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## Local Government Standards Panel

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Complaint Number	20220082
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Mr Paul Shanahan</b>
<b>Respondent</b>	<b>Councillor Giorgia Johnson</b>
Local Government	<b>City of Bayswater</b>
Regulation	Regulation 18 of the <i>Local Government (Model Code of Conduct) Regulations 2021</i>
Panel Members	Mr Tim Fraser (Presiding Member) Mrs Emma Power (Member) Cr Peter Rogers (Member)
Heard	4 August 2022 Determined on the documents
Finding	1 x Breach Regulation 18

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### FINDING AND REASONS FOR FINDING

Delivered 9 November 2022

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#### DEFAMATION CAUTION

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## Summary of the Panel's decision

1. On 4 August 2022, the Panel found that Councillor Giorgia Johnson a councillor of the City of Baywater ("**the City**"):
  - a. did commit a minor breach pursuant to the *Local Government Act 1995 (WA)* ("**the Act**") and Division 4 and Regulation 18 of the *Local Government (Model Code of Conduct) Regulations 2021* ("**the Regulations**") when she made a post on her Councillor Facebook Page in respect to a development in the City; and
  - b. did not commit a minor breach pursuant to the Act and Division 4 and Regulation 18 of the Regulations when she used her personal Facebook account to make a comment relating to a development in the City;
  - c. did not commit a minor breach pursuant to the Act and Division 4 and Regulation 18 of the Regulations when she allegedly encouraged and validated third party responses to matters being discussed on Facebook,as further set out in paragraph 17 below.

## The Panel's Role

2. Under section 5.110(2) of the Act the Panel is required to consider a minor breach complaint and make a finding as to whether the alleged minor breach occurred.
3. The Act and the *Local Government (Administration) Regulations 1996* provide for the circumstances in which a council member commits a minor breach.
4. Section 5.105(1) of the Act provides that a council or committee member commits a minor breach if the council or committee member contravenes a rule of conduct. Division 4 of the Regulations sets out the rules of conduct for council members and candidates.
5. Regulation 34D of the *Local Government (Administration) Regulations 1996* also provides that the contravention of a "*local law as to conduct*" is a minor breach pursuant to the Act.
6. The Panel may make a finding that a councillor has committed a minor breach of the Act and Regulations based on evidence from which it may be concluded that it is more likely that the alleged breach occurred than it did not occur.<sup>1</sup>
7. In order to find a breach, it must be established that each element of the relevant Regulation is more likely than not to have been breached or met.
8. In considering whether a minor breach is established the Panel must consider:
  - a. all evidence provided and, where there are conflicting circumstances, inferences or evidence, must come to a reasonable conclusion that any circumstance, inference or evidence relied upon is more likely than not to have occurred or be accurate<sup>2</sup>; and
  - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding<sup>3</sup>.

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<sup>1</sup> Section 5.106 of the Act

<sup>2</sup> *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1

<sup>3</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336



9. The Panel does not possess investigative or supervisory powers.<sup>4</sup> The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials in the public domain or published by the relevant local authority's website.
10. It is the responsibility of both complainants and respondents to provide the Panel with all information they wish the Panel to consider when making its determination.
11. The Panel also must have regard to the general interests of local government in Western Australia<sup>5</sup>.
12. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

### **Jurisdiction and Procedural Fairness**

13. On 25 May 2022 the Panel received a complaint from Ms Karen D'Cunha acting as complaints officer of the City ("**the Complaints Officer**"). The same enclosed a Complaint of Minor Breach Form dated 19 May 2022.
14. In the complaint form, the Complainant alleges that Cr Johnson has breached regulation 18 of the Regulations when she:
  - a. she made an allegedly improper post on her Councillor Facebook page in respect to a development in the City ("**Allegation 1**"); and
  - b. used her personal Facebook account to make an allegedly false and offensive comment relating to a development in the City ("**Allegation 2**");
  - c. allegedly encouraged and validated insulting third party responses to matters being discussed on Cr Johnson's Councillor Facebook page ("**Allegation 3**"), as referred to in paragraph 17 below (together "**the Complaint**").
15. The Panel convened on 4 August 2022 to consider the Complaint.
16. The Panel:
  - a. accepted the advice of the Department of Local Government, Sport and Cultural Industries ("**the Department**") that, based on information published on the Western Australian Electoral Commission's website, Cr Johnson was:
    - i. elected to the Council of the City in October 2021 for a term expiring in October 2025; and
    - ii. a Councillor when the Panel met on 4 August 2022;
  - b. was satisfied the Complaint was made within six months after the alleged breach occurred<sup>6</sup>;
  - c. was satisfied that the City's Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of a minor breach<sup>7</sup>;

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<sup>4</sup> Re and Local Government Standards Panel [2015] WASC 51 (at paragraph 24)

<sup>5</sup> Section 8(6) of Schedule 5.1 of the Act

<sup>6</sup> Section 5.107(4) and 5.109(2) of the Act

<sup>7</sup> Section 5.107 and 5.109 of the Act



- d. was satisfied the Department had provided procedural fairness to Cr Johnson; and
- e. found it had jurisdiction to consider the Complaint.

### **The Specifics of the Complaint**

17. The Complainant provided the following comments and arguments in respect to the Complaint as summarised by the Panel:
- a. The Complainant is a board member of the *Future Bayswater Community Group Inc.* and makes the Complaint in that capacity.
  - b. This organisation is a previous winner of the City of Bayswater's Annual Citizen Group of the Year Award, as well as being the recipient of multiple awards from the Planning Institute of Australia. Future Bayswater Community Group Inc also undertakes significant voluntary activities in the community.

#### Allegation 1

- c. Cr Johnson wrote a series of baseless, inappropriate and offensive comments impugning local community members; local businesses; Metronet; and DevelopmentWA on in a post her official 'City of Bayswater' Councillor Facebook page on 21 April 2022 (**"the First Post"**).
- d. An extract of the First Post is as follows (highlight by Complainant):

"... O by the way, insult to injury was the appalling DevelopmentWA Board's decision to INCREASE height in our town centre after the draft plan went for community feedback. It wasn't the feedback of the community who voted for me to represent them that's for sure. Whichever "community" was advocating for even more height, you disgust me. "

**("the First Comment")**.
- e. Cr Johnson derogatory comments and showed disdain for those in the community and Government agencies that don't mirror her view.
- f. Many members of the local community engaged in DevelopmentWA's consultation.
- g. Cr. Johnson has clearly made statements that are divisive, and these have greatly offended and distressed the members of *Future Bayswater Community Group Inc* . They feel they are the target of Cr Johnson's assertion of "*Whichever 'community' was advocating for even more height, you disgust me*"
- h. Cr Johnson has previously made it clear that she doesn't support development in the town centre. The Complainant respects Cr Johnson's right to make these decisions. However, she should make these decisions based on facts and assert her position without being abusive.
- i. Future Bayswater Inc believes the comments from Cr Johnson are not only offensive, but also a slur on the character of local residents, businesses, ratepayers and community members who hold a different opinion to Cr Johnson.
- j. The offensive comments from Cr Johnson are both unwarranted and totally inappropriate from anyone, let alone a person in her position on Council, a community leader.



- k. The Elected Member represents the City of Bayswater, and her page has a presence of ‘officialdom’ to it. These comments, therefore, reflect poorly on the Council and its standards.

### Allegation 2

- l. Cr Johnson also made another baseless and vitriolic post on an anti-development Facebook page of “Bayswater Deserves Better” (“**the Second Post**”) an extract of which is as follows (highlight by the Complainant):

“...We don't know who made what decision or who they met with, who their “mates” are or what financial interests they have or they disclosed. We can only guess from the outcome that it was a developer or developer lobbyist that made the changes. **It's nasty stuff** and I'm really sorry to see what's happened in Bayswater. I would be delighted to have an update on this.”

### **(“the Second Comment”)**

- m. In the Second Comment, Cr Johnson makes baseless and false accusations of corrupt behaviour, without providing any evidence of such behaviour.
- n. The relevant decision made by Development WA in relation to plans for the town centre were based on an extensive and equally inclusive community consultation process. To publicly imply otherwise is false, offensive and defamatory.
- o. Cr Johnson is making statements that the decisions did not represent the majority of community sentiment. The Second Comment is at odds to the publicly available community feedback data published by DevelopmentWA.

### Allegation 3

- p. The Future Bayswater Community Group Inc also takes significant offense at the subsequent third-party responses Cr Johnson has encouraged with respect to the First Post.
- q. These third party comments also attacked other community members, were not moderated and were encouraged by Cr Johnson. While the Councillor doesn't actually name any group in particular, her supporters do and their slanderous responses remain unmoderated or unchallenged by Cr Johnson.
- r. The Complainant provided examples of two third party comments which are not reproduced by the Panel here.
- s. Cr Johnson allowed, responded to, and supported offensive comments against Future Bayswater and members of the local community on her social media page.
- t. She did not take any action to remove these comments, even after Future Bayswater Community Group Inc made her aware of our concerns by way of an email sent 23 April 2022.
- u. Bayswater Community Group Inc's members are not only offended but have also been denied natural justice in that Cr Johnson did not seek to contact them or anyone else involved in the process to obtain the facts before making her social media post and subsequent comments about this matter.
- v. It is likely that Cr Johnson cannot be impartial in relation to dealing with ratepayers and local residents. Her behaviour demonstrates clear bias against



the members of the Future Bayswater Community Group Inc in contravention of Section 2.10 (a) of the Act.

- w. Cr Johnson's criticisms are also at direct odds with her voting record on Council.
- x. Cr Johnson voted to approve the Development Application for the station and associated works without comment. Despite voting for the proposed development of the station, she now appears to be unhappy with it, even though it is occurring as planned.

#### Breaches of the Act

- y. The various comments by Cr Johnson are in clear contravention of the local Government Act – specifically section S 2.10(a) of the Act for a councillor's role:  
*“represents the interests of electors, ratepayers and residents of the district”*
- z. Cr Johnson has used words that indicate she is only representing those electors who voted for her – we are concerned that these words imply the Councillor is not acting in the best interests of every ratepayer and resident in the District.

#### Breach of The City of Bayswater's Code of Conduct (2021)

- aa. The behaviour by Cr Johnson also breaches the City of Bayswater's Code of Conduct for Councillors including, but not restricted to:
  - i. *Clause 6 - Accountability*
    - A. In her comments, Cr Johnson did not avail herself of the facts in regard to the submissions made by the community (not just her supporters) regarding future plans for the town centre.
    - B. Rather than recognising her responsibility (duty) to everyone in our local community as her constituents (residents and ratepayers of the City of Bayswater), Cr Johnson has done the opposite by going out of her way to divide the community by making offensive comments against those in her community that she does not support.
  - ii. *Clause 5 - Relationship with others*
    - A. Cr Johnson's lack of respect, courtesy and fairness has caused Future Bayswater Community Group Inc's members embarrassment and offense as there was no public interest in making misleading statements.
  - iii. *Clause 4 - Personal Integrity*
    - A. By making offensive statements without seeking clarification, and by inciting and supporting others to cause offense to Future Bayswater Inc and its members, Cr Johnson has not shown any integrity or decency.
    - B. The Councillor is entitled to her personal view – but saying she is “disgusted” with people who have advocated for viable development in the town centre is not only completely inappropriate for an elected member, it is purposely divisive and gives further encouragement for others to attack and abuse those who hold a differing opinion.

#### Breach of the Regulations

- bb. Cr Johnson has breached regulation 18 as she misused her position and influence to purposely denigrate the reputation and standing of Future



Bayswater Inc, local residents, and ratepayers who have advocated for positive change and development in the Bayswater town centre.

- cc. Her actions have caused significant offense to members of Bayswater Community Group Inc who are residents, business owners and ratepayers in the City of Bayswater.
- dd. Cr Johnson demonstrates that she is only representing those who voted for her at the last election to Council. Now that she is an Elected Member, she is clearly not representing every elector in the District.
- ee. It appears that Cr Johnson's priority over the years has been to prevent sustainable and viable town centre regeneration, which is her right, but she -- and those who apparently voted for her -- should do so without being offensive. Cr Johnson has shown that she cannot act appropriately or with objectivity and, in doing so, has breached the City of Bayswater's Code of Conduct and the Act.
- ff. Cr Johnson also fails to recognise the overwhelming feedback in support of the changes to the Bayswater Town Centre Design Guidelines received by DevelopmentWA from the community asking for greater density in the King William Street precinct.
- gg. Cr Johnson has failed to appreciate (or is unaware of) the significant positive community feedback about regenerating the Baywater Town Centre and the benefits of viable and sustainable development in the town centre.
- hh. To ignore supportive community feedback because it doesn't fit your personal view is unconscionable and grounds for an inquiry into the Councillor's conduct.

#### Requested Outcome

- ii. The Future Bayswater Community Group Inc request the following action be taken:
  - i. Cr Johnson removes the First Post.
  - ii. City of Bayswater investigates the breaches and advise as to the outcomes.
  - iii. Cr Johnson apologises in writing and publicly to Future Bayswater Community Group Inc and community members and local businesses for her slanderous statements.

#### **The Respondent's Response**

- 18. By an email dated 24 June 2022, Cr Johnson provided a response to the Complaint.
- 19. Cr Johnson denies that she has committed any minor breach.
- 20. Cr Johnson provided the following comments and arguments regarding the Complaint as summarised by the Panel:
  - a. The Complaint is baseless, shocking, disappointing and an overreach.

#### Allegation 1

- b. This Complaint misrepresents the wording and intent of the First Post.
- c. The First Post highlighted a proposal to use a part of a local park for activities related to the Bayswater train station construction and was essentially a protest at the continued impact on residents by the construction of the new train station.



- d. This is a widespread view locally that was consequently supported by many people who engaged with the First Post.
- e. Cr Johnson did make the comment to the effect that whoever advocated for the increase in permitted building heights disgust her and, as she does not know who that was.
- f. There was some lack of transparency in this decision which is disappointing and surprising.
- g. It was not Cr Johnson's wording or intent to "impugn local community members". She has not heard any local community members or groups advocating for building heights greater than 10 stories in this area.
- h. The comment was certainly intended, and Cr Johnson believes understood, to support, and not cause detriment to anyone in the local community.
- i. In respect to the third party comments Cr Johnson has attempted to diffuse anger in her replies.

#### Allegations 2

- j. Comment 2 as made in the context of a post on the page of another community group, Bayswater Deserves Better headed "*Is This the Removal of Democratic Process?*" as follows:

*" We're still processing the news that DevelopmentWA changed the guidelines significantly last minute (read below for Respect Bayswater Heritage Heart's breakdown of the amendments) including raising the height of Bayswater town centre to 8-10 storeys! So how did that happen?? After years of being consulted, why was so much changed in the last meeting? We think this makes our area less livable with higher, bulkier towers abutting our residential area. We'd like to hear your views?"*

- k. In this context Cr Johnson made the Second Comment, from her personal page, not councillor page, calling for greater transparency and being somewhat cynical about the process.
- l. Cr Johnson's criticism was about the process and consequent community disharmony. It was clear that Cr Johnson did not know who was making or influencing the decisions and she did not disparage anyone or any local groups.
- m. The part of the Complaint in respect of the City of Bayswater's Code of Conduct, Cr Johnson does not believe is not within scope of this enquiry.
- n. In general, Cr Johnson has supported many of the local works and she has made comments on local development issues at Council and respected that as the route for formal feedback and submissions, which have been undertaken on behalf of Council by the City of Bayswater.
- o. Cr Johnson has also used formal routes to express frustration on behalf of the whole community that the ongoing impact of construction, particularly in the Bayswater Town Centre in terms of road closures, rail closures, vibration, noise and dust has been far in excess of that originally disclosed or anticipated.
- p. In general, Cr Johnson has consistently been supportive of the local community and community groups, supporting local groups at Council, attending local





events and using social media to promote local events, community groups and businesses.

- q. This Complaint is therefore devastating, quotes Cr Johnson's comments out of context and completely misrepresents her position.

21. Cr Johnson also provided a copy of the First Post and the related third party comments.

### **Regulation 18**

22. Regulation 18 prohibits councillors engaging in conduct to either gain an advantage for themselves (or another party) or cause detriment to another party and specifically provides as follows:

**“ 18. Securing personal advantage or disadvantaging others**

*(1) A council member must not make improper use of their office —*

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

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

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

23. To make a finding of a minor breach of regulation 18 of the Regulations the Panel must be satisfied to the required standard that:

- a. Cr Johnson was an elected member or a candidate at the time of the alleged breach and the time of the determination;
- b. Cr Johnson made use of her office as Council member or candidate of the City;
- c. when viewed objectively, such use was an improper use of Cr Johnson's office in that it:
  - i. involved a breach of the standards of conduct that would be expected of a person in the position of councillor by reasonable persons; and
  - ii. was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty; and
- d. Cr Johnson engaged in the conduct in the belief that detriment would be suffered by another person.

24. As the Complainant has not alleged any advantage was intended to be gained, the Panel has only considered regulation 18(1)(b) in this case.

25. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or lack of wisdom. It requires an abuse of power or the use of the councillor's position in a manner that such councillor knew (or ought to have known) was not authorised.

26. Impropriety does not depend on a councillor's consciousness of impropriety. It is to be judged objectively and does not involve an element of intent.



27. Any decision as to what is “improper” cannot be made in isolation but must be considered in the relevant context including the specifics of the relevant event as well as councillor's formal role and responsibilities.
28. In the case of impropriety arising from an abuse of power, a councillor's alleged knowledge or means of knowledge of the circumstances in which the power is exercised and his or her purpose or intention in exercising the power will be important factors in determining whether the power has been abused<sup>8</sup>.
29. “Detriment” means loss, damage or injury. It is construed widely and includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage.
30. It is not necessary to find whether any detriment was actually suffered<sup>9</sup>, but an intent to cause such detriment must be established.

### **Code of Conduct**

31. The City adopted their code of conduct during the Special Council Meeting 23 February 2021 (“**the Code of Conduct**”).
32. The relevant provisions of the Code of Conduct are as follows:

#### **“ 4. Personal Integrity**

(1) *A council member, committee member or candidate should -*

- (a) *act with reasonable care and diligence; and*
- (b) *act with honesty and integrity; and*
- (c) *act lawfully; and*
- (d) *identify and appropriately manage any conflict of interest; and*
- (e) *avoid damage to the reputation of the City.*

.....”

#### **“ 5. Relationship with others**

(1) *A council member, committee member or candidate should —*

- (a) *treat others with respect, courtesy and fairness; and*
- (b) *respect and value diversity in the community.*

(2) *A council member or committee member should maintain and contribute to a harmonious, safe and productive work environment.*

#### **“ 6. Accountability**

*A council member or committee member should —*

- (a) *base decisions on relevant and factually correct information; and*

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<sup>8</sup> Treby and Local Government Standards Panel [2010] WASAT 81 (at 31); Chew v The Queen (1992) 173 CLR 626 (at 640 - 641 [Dawson JJ]); R v Byrnes (1995) 183 CLR 501 – (at 514 - 515 [Brennan, Deane, Toohey and Gaudron JJ] and at 521 [McHugh J].

<sup>9</sup> Yates and Local Government Standards Panel [2012] WASAT 59 at [72]



- (b) *make decisions on merit, in the public interest and in accordance with statutory obligations and principles of good governance and procedural fairness; and*
- (c) *read all agenda papers given to them in relation to council or committee meetings; and*
- (d) *be open and accountable to, and represent, the community in the district.”*

**“8. Personal integrity**

(1) *A council member, committee member or candidate —*

- (a) *must ensure that their use of social media and other forms of communication complies with this code; and*
- (b) *must only publish material that is factually correct.*

....”

**PANEL’S CONSIDERATION**

**Regulation 18(1)(b) - Allegation 1**

**Cr Johnson was an Elected Member or a Candidate at the relevant times**

- 33. Cr Johnson was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.
- 34. This element is met.

**Cr Johnson made use of her office as Council Member of the City**

- 35. The relevant conduct concerns comments by Cr Johnson on her councillor Facebook Page.
- 36. In the First Post Cr Johnson:
  - a. expressly identified herself as an elected member by using the Facebook account “*Giorgia Johnson - City of Bayswater, West Ward*”
  - b. was commenting on a matter relating to the City; and
  - c. purported to communicate with and guide the community in the local municipality.
- 37. Due to the above, the Panel finds that it is more likely than not that Cr Johnson was acting in her capacity as an elected member and made use of her office as an elected member when undertaking the relevant conduct.
- 38. This element is met.

**Cr Johnson’s use was improper**

- 39. Allegation 1 deals with the First Post made by Cr Johnson and, in particular the following text:

*“It wasn’t the feedback of the community who voted for me to represent them that’s for sure. Whichever “community” was advocating for even more, you disgust me. ”*



40. The Complainant has alleged that the First Comment is improper as it is:
  - a. divisive and derogatory and shows disdain local residents, businesses, ratepayers and community members and government agencies; and
  - b. not accurate as to community views and support for the relevant project.
41. The Panel notes Cr Johnson's comments as to the Code of Conduct. Although a breach of the Code of Conduct does not by itself constitute a breach of the Regulations, where the conduct is in breach of the Code of Conduct this can indicate that the relevant conduct is "improper" for the purposes of Regulation 18.
42. When considering the relevant conduct the Panel has considered totality of the First Post and not just the text of the First Comment as provided.
43. The Panel particularly finds that the First Post is in breach of the following provisions of clause 5(1)(a) of the Code of Conduct to "*treat others with respect, courtesy and fairness*".
44. To state that a group of persons "disgust me" cannot be considered courteous or respectful. Further the tone and general content of the entire First Post can be considered to be a "rant" in nature rather than a post made for informing the community in the capacity of elected member.
45. Despite the above the Panel does not find that there is any breach of clauses 4 or 6 of the Code of Conduct in respect to Cr Johnson allegedly:
  - a. holding a view that does not reflect that of the whole of the community; or
  - b. having a bias as to the matter.
46. It is a fundamental feature of democracy and the local government system that elected members may choose to support, or not support, certain matters that come before Council. Many candidates and council members, create an express platform on doing so.
47. It is simply not feasible, or reasonably expected, that Councillors should equally represent or support the views of every single member of their community. Councillors are allowed to have individual views, even a minority or unpopular view. That is not improper.
48. The Panel urges all councillors to carefully consider the wording and tone of the public communications. An unfortunate choice of wording can cause elected members to fall foul of the regulations.
49. Given the above, the Panel finds that it is more likely than not that the Comment was improper as:
  - a. the conduct was in breach of the Code of Conduct;
  - b. the conduct was of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
  - c. the conduct is deserving of a penalty.
50. This element is met.

Regulation 18(1)(b) – Cr Johnson intended to cause a disadvantage

51. The Complaint has alleged that Cr Johnson has made a slur on the character of local residents, businesses, ratepayers and community members who hold a different

opinion to Cr Johnson and in particular insulted the members of the Future Bayswater Community Group Inc.

52. The Panel does not accept that the First Post was particularly directed to the Future Bayswater Community Group Inc in particular. It appears apparent Cr Johnson did not know who the parties who had advocated for an increased height limit were.
53. Despite this, Cr Johnson should have been aware that there was at least some support for such height increase and that her comment that such parties “disgust me” would be found to be offensive by those parties.
54. Cr Johnson could have certainly used milder, non-offensive language to state her opinion, The fact she choose the language she did indicates that she wished other members of the public to also think less of these of those parties.
55. The Panel therefore finds it was more likely than not that one of the predominate purposes of the Comment was to cause a disadvantage to the parties that had lobbied DevelopmentWA as to the increase the height restriction in the relevant development.
56. This element is met.

#### Conclusion

57. Given the above, the elements required to find a breach of regulation 18 of the Regulations have been met.

#### **Regulation 18(1)(b) - Allegation 2**

##### Cr Johnson was an Elected Member or a Candidate at the relevant times

58. Cr Johnson was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.
59. This element is met.

##### Cr Johnson made use of her office as Council Member of the City

60. It is an essential element of finding a Regulation 18 breach that the relevant councillor was acting in their capacity as an elected member when undertaking the relevant conduct.
61. In this case, the Second Post was made using Cr Johnson’s personal and private Facebook account. Cr Johnson also has a dedicated councillor Facebook page/account that is clearly used for City related matters.
62. In *Paine v Local Government Standards Panel [2020] CC 952* and *Paine v Local Government Standards Panel [2021] CC 207* the State Administrative Tribunal found that although Cr Paine was commenting on local and general political issue, the fact he used his personal Facebook account (asserted to be intended to be private, although not actually private in that instance) and did not refer to himself as a councillor, meant he was not acting in his capacity as a local councillor.
63. In *Separovich v Local Government Standards Panel [2021] CC 303* this approach was supported by Member Owen-Conway who found that the relevant conduct did not fall under the relevant regulation [then regulation 7(1)(b)] as, in that case he was satisfied:



*“ that there is no evidence that the applicant’s Facebook page is one where he identified himself as a councillor of the city or, indeed, hinted or purported to lead or guide the community in his local municipality or elsewhere.”*

64. Given the facts that:

- a. Cr Johnson used a personal and private Facebook account to make the Second Comment; and
- b. there is no evidence that Cr Johnson used the Facebook account to identify herself as a councillor of the City; and
- c. the relevant Second Comment is by nature a statement of personal opinion and a request for further information and therefore does not appear to be intended to lead or guide the community,

the Panel finds to the required standard that Cr Johnson was not acting in her capacity as an elected member when she made the Second Post.

65. This element is not met.

Cr Johnson’s use was improper AND Cr Johnson intended to cause a disadvantage

66. As the above element is not met, the Panel has not further discussed the remaining elements of Allegation 2.

#### Conclusion

67. Given the above, the elements required to find a breach of regulation 18 of the Regulations have not been met.

### **Regulation 18(1)(b) - Allegation 3**

Cr Johnson was an Elected Member or a Candidate at the relevant times

68. Cr Johnson was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.

69. This element is met.

Cr Johnson made use of her office as Council Member of the City

70. The relevant conduct concerns comments by the parties in response to the First Post by Cr Johnson on her councillor Facebook Page.

71. In the First Post Cr Johnson:

- a. expressly identified herself as an elected member by using the Facebook account “*Giorgia Johnson - City of Bayswater, West Ward*”
- b. was commenting on a matter relating to the City; and
- c. purported to communicate with and guide the community in the local municipality.

72. Due to the above, the Panel finds that it is more likely than not that Cr Johnson was acting in her capacity as an elected member and made use of her office as an elected member when undertaking the relevant conduct.

73. This element is met.

Cr Johnson’s use was improper



74. The Complainant has alleged that Cr Johnson acted improperly as she:
  - a. allowed, responded to, and supported offensive third party comments; and
  - b. did not remove the relevant third party comments.
75. There are two third party comments supplied by the Complaint that mention Future Bayswater Community Group Inc.
76. To be clear, Cr Johnson is not responsible for the content of third party comments
77. It is an express function of Facebook that the public may freely comment on posts.
78. Where third party public comments are simply expressing an opinion and not breaching any relevant group or Facebook rules, there is no obligation or cause for any posting party or administrator to remove the same.
79. The Complainant appears to be arguing that where independent third parties made comments that could be construed negatively towards a party (in particular Future Bayswater Community Group Inc) Cr Johnson would be reasonably expected to delete or contradict such comments.
80. Such a stance is simply unrealistic and attempts to over-regulate the intended purpose of Facebook where councillors are communicating with the public, which is part of their mandated role.
81. In this case Cr Johnson has not re-posted or shared such comments which, in some cases, may be considered an adoption of the contents of such reposted content.
82. Cr Johnson did respond to the comments, but in a general manner which stated she supported the local community. Nothing in her responses indicate that she agreed or endorsed any negative criticism of Future Bayswater Community Group Inc.
83. In any event, the Panel does not consider that any of the third party comments are unduly offensive in the context of public comment regarding a controversial community issue.
84. By its very nature a post on Facebook invites comment. That is the communication platform provided.
85. However, it is not controllable by an author of a post whether comment will be negative or positive, or even accurate. It is not reasonable to argue that, irrespective of content, a councillor will have acted improperly by using a communication platform that allows for public comment.
86. The Panel further considers that by allowing comment on the First Post and responding to those comments, Cr Johnson was expressly engaging in her statutory role under section 2.10(c) of the Act to "*facilitate communication between the community and the council*". This cannot be considered to be improper.
87. Given the above, the Panel finds that it is more likely than not that the Comment was not improper as:
  - a. the conduct was not in breach of the Code of Conduct or Act;
  - b. the conduct was not of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
  - c. the conduct is not deserving of a penalty.
88. This element is not met.



Regulation 18(1)(b) – Cr Johnson intended to cause a disadvantage

89. The Complainant has not made it clear how, by responding to and not deleting comments, Cr Johnson intended to cause a detriment to Future Bayswater Community Group Inc, DevelopmentWA or the Local Government.
90. As noted above, the Panel considers that Cr Johnson was expressly engaging in her statutory role under section 2.10(c) of the Act. The Panel therefore finds to the required standard that this was the predominant purpose of allowing public comment on the First Post.
91. This element is met.

Conclusion

92. Given the above, the elements required to find a breach of regulation 18 of the Regulations have not been met.

**Panel's Findings**

93. With respect to Allegation 1, Cr Johnson did commit a breach of Regulation 18(1)(b) of the Regulations and therefore did commit a minor breach.
94. With respect to Allegation 2, Cr Johnson did not commit a breach of Regulation 18 of the Regulations and therefore did not commit a minor breach.
95. With respect to Allegation 3, Cr Johnson did not commit a breach of Regulation 18 of the Regulations and therefore did not commit a minor breach.

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Tim Fraser (Presiding Member)

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Emma Power (Legal Member)

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Peter Rogers (Member)





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## Local Government Standards Panel

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Complaint Number	20220082
Legislation	<i>Local Government Act 1995 (WA)</i>
<b>Complainant</b>	<b>Mr Paul Shanahan</b>
<b>Respondent</b>	<b>Councillor Giorgia Johnson</b>
Local Government	<b>City of Bayswater</b>
Regulation	Regulation 18 of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i>
Panel Members for Penalty Consideration	Mr Tim Fraser (Presiding Member) Mrs Emma Power (Member) Cr Peter Rogers (Member)
Heard	4 August 2022 Determined on the documents
Penalty Considered	8 December 2022
Outcome	Public Apology

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### DECISION AND REASONS FOR DECISION

Delivered 24 January 2023

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#### 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

1. At its meeting on 4 August 2022, the Panel found that Councillor Giorgia Johnson, a councillor for the City of Bayswater (“**the City**”), committed one minor breach under the *Local Government Act 1995 (WA)* (“**the Act**”) and regulation 18 of Division 4 of the *Local Government (Model Code of Conduct) Regulations 2021* (“**the Regulations**”) when she made a post on her Councillor Facebook Page in respect to a development in the City and certain community members who supported such development (“**the Minor Breach**”).

## Jurisdiction and Law

2. The Panel convened on 8 December 2022 to consider how it should deal with the Minor Breach.
3. 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 Johnson had ceased to be, or was disqualified from being, a councillor.
4. 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).<sup>1</sup>
5. By a letter dated 16 November 2022, Cr Johnson was:
  - a. notified of the Panel’s finding of the Minor Breach;
  - b. provided with a copy of the Panel’s Finding and Reasons for Finding; and
  - c. 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

6. 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*

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<sup>1</sup> *Local Government Act 1995 (WA)*, s 5.110(5).



- (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*

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

### **Cr Johnson's Submissions**

7. By an email dated 30 November 2022, the Department received a response from Cr Johnson.
8. Cr Johnson provided the following comments and arguments as to penalty, as summarised by the Panel:
  - a. Cr Johnson acknowledges the finding of a breach.
  - b. Cr Johnson requests the Panel orders no sanction be imposed, due to the time that has now elapsed since the relevant post was made in April 2022 and the Complaint made in May 2022.
  - c. This is due to the potential for an adverse impact on our community by any public actions in relation to this breach, as in Cr Johnson's view the complaint and the breach arose from existing tensions between various groups and individuals holding different views on the shared future vision of the neighbourhood.
  - d. It is Cr Johnson's view that these tensions have considerably reduced in recent months.
  - e. In the event that the Panel, does wish to impose a sanction, Cr Johnson requests the opportunity to make a public apology.

### **Panel's Consideration**

9. Section 5.110(6) is solely about penalty. The Panel does not have the power to review any finding of a breach.
10. 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.
11. 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:
  - a. the nature and seriousness of the breaches;
  - b. the councillor's motivation for the contravention;
  - c. whether or not the councillor has shown any insight and remorse into his/her conduct;
  - d. whether the councillor has breached the Act knowingly or carelessly;
  - e. the councillor's disciplinary history;
  - f. likelihood or not of the councillor committing further breaches of the Act;



- g. personal circumstances at the time of conduct, and of imposing the sanction;
  - h. need to protect the public through general deterrence and maintain public confidence in local government; and
  - i. any other matters which may be regarded as aggravating conduct or mitigating its seriousness<sup>2</sup>.
12. In this case, it is noted that Cr Johnson accepts the breach finding and shows insight into her conduct and the circumstances from which it arose.
13. Although there has been some time elapsed since the relevant conduct, it is an important component of a review system that a complainant party (who was aggrieved enough to initiate a complaint) be able to see that a suitable penalty is imposed.
14. The Panel considers that due to the public nature of the initial Facebook post it is appropriate that Cr Johnson makes an apology to those parties who may consider they were the subject of that public comment.
15. Making a public apology is a significant sanction, being a personal admission by the individual of wrongdoing<sup>3</sup>. It is a suitable and appropriate penalty when a councillor's conduct:
  - a. adversely affects particular individuals<sup>4</sup>; and/or
  - b. does not meet the standards other councillors seek to uphold.
16. 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 Johnson recoup to the City the costs of the Department incurred with respect to the Complaint.

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

<sup>3</sup> *Treby and Local Government Standards Panel [2010] WASAT 81 (Pritchard J).*

<sup>4</sup> *Treby and Local Government Standards Panel [2010] WASAT 81 [127] (Pritchard J).*



### Panel's decision

17. The Panel orders pursuant to section 5.110(6)(b)(ii) of the Act that, in relation to the one Minor Breach of regulation 18 of the Regulations, Cr Johnson make a public apology in terms of the attached Order.

### Signing

A handwritten signature in black ink, appearing to be 'T Fraser'.

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Tim Fraser (Presiding Member)

A handwritten signature in black ink, appearing to be 'E Power'.

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Emma Power (Member)

A handwritten signature in black ink, appearing to be 'P Rogers'.

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Peter Rogers (Member)



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## ORDER

Delivered 24 January 2023

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### THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor Giorgia Johnson, a councillor for the City of Baywater **publicly apologise**:
  - i. as specified in paragraph 2; OR
  - ii. 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 Baywater first occurring after the expiration of **28 days** from the date of service of this Order on her, Cr Johnson shall:
  - i. attend the relevant ordinary council meeting;
  - ii. ask the presiding person for his or her permission to address the meeting to make a public apology to the public;
  - iii. 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
  - iv. 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 Regulation 18 of Division 4 of the *Local Government (Model Code of Conduct) Regulations 2021* when I made a comment on Facebook that was disparaging towards some members of the community.
- ii. The Panel found that I breached regulation 18 of the said Regulations in making such comment.
- iii. I acknowledge that I should not have made the relevant comment.
- iv. I now apologise to any members of the community who were offended by such comment."



3. If Cr Johnson 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 2 above the Chief Executive Officer of the City of Bayswater shall arrange for the notice of public apology to be published:
  - a. on the Facebook Page of the City of Baywater shall in no less than 10 point font size; and
  - b. in an appropriate place on the website of the City of Bayswater shall in no less than 10 point font size; and
  - c. in the next occurring issue of any City of Bayswater shall public newsletter (if any) whether in electronic or print copy) in no less than 10 point font size.

**PUBLIC APOLOGY BY COUNCILLOR GIORGIA JOHNSON**

A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened Regulation 18 of Division 4 of the Local Government (Model Code of Conduct) Regulations 2021 when I made a comment on Facebook that was disparaging towards some members of the community.

The Panel found that I breached regulation 18 of the said Regulations in making such comment.

I acknowledge that I should not have made the relevant comment.

I now apologise to any members of the community who were offended by such comment.



## 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."