), 5.111(1) of the Act.

Department and the Panel dealt with the Complaint as the report had yet to be published.

9. Based on the information referred to in paragraphs 2 to 8 above the Panel found it had jurisdiction to determine whether Cr Smart had breached regulation 6(2)(a) and regulation 7(1)(b).

Panel's role

10. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.
11. Any finding that a councillor has committed a minor breach must be based on evidence from which it may be concluded that it is more likely than not that the breach occurred than that it did not occur (the required standard of proof).⁶
12. Where direct proof of an alleged fact, proposition or conduct is not available, in order to find the allegation, proposition or conduct has been established, the Panel must be satisfied on the evidence that it is more probable than not that the alleged fact, proposition or conduct occurred. The Panel cannot make a finding that the alleged fact, proposition or conduct occurred if the evidence merely supports two or more conflicting but equally possible inferences.⁷
13. For a finding that a councillor has breached a particular regulation, the Panel must be satisfied that every element of the particular regulation has been established to the required standard of proof.

The Documents

14. The Panel determined the Complaint after considering copies of the following documents:
- (a) the Complaint which included:
- (i) a Confidential Attachments cover sheet for the Ordinary Council Meeting on 28 February 2018. The Confidential Attachments are listed on the cover sheet as including:
- Attachment 1 Executive Summary of Report of an Aboriginal Heritage Survey for Infrastructure improvements works to the Shire of Augusta Margaret River.
 - Attachment 2 Report of an Aboriginal Heritage Survey for the Winter Diversion Trail
- together the "Confidential Documents".
- (ii) a cover sheet for a report by Brad Goode & Associates for the Winter Diversion Trail;

⁶ Section 5.106 of the Act.

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

- (iii) pages 1, 3-5, 40 – 54 from the Ordinary Council Minutes;
 - (iv) the front page and page 3 from the Augusta Margaret River Times newspaper dated 2 March 2018;
 - (v) an email from the Council Minutes & Agenda Officer, Ms Claire Schiller (“the Officer”) to Mr Gary Evershed sent on 1 March 2018, which includes a copy of the email sent to Councillors on 20 February 2018 attaching the Confidential Documents;
- (b) The Complaint summary;
- (c) Cr Smart’s response to the Complaint summary which included:
- (i) two pages from the Confidential Documents with markings by Cr Smart highlighting two sections of the documents that he states he paraphrased;
 - (ii) an email from Shire President Pam Townshend to Gary Evershed, CEO, sent on 20 March 2018 requesting the Confidential Documents be made available to the public; and
 - (iii) page 3 of the same article referred to in 14(a)(iv) above.

First allegation of breach: Regulation 6

15. Regulation 6 provides:

“6. Use of information

- (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.*

(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.”*

Substance of the Complaint

16. The Complainant alleges that Cr Smart has breached regulation 6 because during debate on a particular item at the Shire’s Council Meeting of 28 February 2018, Cr Smart read two paragraphs verbatim from one or both of the Confidential Documents that had been clearly marked by the CEO as confidential prior to the meeting.
17. The Confidential Documents included reports on the Shire’s Winter Diversion Trail project including surveys commissioned in relation to that project and results of consultations with the SW Boojarah Working Party (“the Working Party”).
18. According to the Complainant, the Confidential Documents had been marked as confidential in two distinct ways:
 - (a) by an attached cover sheet (“Cover Sheet”) with the title “Confidential Attachments” on the front page and which on the inside cover stated:

The attachments in this confidential section of the agenda are clearly marked “Confidential” by the CEO for the purpose of confidential discussions during a committee or council meeting with members of the public excluded. Councillors and staff are not permitted to disclose information discussed at the meeting or contained in a confidential attachment. Disclosure is permitted in some special circumstances as outlined in the Local Government (Rules of Conduct) Regulations 2007. Please refer to the following sections of the Rules of Conduct (Reg 6 & 7); and
 - (b) every page of the Confidential Documents had a highly visible diagonal watermark reading “Confidential” across it.
19. It is alleged that the information quoted by Cr Smart at the meeting was derived from one or both of the Confidential Documents and these were confidential attachments intended for Councillors only as part of the agenda attachments for the Council Meeting.
20. The Confidential Documents were distributed by the Officer by email on 20 February 2018 along with the Council Minutes and Agenda. In her email the Officer made it extremely clear that the documents were confidential and made the statement in bolded and underlined text as follows:



"Please note that these reports have been marked CONFIDENTIAL and are not to be disclosed to other parties".

21. The first Confidential Document also contained the following statement ("Cultural Restriction Warning") on the cover:

Culturally Restricted: This document is culturally restricted as the document contains sensitive data that the SWB do not want in the public domain.

Therefore the report is for the explicit use of the proponent (SAMR) to support a section 18 application under the AHA and can only be submitted to the DPLH, the APMC & SWALSC as a part of the approvals process for the project.

Should third parties wish to obtain this report and cite its contents then prior to the report being released the third party must obtain the written consent of the SWB working party at SWALSC and all the listed copyright owners.

22. The second document was provided in the form of an Executive Summary without the cover containing the Cultural Restriction Warning; however the same document with the cover (and warning) had previously been provided to Council as a confidential document so Councillors knew, or should have known, that the Cultural Restriction Warning also applied to the second document as this had been made clear previously.
23. The Complainant, as CEO of the Shire, was sitting to the right of the Shire President and both he and the Shire President could clearly see the screen of Cr Smart's iPad from which he was quoting verbatim from the Confidential Documents. The watermark saying "Confidential" was clearly visible in diagonal form across the pages. Cr Smart had highlighted the sections he quoted from and the Complainant states he drew the conclusion from this that the quoting from the material had been planned in advance on the part of Cr Smart.
24. The meeting was open to the public and records show that 84 members of the public were in attendance as well as one member of the press (Mr Warren Hatley from the Augusta Margaret River Times), when Cr Smart read from the Confidential Documents.
25. The Council had not made a decision or determination about releasing any of the information contained in the Confidential Documents prior to Cr Smart reading from them in the meeting, nor is there any other justification under the Regulations for Cr Smart's actions.

Councillor Smart's Response

26. Cr Smart sent email correspondence to the Department on 15 April 2018 with his response. In relation to the First Allegation of Breach, he does not accept that he breached Regulation 6 and states:
- a) It is important to place the incident in context of the following:
- the CEO's prior unauthorised approval of a trail through a heritage site; the "token" investigation ordered by the CEO into the

construction of an alternate trail along Caves Road and an alternate concept of a swinging suspension bridge.

- consultation with the Working Party after which the Working Party was given a choice between the trail through the heritage site or the swinging bridge.
- b) By initiating consultation with the Working Party, Council was endeavouring to ascertain the wishes of the Aboriginal people, however the report as presented at the meeting failed to reflect the true response from the group.
- c) By paraphrasing from the Confidential Document, Cr Smart was merely endeavouring to make people aware of the genuine wishes of the Working Party.
- d) The pages and paragraphs he referred to in the Confidential Documents contain no culturally sensitive content and simply reflect the sentiments of the Working Party.
- e) The Shire President emailed the CEO on 20 March 2018 requesting him to release the Confidential Documents to the public as the Aboriginal elders were happy with that option;
- f) The position of the Wadandi elders was contained in a newspaper article which reflected the same sentiment as was in the Confidential Documents;
- g) The information he referred to was already in the public domain and the fact the Aboriginal community was unhappy with the construction of the walk trail had already been reported in the local newspaper on several occasions.
- h) One of the Confidential Documents was prepared by a Brad Goode & Associates and other reports prepared by the same consultants are available online and not considered to be confidential.

Elements of the regulation

27. Regulation 6(2)(a) provides that a person who is a council member must not disclose information that the council member derived from a confidential document.

28. In light of regulation 6(3), the essential issues or elements which need to be satisfied in order for a contravention of regulation 6(2)(a) to have occurred are that it is more likely than it is not that:

- a) a Councillor disclosed information⁸ to someone who at the time was not also a Councillor of the same local government; and

⁸ The word 'information' is given its ordinary meaning, which is knowledge or facts communicated about a particular subject, event etc; Shorter Oxford English Dictionary (6th edition). It is not limited to 'advice', legag, strategic or otherwise; *Corr and Local Government Standards Panel* [2012] WASAT 14 at para [50].

- b) the disclosed information was information the disclosing Councillor derived from a document⁹ that was marked by his or her local government CEO, or at the CEO's direction¹⁰, to clearly show that the information in the document was not to be disclosed; and
- c) the disclosed information was not already in the public domain (ie it was not generally available to all persons¹¹) at the time of the disclosure by the disclosing Councillor, and the disclosure did not occur in any of the ways identified in regulation 6(3).

Panel's consideration

29. The Panel finds it more likely than not, that the essential elements (which need to be satisfied in order for a contravention of regulation 6(2)(a) to have occurred) have been established.

30. It was clear that the documents were confidential in nature:

- i. Councillors were emailed the Confidential Documents on 20 February 2018 by Claire Schiller at the CEO's direction. The email from Ms Schiller stated that the documents were confidential in nature and were not to be disclosed to any other parties.
- ii. the Confidential Documents included a cover sheet referring to their confidential status;
- iii. each page of the Confidential Documents contained a CONFIDENTIAL watermark across it; and
- iv. at least one if not both of the Confidential Documents had also been marked with a "Cultural Restricted Warning".

31. Based on the evidence presented, the Panel finds that Cr Smart did read and quoted from selected sections of the Confidential Documents and disclosed information from them at the Council Meeting; the information disclosed related to the position of the Working Party in relation to specific aspects of the Winter Diversion Trail project.

32. Cr Smart asserts that he paraphrased from the Confidential Documents and provides copies of two pages of the Confidential Documents with the sections he referred to in highlight. The Panel finds that regardless of whether Cr Smart read verbatim from the Confidential Documents as alleged by the Complainant, or paraphrased from them as Cr Smart claims, Cr Smart breached the confidentiality of the documents.

33. The Panel does not find validity in Cr Smart's assertions, in justifying his actions, that he was trying to make the people aware of the genuine wishes of the Working

⁹ 'Document' is defined under s5 of the *Interpretation Act 1984* (WA) 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".

¹⁰ *Corr and Local Government Standards Panel* [2012] WASAT 14 at paragraphs [56] and [57]

¹¹ *Mazza and Local Government Standards Panel* [2009] WASAT 165 at paragraphs [82] – [85]



Party and he was simply reflecting their opinions and there was no culturally sensitive content.

34. The Panel finds that although some of the general views or sentiment in the Confidential Documents may have been familiar to the public, the precise and specific information contained within the Confidential Documents and disclosed by Cr Smart was not. It was highly inappropriate for Cr Smart to make reference directly from the documents.

35. Furthermore, an email sent by Shire President, Councillor Pam Townsend, to the CEO Mr Gary Evershed on 20 March 2018, in which she requests that the Confidential Documents be made public, supports the assertion that the Confidential Documents were not already in the public domain.

-----Original Message-----

From: Pam Townshend
Sent: Tuesday, 20 March 2018 10:53 AM
To: Gary Evershed <gevershed@amrshire.wa.gov.au>
Cc: Councillors <Councillors@amrshire.wa.gov.au>
Subject: WDT - reports

Dear Gary

I am requesting that the two Aboriginal Heritage Survey reports be made available to the public at the earliest opportunity. I have spoken to individual members of the SW Boorah Working Party who cannot understand why it is "Confidential". Surely the Shire has commissioned the studies and the Shire owns the reports?

Why is it that they are not released?

There are many Aboriginal Heritage Survey reports publicly available on-line. The large report commissioned by Main Roads about the bridge over the Margaret River, done by Brad Goode and Associates is on the internet and contains many pages of background cultural information and historical and archaeological information.

Please release both Aboriginal Heritage Survey reports from last year onto the Shire website.

36. On the information available to the Panel, it is satisfied that it is more likely than not that:

- a) Cr Smart is and was at all relevant times a member of the Council of the Shire;
- a) The Confidential Documents were clearly marked as being "Confidential" at the CEO's direction;
- b) Cr Smart read from the Confidential Documents at the Council Meeting on 28 February 2018 at which members of the public and the press were present;
- c) By reading from the Confidential Documents, Cr Smart disclosed information from the Confidential Documents being documents marked at the CEO's direction, to clearly show that the information in the documents was not to be disclosed; and
- d) The information disclosed by Cr Smart from the Confidential Documents was not information that was public knowledge or in the public domain at the time when Cr Smart made the disclosure.

Findings

37. Accordingly for the above reasons, the Panel finds that Cr Smart breached regulation 6(2)(a).

Second allegation of breach: Regulation 7

38. Regulation 7(1)(b) provides:

“7. Securing personal advantage or disadvantaging others

(1) A person who is a council member must not make improper use of the person’s office as a council member –

...

(b) to cause detriment to the local government or any other person.”

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

(a) The Panel decided that the alleged conduct is not conduct that contravenes section 5.93 of the Act or section 83 of *The Criminal Code*.

Substance of the Complaint

39. The Complainant alleges that Cr Smart has breached regulation 7 by selectively quoting from the Confidential Documents at a public meeting and then making disparaging comments in debate about the Aboriginal consultations undertaken by the Shire; Cr Smart improperly used the office of Councillor to gain advantage in the debate and to cause a detriment to the Shire, the Working Party, Brad Goode and Associates and the CEO and staff involved with Aboriginal consultations.

40. Cr Smart’s actions drew a negative response when the Augusta Margaret River Times reported the event as follows:

“Anger was further stirred when Cr Smart read short sections from a confidential Aboriginal heritage report to argue local Noongars and the South West Boojarah working party approved the track because they were “backed up against the wall”.

41. Being an elected Councillor, Cr Smart had access to the confidential report. To use the confidential information contained in the document by selectively quoting from the document to support an argument in public debate, which was derogatory of the consultation process and the parties involved, was an improper use of his office. As well as being detrimental to several parties the use of this information gave Cr Smart an advantage over other Councillors who respected the confidentiality of the documents.

42. Although the Shire claims it acted in good faith and followed the correct procedures in the consultation process, Cr Smart publicly suggested that the Aboriginal members consulted were “backed up against the wall” which implies that there was undue influence exerted or some other form of excessive lobbying, political interference or even stand over tactics employed to manipulate their agreed position to the Shire.

43. Apart from being patronizing to the Aboriginal community, the comments caused a detriment to the reputation and good standing of the Shire, the Working Party, Brad Goode and Associates and the CEO and staff involved with the Aboriginal consultations.

44. An unnecessary slur against the good names of all concerned was perpetrated by Cr Smart implying that due process had not been followed and that undue influence has been applied to the Aboriginal participants to manipulate an outcome.

Cr Smart's response

45. Cr Smart denies he has breached regulation 7 in that:

- a) He did not make any adverse comment about any party involved in the consultations;
- b) He has given an accurate account of the findings of the consultation process and made the public aware that at no time had Council been consulted with regards to the option of constructing a suspension bridge over the Margaret River;
- c) If the CEO takes offence in how he has highlighted his unauthorised inclusion of the bridge in the negotiations, so be it and he has an obligation to speak truthfully in his role. The inclusion of the bridge in negotiations can only be seen as a mechanism to manipulate the outcome of the consultation;
- d) He has no doubt the Aboriginal community would be quite comfortable with the fact he has accurately reflected their sentiments;
- e) All the material from the confidential documents in support of the CEO's preferred outcome has been used in the officer's report to Council;
- f) He did not use the term "backed up against the wall" as this is the journalist's interpretation of his comments relating to the Consultation Group being asked to select the lesser of two evils without being told the trail along the edge of Caves Road was a viable low-cost option.

Elements of regulation 7(1)(b)

46. In order to find that Cr Smart breached regulation 7(1)(b) the Panel must be satisfied to the required standard of proof that:

- (a) the person the subject of the Complaint engaged in the alleged conduct (first element);
- (b) the person the subject of the Complaint was a council member both at the time of the conduct and the time when the Panel makes its determination (second element);
- (c) by engaging in the conduct, the person the subject of the complaint made use of his or her office as a council member (in the sense that he or she acted in their capacity as a councillor, rather than in some other capacity (third element);
- (d) that when viewed objectively, such use was an improper use of the person's office as a council member in that it:

- (i) involved a breach of the standards of conduct that would be expected of a person in the position of a councillor by reasonable persons with knowledge of the duties, power and authority of the councillor and the circumstances of the case; and
 - (ii) was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty;
- (fourth element)
- (e) that the person engaged in the conduct in the belief that detriment would be suffered by the local government or any other person (fifth element).

Panel's consideration

First, second and third elements satisfied

47. The Panel finds that Cr Smart engaged in the conduct which is the subject of the Complaint; and that he was a councillor and was acting as a councillor at all relevant times.

48. The first, second and third elements of regulation 7(1)(b) are established in relation to the Complaint.

Fourth element - meaning of "to make improper use of....office"

49. The Macquarie dictionary definition of "improper" is "not in accordance with propriety of behaviour, manners, etc; unsuitable or inappropriate for the purpose or occasion; abnormal or irregular."¹² The Shorter Oxford dictionary definition is "irregular, wrong; unsuitable, inappropriate; unbecoming, unseemly."¹³

50. Whether there is impropriety is to be assessed objectively: would a reasonable person with knowledge of the duties, powers and authority of a councillor, and all the circumstances of the particular case, form the view that the councillor had breached the standards of conduct expected of a councillor?¹⁴ "For behaviour to be improper it must be such that a right-thinking person would regard the conduct as so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty."¹⁵

51. Under the Act Panel members must have regard to the general interests of local government in Western Australia.¹⁶ It is in the interests of local government that councillors are, and are seen to be, professional and respectful in their dealings with fellow councillors, local government employees and members of the public.

¹² Macquarie Dictionary, Revised Third Edition.

¹³ Shorter Oxford English Dictionary, Sixth Edition.

¹⁴ *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 27, referring to *R v Byrnes* (1995) 183 CLR 501.

¹⁵ *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 9, referring to *Robbins v Harness Racing Board* [1984] VR 641.

¹⁶ Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).

52. Regulation 3 of the Regulations sets out general principles to guide councillors' behaviour, although contravention of any of any of these does not amount to a minor breach.¹⁷ Regulation 3 provides, among other things, that councillors should act with reasonable care, diligence and integrity and treat others with respect and fairness.
53. The meaning of "improper" must be considered in the context of relevant legislation, such as the Act and the Regulations, and other rules and standards that apply to a councillor's role and conduct, such as the local government's Code of Conduct, and the circumstances and context of the case.¹⁸ All these provisions form part of the backdrop to the Regulations and give context to a complaint but the alleged conduct must also be judged in the particular circumstances.
54. Conduct can be improper even though the councillor's judgment is that it isn't improper. A councillor's use of his or her office can be improper even though the councillor is intending to benefit the local government, the council or the ratepayers and residents.¹⁹

Fifth element - meaning of "to cause detriment to the local government or any other person"

55. "Detriment" means loss, damage or injury.²⁰ It includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage. A person can suffer detriment through others thinking less favourably of them.²¹
56. For regulation 7(1)(b) to be satisfied it is not necessary to show that the local government or the person concerned actually suffered detriment.²² However it is not enough to show that the local government or the person concerned suffered detriment, or could have suffered detriment. The Panel must find that it is more likely than not that the councillor believed that his or her actions would cause detriment and intended to cause detriment.²³
57. "To cause detriment" has been interpreted as meaning "in order to" or "for the purpose of" causing detriment, or "with the will to" cause detriment.²⁴ There can be a finding of intent if, after considering all the evidence, the only reasonable inference is that the councillor intended to cause detriment.²⁵

Findings in relation to the Complaint

Whether Cr Smart acted improperly (fourth element)

58. The Panel is satisfied that the fourth element has been established in relation to the Complaint and that Cr Smart did act improperly. The Panel makes this finding

¹⁷ Regulation 3.

¹⁸ *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 10.

¹⁹ *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64, referring to *Treby* 2010.

²⁰ Macquarie Dictionary Revised Third Edition, 2001.

²¹ *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraphs 31, 32.

²² *Treby* 2010, paragraph 96, referring to *Chew v The Queen* 1992 CLR 626 (*Chew* 2010).

²³ *Re and Local Government Standards Panel* [2014] WASAT 111, paragraph 51, referring to *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd* [2013] FCA 1342.

²⁴ *Chew* 2010.

²⁵ *Treby* 2010.

because it is satisfied to the required standard of proof that a reasonable person would consider that Cr Smart did not meet the standards of conduct expected of a councillor when disclosing information from the Confidential Documents publicly at the Council Meeting on 28 February 2018 in that:

- (a) The maintenance of confidentiality by council members is a serious obligation:

*"It is the tribunal's view that the maintenance of confidentiality by council members is a serious obligation. An unauthorised disclosure has the potential to undermine the trust and confidence of council members in each other and has the potential to impair the efficacy of a council's deliberation. An unauthorised disclosure of confidential information is, therefore, a serious matter"*²⁶;

- (b) The Confidential Documents had clearly been marked as so, however Cr Smart proceeded to ignore the CEO's directions and disclose information from the Confidential Documents at the Council Meeting;
- (c) The report by Brad Goode & Associates had been prepared on the basis that it was both Confidential and Culturally Restricted and was marked as such by them. By disclosing information in the report, Cr Smart showed a lack of consideration and respect for the consultants and the strict process that had been followed in putting the report together;
- (d) The Confidential Documents contained sensitive information and some of this information related to the position of the Working Party in relation to the proposals by Council; Cr Smart took it upon himself to disclose certain sections of the Confidential Documents whilst debating to further his arguments when he did not have authority to do so; and
- (e) The Meeting was open to the public; members of the public and the press were present when Cr Smart disclosed the information and the disclosure of confidential information by Cr Smart was reported in the local press. In breaching the confidentiality of the documents Cr Smart failed in his duty as a Councillor, and damaged the reputation of the Shire in the eyes of the community and wider.

Whether Cr Smart intended to cause detriment to the local government or any other person (fifth element)

59. The Panel is satisfied to the required standard that the fifth element has been established and that Cr Smart disclosed information contained in the Confidential Documents to cause detriment to his fellow Councillors, the local government and others:

- (a) the decision to disclose information from the Confidential Documents was a conscious decision on the part of Cr Smart;
- (b) by selectively quoting from the Confidential Documents, Cr Smart put his fellow Councillors at a disadvantage as they were not able to also quote from the same documents and were therefore not on an equal footing during the debate;

²⁶ *Corr and Local Government Standards Panel* [2012] WASAT at paragraph 75.



- (c) on the evidence before the Panel, the only reasonable inference that can be drawn is that Cr Smart chose to disclose information from the Confidential Documents to cause disadvantage to and undermine the position of other Councillors during the debate who themselves were unable to refer to the Confidential Documents;
- (d) by disclosing information from the Confidential Documents Cr Smart intended to cause detriment to the local government and undermine its position; Cr Smart did not follow or respect the correct procedures and revealed confidential information in a highly inappropriate manner;
- (e) by disclosing information from the Confidential Documents, Cr Smart caused detriment to not only his fellow councillors and the Shire, but also the Working Party, Brad Goode & Associates, the CEO and council staff.

Panel's finding

60. The Panel finds that Cr Smart committed one breach of regulation 7(1)(b) in relation to the Complaint.

Sheryl Siekierka (Presiding Member)

Elanor Rowe (Member)

Rebecca Aubrey (Deputy Member)

Date of Reasons – 25 September 2018