



Local Government Standards Panel

Complaint Number	SP 40 of 2018 [DLGSC 20180324]
Legislation	<i>Local Government Act 1995</i>
Complainant	Councillor Kevin Bailey
Respondent	Councillor Andrew Kiely
Local Government	City of Swan
Regulation	Regulations 6 and 7 of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Ms Sheryl Siekierka (Presiding Member) Ms Elanor Rowe (Deputy Member) Ms Rebecca Aubrey (Deputy Member)
Heard	24 October 2018 Determined on the documents
Outcome	One breach of regulation 7(1)(b)

FINDING AND REASONS FOR FINDING

Published 15 November 2018

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 Panel found that Councillor Andrew Kiely ("Cr Kiely"), a councillor for the City of Swan ("the City"), committed one 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* ("the Regulations") with reference to correspondence Cr Kiely sent to the Minister for Local Government, Mr David Templeman ("Minister"). The Panel found that Cr Kiely did not commit a breach of regulation 6.

Jurisdiction

2. The Act provides for the circumstances in which a council member commits a minor breach.¹
3. On 24 May 2018 the Department received a Complaint of Minor Breach Form containing two allegations against Cr Kiely ("the Allegations"). The first allegation relates to a confidential briefing for Councillors, held on 4 April 2018, and an alleged contravention of regulation 6 following the briefing. The second allegation is in relation to a breach of regulation 7 and relates to correspondence that Cr Kiely sent to the Minister. The Complaint was submitted by Councillor Kevin Bailey, ("the Complainant").
4. On 14 June 2018 the Department advised Cr Kiely of the complaint and invited him to respond. The Department sent Cr Kiely a copy of 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 24 October 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 Kiely was a councillor at the time of the alleged breaches, having been elected on 21 October 2017, and was still a Councillor when the Panel met on 24 October 2018.
7. The Panel was satisfied the complaint had been made within two years after the alleged breaches are said to have occurred³, that it 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 Kiely.
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 As Cr Kiely had not previously committed a minor breach the Panel did not consider sending the Complaint to the Chief Executive Officer of the Department.

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.



9. Based on the information referred to in paragraphs 2 to 8 above the Panel found it had jurisdiction to determine whether Cr Kiely had breached regulation 6 and regulation 7 in connection with the Allegations made against him.

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.

Regulation 6

14. 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 s5.23(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.*

⁶ Section 5.106 of the Act.

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



- (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 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.*

Regulation 7

15. Regulations 7(1)(b) and 7(2) provide:

“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.”*

16. 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 two Allegations

First Allegation: Breach of Regulation 6(2)

17. On 4 April 2018, a confidential briefing (“Confidential Briefing”) was held for councillors, during which there was a presentation by Jackson McDonald law firm. The presentation was on the Sale and Development Agreement between the City (as seller) and De Mol Group (as purchaser) of Lot 4, The Avenue, located within the Midland Oval Precinct (“Sale and Development Agreement”). The Confidential Briefing included confidential legal advice (“Confidential Legal Advice”).

18. Sometime following the Confidential Briefing, Cr Kiely sent correspondence to the Minister (“Correspondence”) relating to the Confidential Legal Advice provided at the Confidential Briefing. The Complainant states:

“I understand that issues in the correspondence relate to matters which were subject to the confidential legal advice”.



19. Cr Kiely has confirmed that in addition to the Minister, he also gave copies of his Correspondence to members of the community. It therefore appears that Cr Kiely has disclosed confidential information in breach of regulation 6.

Second Allegation: Breach of Regulation 7

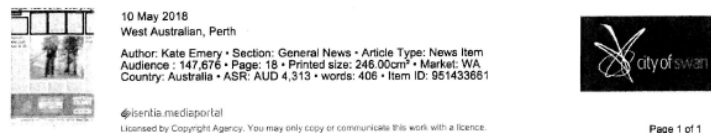
20. Cr Kiely's Correspondence to the Minister contained allegations of illegality by the City and a copy was leaked to a journalist at The West Australian newspaper ("The West Australian"). Cr Kiely admitted that he had disclosed the Correspondence to members of the public, as well as the Minister.

21. In an article in The West Australian on 10 May 2018 ("Article"), a journalist referred to the Correspondence and reported that Cr Kiely had alleged in the Correspondence that the City had acted unlawfully in relation to the Midland Oval redevelopment, but did not provide any evidence.

22. The Complainant alleges that Cr Kiely either:

- a) gave a copy of the Correspondence to a journalist at The West Australian; or
- b) a person that Cr Kiely gave the Correspondence to, then passed it to the journalist.

23. The Complainant attaches a copy of the Article to the Complaint:



Legal fears over oval project

EXCLUSIVE

■ Kate Emery

The Midland Oval redevelopment has caused division in one of Perth's fastest-growing councils, with City of Swan councillor Andrew Kiely saying he will not take part in future council decisions on the project.

Cr Kiely, a critic of the development before and after he was elected to council last year, has written to Local Government Minister David Templeman to express his concerns the city had acted unlawfully.

In the letter, a copy of which was obtained by *The West Australian*, Cr Kiely said he had removed himself from making any decisions on the oval until the city provided legal advice because he was concerned action taken by the city "may be proven to be unlawful and subsequently, I believe I could be held accountable for any 'loss' incurred".

Cr Kiely did not specify how he believed the city had acted unlawfully.

"I do not believe I should be supporting motions that may be potentially unlawful and

possibly make me personally liable," he wrote.

Swan chief executive Mike Foley said the city had provided legal advice to Cr Kiely and strongly rejected any suggestion it had acted unlawfully.

He said the city had fully complied with its legal requirements, acted on the basis of legal advice and given all councillors the opportunity to ask questions about that advice.

"The city has complied fully with its statutory obligations, obtained legal advice at numerous points during the process and made legal advisers accessible to councillors," Mr Foley said.

He said the city had entered into a sale and development agreement with developer De Mol Group only after adopting a business plan and ensuring it complied with section 3.59 of the Local Government Act, which covers commercial deals done by local governments.

Swan council cleared the way for the Midland Oval redevelopment last month, when it approved amendments to the site master plan.

The oval development has come in for criticism from some

in the community, largely for the loss of public open space.

Greens East Metropolitan MLC Tim Clifford last month released a video mocking some of the questionable sites that counted as public open space in the city.

He said this week he was concerned that work on the Midland Oval project was continuing despite community concerns.

"There's overwhelming dismay that people's rates have been spent on a project they don't want or need," he said.

Mr Foley said the project would have 2.3ha of open space.



24. It is the Complainant's understanding that all Councillors are required to ensure that proper records of documents are kept in the City's record keeping system. However, Cr Kiely has refused to provide a copy of the Correspondence to Councillors or the City.
25. Cr Kiely, in alleging illegality by the City in the Correspondence, without any evidence, and then giving the Correspondence to the press (or providing it to community members and therefore allowing it to be leaked to the press), has made improper use of his position as a councillor to cause detriment to the City.
26. Cr Kiely, by withholding the Correspondence from the City and councillors, is further causing detriment to the City, as the City is unable to respond to the allegations. Cr Kiely is acting with the sole purpose of damaging the City's reputation by publicly alleging illegality without any evidence.

Summary of Complainant's evidence

27. The Complainant attaches the following documents to the Complaint:
 - i. A copy of the Article in The West Australian;
 - ii. The minutes of the Council Meeting where Cr Kiely admitted to giving or showing the Correspondence to members of the community;
 - iii. The minutes of the Confidential Briefing where Confidential Legal Advice was provided including a copy of the presentation by Jackson McDonald; and
 - iv. An emailed letter from Mayor David Lucas ("Mayor Lucas") to all councillors, sent on 11 May 2018.

Councillor Kiely's Response

28. In his response, Cr Kiely refers to two separate complaints made against him; the current Complaint (SP40) made by the Complainant, and SP66, made by Councillor Maria Haynes. The Panel is not considering SP66 for the purposes of this Finding and Reasons for Finding. Specifically in relation to this Complaint, Cr Kiely states:
 - (a) The Complainant is incorrect in alleging that Cr Kiely did not make the Correspondence available to Council; while he may have withheld the Correspondence for a short period of time, it was eventually provided to Council.
 - (b) Importantly, the Complainant is merely guessing at what might have been in the Correspondence, which Cr Kiely confirms was a letter to the Minister. Cr Kiely cannot see how the Complainant can assume that Cr Kiely has provided Confidential Legal Advice to the public or the Minister as the Complainant has not seen the Correspondence.



- (c) In addition, the Complainant is attempting to discredit him by making the Complaint, and the Complaint is designed to draw attention away from the Complainant's own misgivings as a Councillor.
- (d) The Complainant has a lot of explaining to do himself, in respect of what Cr Kiely sees as a potential failure of good governance by the Complainant as a Councillor of the City.
- (e) The City has made purchases of land while the Complainant was in office, but prior to Cr Kiely's term, in excess of \$30 million without following the requirements of the Local Government Act. The whole issue is currently the subject of an official determination and he will await any findings in that respect.

First Allegation

Regulation 6

29. Regulation 6(2) provides that a person who is a council member must not disclose information that the council member derived from a confidential document⁸ or information that the council member acquired at a closed meeting other than information derived from a non-confidential document⁹.
30. 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) or (b) to have occurred are that it is more likely than it is not that:
- a) a Councillor disclosed information¹⁰ to someone who at the time was not also a Councillor of the same local government; and
 - b) the disclosed information was information the disclosing Councillor derived from a document that was marked by his or her local government's CEO, or at the CEO's direction, to clearly show that the information in the document was not to be disclosed (regulation 6(2)(a)); or
 - c) the disclosed information was information the disclosing Councillor acquired at a closed council or committee meeting (or a part of, that was closed) and the disclosing Councillor did not derive the disclosed information from a non-confidential document (regulation 6(2)(b));
 - d) and 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).
31. The information in a closed Council meeting that, by virtue of regulation 6, a Councillor is not permitted to disclose publicly includes:

⁸ Regulation 6(2)(a)

⁹ Regulation 6(2)(b)

¹⁰ 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', legal, strategic or otherwise; *Corr and Local Government Standards Panel* [2012] WASAT 14 at para [50].

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



- a) any information in a document marked by (or on behalf of) the CEO to clearly show the information in the document is not to be disclosed (except what is generally available to all persons at the time of the Councillor's disclosure);
- b) any word that is said during the closed meeting (except what is generally available to all persons at the time of the Councillor's disclosure); and
- c) any information referred to in s5.94 of the Act which deals with anything in respect of which a meeting has been closed¹² (except for such of that information that Council has resolved be available for inspection).

Panel's consideration

32. The Panel finds, based on the evidence, that the following series of events occurred:

- i. On 4 April 2018, Councillors were given a Confidential Briefing during which Confidential Legal Advice relating to the Sale and Development Agreement was provided;
- ii. Before the Council Meeting on 9 May 2018 ("Council Meeting"), Cr Kiely sent Correspondence to the Minister;
- iii. At the Council Meeting, Cr Kiely was asked a number of questions relating to the Correspondence. Cr Kiely was asked to whom he had disclosed the Correspondence; Cr Kiely confirmed that in addition to the Minister, he had given copies of the Correspondence to other people. Cr Kiely was also asked whether the contents of the Correspondence included allegations against the City that it had "*acted illegally*" in relation to the Sale and Development Agreement. In response to this, Cr Kiely said that those were not his words, but those of a journalist.
- iv. On 10 May 2018, an Article was published in The West Australian that referred to Cr Kiely having sent the Minister, Correspondence regarding his concerns about the City's actions and the Sale and Development Agreement; and
- v. On 11 May 2018, Mayor Lucas sent an email to all councillors asking whether they had seen a copy of Cr Kiely's Correspondence, and confirming he himself had not seen a copy.

33. The Complainant does not particularise whether it is a breach of regulation 6(2)(a) or 6(2)(b) that he alleges against Cr Kiely. However, based on the information provided in the Complaint, the Panel determines that it is a breach of regulation 6(2)(b) that is alleged; that Cr Kiely disclosed confidential information relating to the Confidential Legal Advice, that he acquired at the Confidential Briefing on 4 April 2018, in his Correspondence to the Minister.

34. The Panel has not been provided with a copy of the Correspondence and therefore does not know the contents of it. The Panel cannot determine what, if any,

¹² s5.23 of the Act



confidential information may or may not have been disclosed by Cr Kiely in his Correspondence.

35. Based on the evidence before it, the Panel cannot be satisfied to the required standard that Cr Kiely divulged confidential information that he acquired at the Confidential Briefing in his Correspondence, and that the essential elements, which need to be satisfied in order for a contravention of regulation 6(2)(b), have been established.

Findings

36. Accordingly for the above reasons, the Panel finds that Cr Kiely did not breach regulation 6(2)(b).

Second Allegation

Elements of regulation 7(1)(b)

37. In order to find that Cr Kiely 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).

First, second and third elements satisfied



38. The Panel finds that Cr Kiely engaged in the conduct which is the subject of the Second Allegation; and that he was a councillor and was acting as a councillor at all relevant times.
39. The first, second and third elements of regulation 7(1)(b) are established for the Second Allegation.

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

40. 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.”¹³ The Shorter Oxford dictionary definition is “irregular, wrong; unsuitable, inappropriate; unbecoming, unseemly.”¹⁴
41. 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?¹⁵ “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.”¹⁶
42. Under the Act Panel members must have regard to the general interests of local government in Western Australia.¹⁷ 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.
43. 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.¹⁸ Regulation 3 provides, among other things, that councillors should act with reasonable care, diligence and integrity and treat others with respect and fairness.
44. 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.¹⁹ 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.
45. 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.²⁰

¹³ Macquarie Dictionary, Revised Third Edition.

¹⁴ Shorter Oxford English Dictionary, Sixth Edition.

¹⁵ *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 27, referring to *R v Byrnes* (1995) 183 CLR 501.

¹⁶ *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 9, referring to *Robbins v Harness Racing Board* [1984] VR 641.

¹⁷ Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).

¹⁸ Regulation 3.

¹⁹ *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 10.

²⁰ *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64, referring to *Treby* 2010.



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

46. “Detriment” means loss, damage or injury.²¹ 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.²²
47. 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.²³ 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.²⁴
48. “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.²⁵ 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.²⁶

Whether Cr Kiely acted improperly (fourth element)

49. The Panel is satisfied to the required standard of proof that the fourth element has been established and that a reasonable person would consider that Cr Kiely did not meet the standards of conduct expected of a councillor by circulating the Correspondence and failing to provide information relating to the Correspondence to Mayor Lucas and his fellow councillors.
50. The Panel refers to its findings at paragraph 32(i) to (v).
51. The Panel has not been provided with a copy of the Correspondence, however the Panel finds that it is more likely than it is not, that Cr Kiely made the decision to contact the Minister directly regarding concerns he held as a councillor about the actions of the City. Cr Kiely chose to share his Correspondence, in which he expressed those concerns, with a number of other people, including members of the public (which Cr Kiely does not deny). Below is a copy of a question asked by Councillor David McDonnell (“Cr McDonnell”) to Cr Kiely, extracted from the Minutes of the Council Meeting:

²¹ Macquarie Dictionary Revised Third Edition, 2001.

²² *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraphs 31, 32.

²³ *Treby* 2010, paragraph 96, referring to *Chew v The Queen* 1992 CLR 626 (*Chew* 2010).

²⁴ *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.

²⁵ *Chew* 2010.

²⁶ *Treby* 2010.

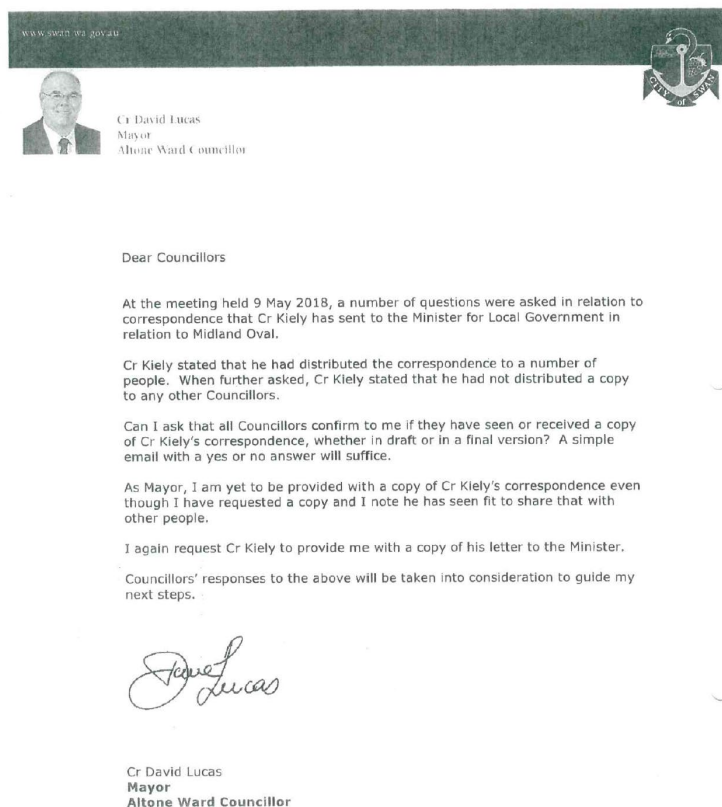


Cr McDonnell

- Q1 *It has been reported that the contents of an email Cr Kiely sent to the Minister for Local Government were revealed to a journalist. What was in the email?*
- A1 The Mayor advised he had not seen the email and offered Cr Kiely the opportunity to respond.
- Cr Kiely advised he was unwilling to provide that information.
- Q2 *Did Cr Kiely provide the email to a journalist?*
- A2 Cr Kiely advised that due to the nature of his concerns and inquiries, some people were required to be informed. This included a number of people. He advised he was unwilling to provide the email.

52. A councillor is a member of a team and is expected to promote open and transparent government; however for a period of time, and despite disclosing his concerns to other people, Cr Kiely refused to share details relating to his Correspondence with Mayor Lucas or his fellow councillors. Mayor Lucas was compelled to write to all councillors asking whether they had seen a copy of the Correspondence.

53. Below is a copy of Mayor Lucas' emailed letter to councillors, sent on 11 May 2018:



54. By failing to cooperate with Mayor Lucas and his fellow councillors, and disclose information relating to the Correspondence, (that was disclosed to people who were not councillors), Cr Kiely failed to show mutual respect for Mayor Lucas and his fellow elected members.



55. Furthermore, the community relays its desires, concerns and opinions to council through councillors, and councillors represent the interests of the community. If members of the community had raised concerns and issues with Cr Kiely, it would be reasonable to expect a councillor to discuss these with their fellow councillors. Below is a further extract from the Minutes of the Council Meeting, of questions asked by Cr McDonnell to Cr Kiely:

Q4 *Will Cr Kiely provide the email to all Councillors?*

A4 Cr Kiely advised he was unwilling to do so.

Q5 *Councillors hold a privileged position. If Cr Kiely was concerned, why didn't he raise these matters in Council?*

A5 Cr Kiely advised that the issues have been raised by the community and by himself in discussions. He is guided by the community that he is required to represent.

56. Councillors also have a duty to facilitate communication between the community and council and vice versa and members of the community look to their elected representatives to provide leadership and guidance. However, by withholding any details of the Correspondence from his fellow councillors, Cr Kiely prevented them from being informed of all relevant information on important matters relating to the City. Further disadvantage was caused to councillors when details of Cr Kiely's Correspondence were passed to a journalist and the Article was published, as they had not seen the Correspondence themselves.

57. The question is whether in all the circumstances, a reasonable person would consider Cr Kiely acted improperly. The Panel finds that this element is satisfied.

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

58. The Panel is satisfied to the required standard that the fifth element has been established; Cr Kiely, in choosing to disclose details of his Correspondence to some people, but not Mayor Lucas or his fellow councillors, intended to cause detriment to councillors by placing them at a disadvantage in terms of their knowledge on an important council matter. The Panel finds that it is more likely than it is not that:

- (a) Cr Kiely wilfully chose to share a copy of his Correspondence with other people, and not just the Minister who he had written to.
- (b) Cr Kiely was asked at the Council Meeting for information regarding the Correspondence but refused to provide any details to his fellow councillors.
- (c) Cr Kiely was aware at the time of the Council Meeting that details of the Correspondence had been revealed to a journalist; however Cr Kiely still refused to provide any information about the Correspondence to his fellow councillors. The following day, a newspaper article appeared in The West Australian relating to the Correspondence.



(d) Mayor Lucas requested a copy of the Correspondence from Cr Kiely; however Cr Kiely did not cooperate and delayed in providing any information to him.

59. On the evidence before the Panel, the only reasonable inference that can be drawn is that Cr Kiely did not provide Mayor Lucas or his fellow Councillors with information relating to the Correspondence in a timely manner, with the intention of causing detriment to his fellow Councillors.

60. The Panel is satisfied to the required standard of proof that Cr Kiely intended to cause detriment to his fellow councillors.

Panel's finding

61. The Panel finds that Cr Kiely committed one breach of regulation 7(1)(b) in relation to the Second Allegation.

Sheryl Siekierka (Presiding Member)

Elanor Rowe (Member)

Rebecca Aubrey (Member)

Date of Reasons – 14 November 2018