



Local Government Standards Panel

Complaint Number	SP 2019-085
Legislation	<i>Local Government Act 1995</i>
Complainant	Mr Stephen Cain
Respondent	Councillor Lee-Anne Smith
Local Government	City of Cockburn
Regulation	Regulation 7 of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mr Michael Connolly (Presiding Member) Ms Elanor Rowe (Deputy Member) Ms Rebecca Aubrey (Deputy Member)
Heard	16 December 2019 Determined on the documents
Outcome	Breach of 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>

FINDING AND REASONS FOR FINDING

Published 13 February 2020

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 the Panel's decision

1. The Local Government Standards Panel ("the Panel") found that Councillor Lee-Anne Smith ("Cr Smith"), a councillor for the City of Cockburn ("the City"):
 - a. did not commit a breach under the *Local Government Act 1995* (WA) ("the Act") and regulation 7(1)(a) and (b) of the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations") when she posted comments on Facebook in which she showed support for two candidates in the local government elections and caused disadvantage to a third; and
 - b. did commit a breach under the Act and Regulation 7(1)(b) when she did not remove material from Facebook relating to a petition that was put forward regarding the Bartram Road Footbridge.

Jurisdiction and procedural fairness

2. The Act makes provision for the circumstances in which a council member commits a minor breach.¹
3. On 8 October 2019 the Department of Local Government, Sport and Cultural Industries ("the Department") received a Complaint of Minor Breach Form dated 7 October 2019 ("Complaint"). The Complaint was signed by the City's Chief Executive Officer, Mr Stephen Cain ("Complainant"), and contained two allegations of a breach of Regulation 7 by Cr Smith when she:
 - a. posted comments on Facebook in which she showed support for two candidates in the local government elections and caused disadvantage to a third ("First Allegation") and
 - b. did not remove material from Facebook relating to a petition that was put forward regarding the Bartram Road Footbridge ("Second Allegation").
4. On 10 October 2019, the Department advised Cr Smith of the Complaint and invited her to respond. The Department sent Cr Smith a copy of the original Complaint 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 16 December 2019 the Panel convened to consider the Complaint.
6. The Panel:
 - (a) accepted the Department's advice, based on information from the Western Australian Electoral Commission, that Cr Smith was a councillor at the time of the alleged breach, having been elected on 21 October 2017, and was still a Councillor when the Panel met on 16 December 2019;

¹ Section 5.105 of the Act.

² Section 5.110(2)(a) of the Act.



- (b) was satisfied the Complaint had been made within six months after the alleged breach is said to have occurred³;
 - (c) was satisfied the Complaint had been dealt with in accordance with the administrative requirements in the Act for dealing with complaints of minor breaches⁴; and
 - (d) was satisfied that the Department had provided procedural fairness to Cr Smith.
7. 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 Cr Smith has previously been found to have committed four minor breaches, however the nature of those breaches was different to that of the current alleged breaches, and therefore the Panel decided to not send the Complaint to the Chief Executive Officer of the Department.
8. Based on the information referred to in paragraphs 2 to 7 above, the Panel found it had jurisdiction to determine whether Cr Smith had breached Regulation 7 in connection with the First and Second Allegations.

Panel's role

9. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.
10. 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
11. In order to find the allegation, proposition or conduct has been established, and where direct proof is not available, the Panel must be satisfied from the evidence that it is more probable than not that it has 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
12. 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.

Regulation 7

13. Regulation 7 provides:

"7. Securing personal advantage or disadvantaging others

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.

⁶ Section 5.106 of the Act.

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



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

(a) *to gain directly or indirectly an advantage for the person or any other person; or*

(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."*

14. 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*.

Elements of Regulation 7

15. In order to find a breach of Regulation 7, 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) 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) the person engaged in the conduct in the belief that:

(i) [in the case of regulation 7(1)(a)] an advantage would be gained either directly or indirectly for the person or any other person; or

(ii) [in the case of regulation 7(1)(b)] detriment would be suffered by the local government or any other person

(fifth element).

Fourth element - meaning of “to make improper use of....office”

16. 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.*”⁸ The Shorter Oxford dictionary definition is “*irregular, wrong; unsuitable, inappropriate; unbecoming, unseemly.*”⁹
17. 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?¹⁰ “*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.*”¹¹
18. Under the Act Panel members must have regard to the general interests of local government in Western Australia.¹² 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.
19. Regulation 3 sets out general principles to guide councillors’ behaviour, although contravention of any of these does not amount to a minor breach.¹³ Regulation 3 provides, among other things, that councillors should act with reasonable care, diligence and integrity and treat others with respect and fairness.
20. 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.¹⁴ 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.
21. 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.¹⁵

Fifth element - meaning of “to gain directly or indirectly an advantage for the person or any other person” and “to cause detriment to the local government or any other person”

Advantage

⁸ Macquarie Dictionary, Revised Third Edition.

⁹ Shorter Oxford English Dictionary, Sixth Edition.

¹⁰ *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 27, referring to *R v Byrnes* (1995) 183 CLR 501.

¹¹ *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 9, referring to *Robbins v Harness Racing Board* [1984] VR 641.

¹² Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).

¹³ Regulation 3.

¹⁴ *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 10.

¹⁵ *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64, referring to *Treby* 2010.

22. “*Advantage*” is defined as “*favouring a circumstance; something which gives one a better position ... benefit; increased well-being or convenience ... pecuniary profit ...*”¹⁶
23. “*To*” in “*to gain directly or indirectly an advantage*” indicates that for this element to be established, a councillor must have intended to gain an advantage for themselves or another person.
24. For this element to be established, it is not necessary to find that the councillor’s actions did, or reasonably could have, delivered the result sought.¹⁷

Detriment

25. “*Detriment*” means loss, damage or injury.¹⁸ 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.¹⁹
26. 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.²⁰ 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.²¹
27. “*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.²² 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.²³

Substance of the Complaint

First Allegation

28. In or around October 2019, Cr Smith published several Facebook posts promoting two candidates in the local government election, while at the same time, being aggressive and causing detriment to a third candidate, Mr Tarun Dewan (“Mr Dewan”). Below are three of the Facebook Posts referred to in the Complaint (“Posts A-C”) that were published on *The Word in the East* Facebook page (“Word in the East Page”), which is administered and controlled by Cr Smith in her capacity as a councillor:

¹⁶ Shorter Oxford English Dictionary, Sixth Edition

¹⁷ Yates and Local Government Standards Panel [2012] WASAT 59, paragraphs 71,72

¹⁸ Macquarie Dictionary Revised Third Edition, 2001.

¹⁹ Ryan and Local Government Standards Panel [2009] WASAT 154, paragraphs 31, 32.

²⁰ Treby 2010, paragraph 96, referring to *Chew v The Queen* 1992 CLR 626 (*Chew* 2010).

²¹ 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.

²² Chew 2010.

²³ Treby 2010.

Post A



The Word in the East
September 29 at 9:14 AM

Like as Your Page

The word in the East Candidate Dewan DID NOT get the council to vote in favour of the footbridge. Mr Dewan attended the meeting and accepted the Council decision - NO to the footbridge and Council have heard nothing from Mr Dewan since.

Summary:

Petition in the Lions Club of Atwell's name, received for the construction of a footbridge over the Kwinana Freeway at Bartram Road (not vehicles) received by Council.

14 June 2018 - CLR (DM) Smith requested a report be presented to a future Council Meeting on the Bartram Road Bridge project and opportunities to bring this project forward from the current 2031 planning time frame.

The pedestrian & cyclist option put forward in the petition was unanimously voted against by Council.

The Reasons:

The District Traffic Study identified benefits to the local road network on the west side of the freeway if a vehicle link is in place along Bartram Road Reserve (not a footbridge).

A vehicle bridge (including cyclists & pedestrians) would be the responsibility of the Main Roads WA (MRWA) and as such funded by the State NOT the City- \$50 million.

The city to advocate for this option (not the footbridge - advised expected timeframe 2041).

A footbridge only (as outlined in the petition) would become the responsibility of the City and as such RATEPAYER FUNDED - \$6 million.

Post B



The Word in the East
1 hr •

This strong and resilient candidate still has confluents up regardless of sabotage!

✓ Steve Greenwood for Cockburn East

✓ Kathy Pritchard for East Ward

✗ Tarun Dewan for Cockburn East Ward



Write a comment... GIF

Post C



The Word in the East
1 hr •

South of the freeway I will not be pressured I will not take them any more I will not take them any more I will not take them any more

Take more than ever I want to see the endowment of Steve Greenwood for Cockburn East and every candidate for East Ward

I want a consistent, hardworking, grassroots team working with the East Ward Residents

Organized and authorized by Law-Active team

EAST WARD CITY OF COCKBURN

Vacancies (2) Councillors

Expiry of term 21 October 2023

Candidates EAST WARD

PRITCHARD, Kathy ✓ NO.3

GREENWOOD, Steve ✓ NO.9

Like Comment Retweet

29. In Post A, Cr Smith stated:

"The word in the East Candidate Dewan DID NOT get the council to vote in favour of the footbridge. Mr Dewan attended the meeting and accepted the Council decision – NO to the footbridge and Council have heard nothing from Mr Dewan since."

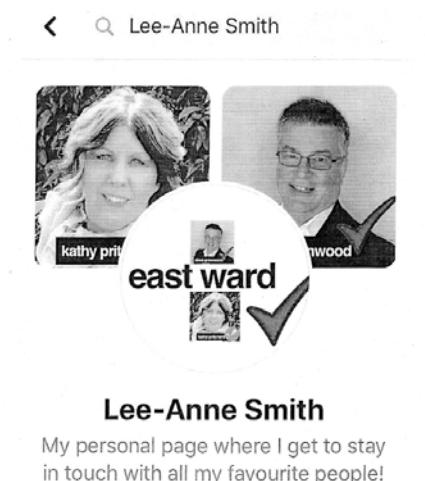
30. Post B contained imagery that included the names of the two favoured candidates with green ticks before their names; this indicated to electors that they should vote for those two candidates thereby causing advantage to them. Conversely, Mr Dewan was shown with a red cross next to his name thereby causing him disadvantage by indicating that electors should not vote for him.

31. In Post C, Cr Smith stated:

"I will not take down any posts. I will seek MY truth!" "Now more than ever I stand by my endorsements of Steve Greenwood for Cockburn East and Kathy Pritchard for East Ward" and "Written and authorised by Lee-Anne Smith".

32. Below is an image ("Post D") taken from Cr Smith's personal "Lee-Anne Smith" Facebook page, from around the same time that Posts A-C were published that also promoted the two favoured candidates:

Post D



33. Mayor Logan Howlett ("Mayor Howlett") advised that he had received a telephone call from Mr Dewan complaining about the Facebook Posts, and that Cr Smith had refused to remove them.
34. The material on the Word in the East Page and Cr Smith's personal Facebook page (together "the Facebook Posts"), was electoral in nature and directly referenced candidates in the local government elections for the City's East Ward. It is the City's view that Cr Smith sought to use her position as Deputy Mayor and sitting East Ward Councillor to advantage candidates that she wished to see elected, while referencing Mr Dewan in a negative light and seeking to disadvantage him.

Second Allegation

35. On 1 October 2019, the City's Director of Governance and Community Services ("Director of Governance") received an email from Mr Dewan containing a separate complaint against Cr Smith relating to Post A. Post A referred to the Bartram Road footbridge proposal and a petition ("Petition") submitted by the Atwell Lions Club ("Atwell Lions Club"). A further copy of Post A is below:



The Word in the East
September 29 at 8:14 AM

Like as Your Page

The word in the East Candidate Dewan DID NOT get the council to vote in favour of the footbridge. Mr Dewan attended the meeting and accepted the Council decision - NO to the footbridge and Council have heard nothing from Mr Dewan since.

Summary:

Petition in the Lions Club of Atwell's name, received for the construction of a footbridge over the Kwinana Freeway at Bartram Road (not vehicles) received by Council.

14 June 2018 - CLR (DM) Smith requested a report be presented to a future Council Meeting on the Bartram Road Bridge project and opportunities to bring this project forward from the current 2031 planning time frame.

The pedestrian & cyclist option put forward in the petition was unanimously voted against by Council.

The Reasons:

The District Traffic Study identified benefits to the local road network on the west side of the freeway if a vehicle link is in place along Bartram Road Reserve (not a footbridge).

A vehicle bridge (including cyclists & pedestrians) would be the responsibility of the Main Roads WA (MRWA) and as such funded by the State NOT the City- \$50 million.

The city to advocate for this option (not the footbridge - advised expected timeframe 2041).

A footbridge only (as outlined in the petition) would become the responsibility of the City and as such RATEPAYER FUNDED - \$6 million.

36. Mr Dewan asked the City to remove Post A on the grounds that it incorrectly referred to the Petition being submitted "*in the Lions Club of Australia's name*". By way of background, in or around July 2018, Mr Dewan had submitted the Petition by email, however, when he did so, he inadvertently included the below signature on the cover email attaching the Petition:

Kind Regards

Tarun Dewan
Diabetes Chairperson
Lions Clubs International District 201W2



The inclusion of the signature and reference to the Lions Club was an error and there should not have been any mention of Mr Dewan's association with the club (of which he was the Diabetes Chairperson) when the Petition was submitted.

37. The Director of Governance also received an email from the President of the Atwell Lions Club, Mr Raymond Carter ("Mr Carter") on 1 October 2019, also complaining about Post A. In his email Mr Carter stated:

"I have asked Ms Smith to remove the Lions Club of Atwell from the missive that has been posted on the Facebook page which she refuses to do as she says that the petition was put up in his (Mr Dewan's name) and as such it remain as such because it is on the public record".

38. Mr Dewan sent a further email on 2 October 2019 referring to the Petition itself:

"Nothing was mentioned about my association with the Lions Club of Atwell. The Deputy Mayor has misused her power in her official capacity to access this official communication and has shared with the entire Cockburn community on a social media platform. This information is being used by Deputy Mayor to influence the local council elections. The erroneous post still exists on her page 'The word in the East'".

Conclusion

39. The City has previously provided several training sessions for its Elected Members on the use of social media and Cr Smith has been in attendance at this training. The City's Elected Member Code of Conduct was amended in May 2018 to include specific references to social media. At clause 5.2(a) it states:

- 5.2 (a) Elected Members are responsible for the content they publish in a personal capacity on any form of social media platform and in this regard must understand their legal obligations.

The speed and reach of publishing online means content is available immediately to a wide audience. Anything posted can be difficult to delete and may be replicated, misconstrued and seen by people the author never intended or expected would see it.

Elected Members must recognize the potential damage that may be caused to the City through inappropriate use of social media. Accordingly, Elected Members should comply with this guideline to ensure that the risk of such damage is minimized, including potential action against an Elected Member under the Local Government (Rules of Conduct) Regulations 2007.

40. In the context of the complaints from Mr Dewan and Mr Carter it is clear that they have both asked Cr Smith to remove material from Facebook pages that she controls, that they find disadvantageous to themselves or the organisation they represent, and Cr Smith has refused to do this.

Cr Smith' Response

41. Cr Smith indicated that she did not accept the information detailed in the Complaint or that she committed the alleged conduct.

Panel's Consideration

First Allegation

First, second and third elements satisfied

42. The Panel finds that Cr Smith engaged in the conduct which is the subject of the First Allegation and that she was a councillor and was acting as a councillor at all relevant times.

43. The first, second and third elements of Regulation 7(1)(a) and (b) are established.

Whether Cr Smith acted improperly (fourth element)

44. Based on the evidence before it, the Panel is satisfied that the fourth element has been established in relation to Post B and finds that Cr Smith did act improperly. The Panel makes this finding because it is satisfied to the required standard of proof that a reasonable person would consider that Cr Smith did not meet the standards of conduct expected of a councillor when she posted material (Post B) to the Word in the East Page in relation to the upcoming local government election:



- a. The Panel has considered the content of all the Facebook Posts referred to in the Complaint and the context in which they were published:

Post A, Post C and Post D

- b. The Panel does not find Posts A, C and D to be improper:
- i. The subject matter of Post A is the history of the Bartram Road Footbridge Petition. The post is reasonable in length and is set out in a clear and matter-of fact manner. While Cr Smith refers to Mr Dewan initially, the reference is very limited and not overtly aggressive as alleged:

“The word in the East Candidate Dewan DID NOT get the council to vote in favour of the footbridge. Mr Dewan attended the meeting and accepted the Council decision – NO to the footbridge and Council have heard nothing from Mr Dewan since.”

Councillors are under a duty to provide information to the community. Post A appears to be a straightforward explanation by Cr Smith of the background to the Petition and there is no evidence that the information contained therein was factually incorrect, misleading or irrelevant.

- ii. The Panel also does not find Post C to be improper. It is acceptable for councillors to openly support candidates (so long as they are respectful in doing so). It is clear Cr Smith felt strongly about this issue and that she wished to defend / restate her position in this regard. She also outlines what she would like to see for the City:

“I want a cohesive, hardworking, grassroots team working WITH East Ward Residents!”

The statement is short in terms of length and the contents are neither so wrongful, or inappropriate in the circumstances.

- iii. Finally, with regard to Post D, the Panel also does not find that it was improper. The Post simply shows photographs of two candidates with green ticks against their names; the imagery is mild in nature and there is no further accompanying commentary.

Post B

- c. With regard to Post B, the Panel finds that Cr Smith did cross the line of impropriety. As stated above, Cr Smith clearly supported two of the candidates and indicated this by placing ticks by their names. However, she also included Mr Dewan’s name with a red cross next to it. As referred to above, councillors are entitled to support candidates in local elections but should do so in a respectful manner to all candidates. This is especially so, as they may find themselves sitting with individuals (who they did not necessarily support), on Council and as part of the same team, following the election.

- d. Furthermore, Councillors hold positions of influence and people often look to elected representatives to provide guidance. While the Panel does not find Cr Smith's conduct to be wrongful in the most serious sense, it does find it was somewhat unfair for Cr Smith to display blatant and unnecessary negativity towards one particular candidate.

Whether Cr Smith intended to cause advantage to herself or any other person or detriment to the local government or any other person.

45. The Panel is not satisfied to the required standard of proof that Cr Smith intended to gain an advantage for herself or any other person or cause detriment to Mr Dewan by publishing Post B:

- a. Other than the names of the candidates, and a small single green tick or a red cross, Cr Smith did not refer to any of the parties further - there is no additional commentary.
- b. The Panel has considered Cr Smith's other Facebook Posts, and notes that she also uses 'ticks' and 'crosses' in some others. When listing the potential candidates, Cr Smith adopted the same approach, and therefore, it appears to be a stylistic tool adopted by Cr Smith when posting on social media generally.
- c. The local elections were an important and topical community issue, and the Panel finds it plausible that Cr Smith simply wished to communicate with electors which candidates had her support.

Findings

46. Accordingly, for the above reasons, the Panel finds that Cr Smith did not breach Regulation 7(1)(a) or (b) in relation to the First Allegation.

Second Allegation

First, second and third elements satisfied

47. The Panel finds that Cr Smith engaged in the conduct which is the subject of the Second Allegation and that she 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.

Whether Cr Smith acted improperly (fourth element)

49. Based on the evidence before it, the Panel is satisfied that the fourth element has been established in relation to the Second Allegation and finds that Cr Smith did act improperly. The Panel makes this finding because it is satisfied to the required standard of proof that a reasonable person would consider that Cr Smith did not meet the standards of conduct expected of a councillor when she failed to remove Post A from the Word in the East Page:

- a. Based on the evidence before it, the Panel finds it more likely than not that the following series of events occurred:



- The Petition was filed by Mr Dewan by email in or around July 2018 and the covering email contained the email signature referring to the Lions Club (“Lions Email Signature”);
- Post A²⁴ was published by Cr Smith on 29 September 2019 and included the following statement:

“Petition in the Lions Club of Atwell’s name, received for the construction of a footbridge over the Kwinana Freeway at Bartram Road (not vehicles) received by Council.

The Panel notes that there are two versions of Post A included in the Complaint, both with the same date and time of publication. The second version of Post A²⁵ stated:

“Petition submitted under the cover letter of the Lions Club of Atwell received....”

- Following the publication of Post A, the Atwell Lions Club President, Mr Carter, contacted Cr Smith and asked her to remove the Post. Below is a copy of an email that Cr Smith sent to the City’s Director of Governance and Chief Executive Officer (“CEO”) on 1 October 2019 following a conversation she had with Mr Carter:

Stephen Cain

From: Lee - Anne Smith - Deputy Mayor
Sent: Tuesday, 1 October 2019 4:31 PM
To: EM Customer Requests; Don Green; Stephen Cain
Cc: 15 Elected Members DL
Subject: Petition

Hi Don and Stephen

I gave just received a call from the Atwell Lions Committee asking for a retraction of the Bartram Rd footbridge petition that was submitted on their behalf.

I’m sorry I didn’t catch the member’s name however, his phone number is 0417 180 621.

He explained it goes against the Lion’s policies to use their name on anything politically related including this petition.

We would appreciate advice on how to have the petition retracted.

Kind Regards

Lee-Anne

- Cr Smith did not remove Post A despite being asked to do so.
- b. Based on the evidence before it, the Panel finds it more likely than not that the Petition was not filed on behalf of the Atwell Lions Club; the Petition itself did not include any reference to the Club and was signed by local residents. It also finds that the Lions Email Signature should not have been included when the Petition was submitted.

²⁴ Attachment C in the Complainant’s bundle of documents.

²⁵ Attachment H in the Complainant’s bundle of documents

- c. Councillors are under a duty to work with community based groups positively and proactively. However, Cr Smith's actions in ignoring their request was potentially harmful to the relationship between the Atwell Lions Club and Council. In addition, councillors are also under a duty to communicate with local residents in a manner that does not mislead them. It is clear that Cr Smith was made aware of the erroneous reference to the Club in the Post and refused to remove or amend it, and the Panel finds it was wrong for Cr Smith to do so.

Whether Cr Smith intended to cause detriment to the local government or any other person.

50. The Panel is satisfied to the required standard of proof that Cr Smith intended to cause detriment to the Atwell Lions Club when she refused to remove or amend Post A from the Word in the East Page:

- a. Based on the evidence before it, the Panel finds it more likely than not that Cr Smith had been contacted on at least two occasions regarding the error in the Post and who the Petition was submitted on behalf of.
- b. Cr Smith herself described how Mr Carter made her aware of the damage that could be caused to the Club, if the incorrect reference was not removed. In her email dated 1 October 2019 to the City's Director of Governance and CEO (referred to in paragraph 49(a) above) she stated:

"He explained it goes against the Lion's policies to use their name on anything politically related including this petition."

- c. On 2 October 2019, in an email to the CEO, Mayor Logan refers to two separate telephone conversations he had had with Mr Carter and Mr Dewan on the same day in relation to Post A:

"Raymond CARTER – President, Lions Club of Atwell

Raymond said to me that he had contacted Lee-Anne Smith regarding her face book posting on Tarun Dewan's letter/petition re the Bertram Road Bridge previously presented to Council. He had said to Lee-Smith that Lions Clubs were 'apolitical' and that there was a reference on her Facebook page that should be removed regarding the document.

He said that Lee-Anne refused to remove the posting and had sent him a large document that she said he could check through to find the petition information etc. He said that she was unhelpful leaving him with a large document to search through.

.....

Tarun said to me that he had contact Lee-Anne Smith to request the removal of the Facebook post referring to the petition he had presented to Council referencing Bartram Road Bridge stating that his email had inadvertently picked up his Diabetes Co-ordinator (for the Lions Club) address instead of his private email address.

He wanted the posting removed for the above reason. He said Lee-Anne Smith had refused."



- d. It is likely that it would have been relatively straightforward for Cr Smith to remove the Post entirely, or at least delete the reference to the Atwell Lions Club, until the issue had been resolved but she chose not to.
- e. Based on the evidence before it, the Panel finds that the Cr Smith was aware of the disadvantage to the Atwell Lions Club that Post A potentially could cause it, and refused to remove it regardless. The only reasonable inference is that Cr Smith intended to cause the Atwell Lions Club detriment.

Findings

51. Accordingly, for the above reasons, the Panel finds that Cr Smith did breach Regulation 7(1)(b).

Mick Connolly (Presiding Member)

Elanor Rowe (Deputy Member)

Rebecca Aubrey (Deputy Member)



Local Government Standards Panel

Complaint Number	SP 2019-085
Legislation	<i>Local Government Act 1995 (WA)</i>
Complainant	Mr Stephen Cain
Respondent	Cr Lee-Anne Smith
Local Government	City of Cockburn
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i>
Panel Members for	Mr Michael Connolly (Presiding Member)
Penalty Consideration	Cr Peter Rogers (Member) Mrs Emma Power (Member)
Heard	16 December 2019 Determined on the documents
Penalty Considered	10 June 2020
Outcome	Public Apology

DECISION AND REASONS FOR DECISION

Delivered 13 July 2020

DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005 (WA)*, 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



Introduction

At its meeting on 16 December 2019, the Panel found that Councillor Lee-Anne Smith, councillor for the City of Cockburn (**“the City”**), committed 1 minor breach under the Local Government Act 1995 (WA) (**“the Act”**) and regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) (**“the Regulations”**) when, following a reasonable request, she did not remove material from Facebook relating to a petition that was put forward regarding the Bartram Road Footbridge (**“the Minor Breach”**).

Jurisdiction and Law

The Panel convened on 10 June 2020 to consider how it should deal with the Minor Breach.

The Panel accepted the advice of the Department of Local Government, Sport and Cultural Industries (**“the Department”**) that on this date there was no available information to indicate that Cr Smith had ceased to be, or was disqualified from being, a councillor.

If the Panel finds that a councillor has committed a minor breach, it must give the councillor an opportunity to make submissions to the Panel about how it should deal with the breach under section 5.110(6).¹

By a letter dated 14th February 2020, Cr Smith was:

- notified of the Panel’s finding of the Minor Breaches;
- provided with a copy of the Panel’s Finding and Reasons for Finding; and
- offered an opportunity to make submissions as to how the Minor Breach should be dealt with under section 5.110(6) of the *Act*.

Possible Sanctions

Section 5.110(6) of the *Local Government Act 1995* (WA) (**“the Act”**) provides that the Panel is to deal with a minor breach by:

- (a) *ordering that no sanction be imposed; or*
 - (b) *ordering that —*
 - (i) *the person against whom the complaint was made be publicly censured as specified in the order;*
or
 - (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
 - (iv) *the person against whom the complaint was made pay to the local government specified in the order an amount equal to the amount of remuneration and allowances payable by the local government in relation to the complaint under Schedule 5.1 clause 9;*
- or*

¹ *Local Government Act 1995* (WA), s 5.110(5).



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

Councillor Smith's Submissions

By an email dated 31 March 2020, the Department received a response from Cr Smith with the following comments and arguments as to penalty as summarised by the Panel:

Cr Smith accepts the findings of the Panel;

Cr Smith asks the Panel to take into consideration her current suspension and the amount of complaints against her, many of which were unfounded;

CR Smith removed the post soon after but in hindsight she should have removed this immediately; and

Cr Smith is more than happy to apologise to the Lions Club through a letter of apology but requests that she not be asked to give a public apology as the Lions Club footer that was used in error and the relevant letter still remains on the City's website.

Panel's Consideration

Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach.

The Panel may order under section 5.110(6)(a), that no sanction be imposed not to reverse the Panel's finding of a breach, but to indicate that in all the circumstances the relevant councillor should not be penalised further.

Guidance as to the factors which the Panel may consider in determining the appropriate penalty to impose include, but are not limited to, the following:

the nature and seriousness of the breaches;

the councillor's motivation for the contravention;

whether or not the councillor has shown any insight and remorse into his/her conduct;

whether the councillor has breached the Act knowingly or carelessly;

the councillor's disciplinary history;

likelihood or not of the councillor committing further breaches of the LG Act;

personal circumstances at the time of conduct, and of imposing the sanction;

need to protect the public through general deterrence and maintain public confidence in local government; and

any other matters which may be regarded as aggravating conduct or mitigating its seriousness².

The Panel notes that Cr Smith accepts that she has breached the Regulations and is remorseful for her actions. However, although the breach is on the lower end of seriousness, the Panel has taken into account the fact the conduct took place publicly and,

² Chief Executive Officer, Department of Local Government and Communities and Scaffidi [2017] WASAT 67 (S)



even following requests by multiple parties, Cr Smith took some time to remove the relevant material from Facebook.

In these circumstances, the Panel considers that the appropriate sanction is that Cr Smith make a public apology. Section 5.110(6)(ii) of the Act specifies that any apology ordered by the Panel be made “*publicly*”. Consequently, the Panel is not able to order a private apology to be made by Cr Smith.

The public nature of any apology given by a councillor under the Act is appropriate as a councillor’s office is public in nature, and, in most instances, the conduct undertaken by the relevant councillor is also public in nature.

Making a public apology is a significant sanction, being a personal admission by the individual of wrongdoing. It is a suitable and appropriate penalty when a councillor’s conduct:

adversely affects particular individuals³; and/or

does not meet the standards other councillors seek to uphold.

In the relevant circumstances, the Panel considers that making a public apology is an adequate sanction and that it is not necessary to make an order in accordance with Schedule 5.1 clause 9 of the Act that Cr Smith recoup to the City the costs the Department incurred with respect to the Complaint.

Panel’s decision

The Panel orders pursuant to section 5.110(6)(b)(ii) of the Act that, in relation to the Minor Breach of regulation 7(1)(b) of the Regulations, Cr Smith make a public apology in terms of the attached Order.

Mick Connolly (Presiding Member)

Emma Power (Member)

Peter Rogers (Member)

³ *Treby and Local Government Standards Panel* [2010] WASAT 81 [127] (Pritchard J).



ORDER

Delivered 13 July 2020

DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005 (WA)*, 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

THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor Lee-Anne Smith, a councillor for the City of Cockburn **publicly apologise**, as specified in paragraph 2, or failing compliance with paragraph 2 within the specified timeframe, then paragraph 3 shall apply.

Public Apology

2. On the ordinary council meeting of the City of Cockburn first occurring after the expiration of **28 days** from the date of service of this Order on her, Councillor Smith shall:
 - a. attend the relevant ordinary council meeting;
 - b. ask the presiding person for his or her permission to address the meeting to make a public apology to the public;
 - c. make the apology immediately after Public Question Time or during the Announcements part of the meeting, or at any other time when the meeting is open to the public, as the presiding person thinks fit; and
 - d. address the Council and public as follows, without saying any introductory words before the address, and without making any comments or statement after the address:

"I advise this meeting that:

- i. A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened *the Local Government (Rules of Conduct) Regulations 2007 (WA)* when I did not remove material from a Facebook Page relating to a petition regarding Bartram Road Footbridge that incorrectly referred to the involvement of the Lions Club Australia.
- i. The Panel found that I breached regulation 7(1)(b) of the said Regulations as my conduct in refusing a reasonable request to remove the material was improper and deserving of a penalty.
- ii. I accept that I should have removed the relevant material from Facebook upon request.
- iii. I now apologise to the Lions Club Australia, my fellow Councillors and the public."



-
3. If Councillor Smith fails to, or is unable to, comply with the requirements of paragraph 2 above in the required time frame THEN, within the next **28 days** following the ordinary council meeting referred to in paragraph 3 above:
- a. Councillor Smith shall cause the following notice of public apology to be published in no less than 10 point print, as a one-column or two-column display advertisement in the first 10 pages of:
 - i. the “Cockburn City Herald” community newspaper; AND
 - ii. the “Cockburn Gazette” community newspaper; AND
 - b. the Chief Executive Officer of the City of Cockburn shall arrange for the notice of public apology to be published:
 - i. on the Facebook Page of the City of Cockburn in no less than 10 point font size; and
 - ii. in an appropriate place on the website of the City of Cockburn in no less than 10 point font size; and
 - iii. be published in any City of Cockburn public newsletter (if any) whether in electronic or print copy) (if any) in no less than 10 point font size.

PUBLIC APOLOGY BY COUNCILLOR LEE-ANNE SMITH

A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened the *Local Government (Rules of Conduct) Regulations 2007 (WA)* when I did not remove material from a Facebook Page relating to a petition regarding Bartram Road Footbridge that incorrectly referred to the involvement of the Lions Club Australia.

The Panel found that I breached regulation 7(1)(b) of the said Regulations as my conduct in refusing a reasonable request to remove the material was improper and deserving of a penalty.

I accept that I should have removed the relevant material from Facebook upon request.

I now apologise to the Lions Club Australia, my fellow Councillors and the public.



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) advises:

- (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 *Breach Findings and these Findings and Reasons for Finding – Sanctions*, 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."