



Local Government Standards Panel

Complaint Number	20230316
Legislation	<i>Local Government Act 1995</i>
Complainant	Councillor Peter Rogers
Respondent	Councillor Ahmed Zilani
Local Government	City of Mandurah
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 Renee McLennan (Member)
Heard	8 December 2023 Determined on the documents
Finding	1 x Breach - Regulation 18

FINDING AND REASONS FOR FINDING

12 January 2024

DEFAMATION CAUTION

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Summary of the Panel's decision

1. On 8 December 2023, the Panel found that Councillor Ahmed Zilani a councillor of the City of Mandurah ("**the City**") 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 he commented on a Facebook post by the Complainant which allegedly caused a detriment to the Complainant as further set out in paragraph 17 below.

Panel Members – Conflict of Interest Matter

2. The Panel notes Cr Zilani's comments in respect to the Panel's potential bias in this matter.
3. The Panel declares as follows:
 - a. Cr Rogers did not sit on this matter, nor has any sitting member of the Panel or administration support staff discussed this matter with him.
 - b. No administration support staff member has any role in deciding any breach matter and such staff provide clerical support to the Panel only.
 - c. No sitting Panel member was aware of the Complaint until the same was brought to the relevant meeting.
 - d. The members of the Panel who have previously sat with Cr Rogers on other minor breach matters have made a formal declaration that:
 - i. they know and have worked with Cr Rogers in his capacity as a member of the Panel; and
 - ii. they were able to put their mind to the matter fairly and impartially and without being influenced by their existing relationship with Cr Rogers.
4. The manner in which the Panel is constituted by the Act does not allow for the parties who have worked with Cr Rodgers to excuse themselves in this case. However, in the event Cr Zilani considers there is any bias involved, then the Panel notes that the matter may be appealed to the State Administrative Tribunal.

The Panel's Role

5. 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.
6. The Act and the *Local Government (Administration) Regulations 1996* provide for the circumstances in which a council member commits a minor breach.
7. 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.
8. 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.



9. 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.¹
10. 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.
11. 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 accurate²; and
 - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding³.
12. The Panel does not possess investigative or supervisory powers.⁴ 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.
13. 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.
14. The Panel also must have regard to the general interests of local government in Western Australia⁵.
15. 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

16. On 2 November 2023 the Panel received a complaint from Ms Casey Mihovilovich acting as complaints officer of the City ("**the Complaints Officer**"). The same enclosed a Complaint of Minor Breach Form dated 19 October 2023.
17. In the complaint form, the Complainant alleges that Cr Zilani has breached regulation 18 of the Regulations when he:
 - a. commented on a Facebook post made by the Complainant, stating that such post was "*100% incorrect and misleading to the community*" ("**Allegation 1**"); and
 - b. made a further comment relating to the Complainant's post in which he stated in what manner such initial post was incorrect and that the same "*might mislead the entire process*" ("**Allegation 2**"),which allegedly caused a detriment to the Complainant as set out in paragraph 17 below (together "**the Complaint**").

¹ Section 5.106 of the Act

² Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1

³ Briginshaw v Briginshaw (1938) 60 CLR 336

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

⁵ Section 8(6) of Schedule 5.1 of the Act



18. The Panel convened on 8 December 2023 to consider the Complaint.
19. 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 Zilani was:
 - i. elected to the Council of the City in October 2023 for a term expiring in October 2027; and
 - ii. a Councillor when the Panel met on 28 November 2023;
 - b. was satisfied the Complaint was made within six months after the alleged breach occurred⁶;
 - 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 breach⁷;
 - d. was satisfied the Department had provided procedural fairness to Cr Zilani; and
 - e. found it had jurisdiction to consider the Complaint.

The Specifics of the Complaint

20. The Complainant provided the following comments and arguments in respect to the Complaint as summarised by the Panel:
 - a. Cr Zilani has breached of Regulation 18 of the Regulations.
 - b. Cr Zilani stated on the Complainant’s Elected Member Facebook page that the Complainant had made an incorrect statement with the intention of deliberately misleading the public.
 - c. On 19 October 2023, the Complainant published a post on my “Councillor Peter Rogers - City of Mandurah” page on Facebook (**the “Post”**) which included the following statement:

“I was honoured to have been unanimously appointed by my Council colleagues to the selection panel for our new CEO with Deputy Mayor Caroline Knight - City of Mandurah and Mayor Rhys Williams.”
 - d. The confirmed Minutes of the November 2022 Council Meeting show that Mayor Williams, Deputy Mayor Knight and Cr Rogers’ appointment to the selection panel was unanimously approved by Council (**the “Resolution”**).
 - e. Cr Ryan Burns stated in the comments section of the Post:

“It is my understanding, Cr Rogers, that it was NOT a unanimous decision.”
 - f. The Complainant then provided him with a photo of the Resolution in the comments to show that it was a unanimous appointment of Council.

⁶ Section 5.107(4) and 5.109(2) of the Act

⁷ Section 5.107 and 5.109 of the Act



- g. Cr Zilani then provided the following statement in the comments section of the Post:

“I can confirm that selection panel of new CEO was not appointed unanimously which you mentioned in the above post that says ‘I was honoured to have been unanimously appointed by my Council colleagues to the selection panel for our new CEO’. This statement is 100% incorrect and misleading to the community.”

(“Comment 1”)

- h. The Complainant sought clarification from both Councillors as to how the Post was incorrect or misleading when the minutes show the resolution was passed unanimously.

- i. Cr Zilani then responded:

“You know very well that there were 5 candidates for the 3 positions on the CEO selection panel, and 3 were chosen by all the councillors through an election process. Three councillors, including you, were elected by a majority vote, NOT unanimously. Then all the councillors unanimously approved the decision of the 3 councillors for the committee who were elected by a majority vote. This doesn’t mean we selected you for the committee unanimously. Please remember that there was an election process in between. Your statement, which says, “I was honored to have been unanimously appointed by my Council colleagues to the selection panel for our new CEO,” might mislead the entire process.”

(“Comment 2”)

- j. The Complainant does not dispute that there was an election process to select the three members of the panel, however, this had nothing to do with the Post as it had to do with an entirely separate vote for the panel members.
- k. The Complainant notes that his commentary shifted from him having misled the community to that he “might” mislead the community.
- l. With the greatest of respect to Cr Zilani - the Council did unanimously appoint the Complainant to the selection panel.
- m. Cr Zilani has breached Regulation 18 in stating that the Complainant was publishing information to the public that was “100% incorrect” and “misleading to the community” when the Post was directly in line with the reality of the Resolution.
- n. Cr Zilani is a current Elected Member, and was exercising his role in communicating with community under section 2.10 of the Act.
- o. Under the Code, Cr Zilani has an obligation to:
- i. ensure his use of social media complies with the Code; and
 - ii. must only publish material that is factually correct.
- p. Cr Zilani’s comment was not factually correct.
- q. Cr Zilani intended to cause the Complainant detriment during an election - as he both agreed with Cr Burns’ statement which was factually inaccurate, and he



then further stated that the Post was unethical and dishonest and was designed to mislead the community.

- r. Cr Zilani failed to adhere to the following under the Code:
 - i. act with reasonable care and diligence (Reg 4(1)(a));
 - ii. act with honesty and integrity (Reg 4(1)(b));
 - iii. act lawfully (Reg 4(1)(c));
 - iv. avoid damage to the reputation of the local government (Reg 4(1)(e));
 - v. treat others with respect, courtesy and fairness (Reg 5(1)(a));
 - vi. contribute to a harmonious, safe and productive work environment (Reg 5(2)); and
 - vii. must not impute dishonest or unethical motives to another council member... in connection with the performance of their official duties.
 - s. For clarity:
 - i. Cr Zilani may argue that the decision was not unanimous as there were other nominations for the selection panel - but this statement is simply not related to the intention of the Post; and
 - ii. Mayor Williams, Deputy Knight and the Complainant were appointed unanimously by Council to the selection panel according to the Resolution.
 - t. The limited scope of the Complaint relates to the behaviour of Cr Zilani in his communication on the Complainant's public Facebook channel which is viewable by the community and Cr Zilani's obligation to not breach the Regulations.
21. The Complainant also provided:
- a. a screenshot copy of the Post;
 - b. a copy of the Council resolution of November 2022;
 - c. a screenshot copy of Comment 1; and
 - d. a screenshot copy of Comment 2.

The Respondent's Response

22. By an email dated 28 November 2023, Cr Zilani provided a response to the Complaint.
23. Cr Zilani denies that he has committed any minor breach.
24. Cr Zilani provided extensive comments and arguments regarding the Complaint, the Panel has summarised those arguments relevant to the Complaint as follows:
 - a. Cr Rogers (the Complainant) alleges that Cr Zilani, in correcting a statement that the Complainant had made on social media on 19 October 2023, caused detriment to the Complainant contrary to Regulation 18 of the Regulations.
 - b. Cr Zilani corrected the Complainant's Post with Comment 1 and Comment 2.



Context

- c. In making the comments on the Facebook Posts Cr Zilani showed personal integrity, respect for his relationship with others and accountability.
- d. To have disadvantaged the Complainant by causing detriment, Cr Zilani must have intended the detriment and caused loss to the Complainant or have been recklessly indifferent that detriment was probable or likely.
- e. Detriment that is a self-inflicted is not a detriment under the Regulations. Cr Zilani in correcting the Complainant's Post could be seen as attempting to cure the Complainant's self-inflicted detriment.
- f. Signing a letter as a councillor is not necessarily an indication of improper use of office. It is submitted that the same reasoning applies to a Councillor making a Facebook post/comment.

Background

- g. Post and Comments were made in the context of an election campaign.
- h. The Post was likely to have been intended to and did secure an (electoral) advantage for the Complainant.
- i. The Complainant's Facebook Post was made on 19 October 2023 during the relevant period for the purpose of the LG Act s.4.88 relating to deceptive electoral material.

Freedom of Political Communication

- j. Regulation 18 does not prohibit Councillors from questioning or even criticising the actions of others, which impact the community. Regulation 18 limits only Councillors' freedom to communicate matters in a way which constitutes improper use of a Councillor's office, and where the Councillor intends to cause detriment to another:
- k. Cr Zilani's fundamental right to freedom of political communication without intimidation is protected by the Australian Constitution and the WA Criminal Code.

Personal Context

- l. Cr Zilani is from Bangladesh and Bengali is his first language. He is a member of the CaLD (Culturally and Linguistically Diverse) community. While Cr Zilani has a good command of the English language, his understanding of words and his choice of words when communicating in English may not always be perfectly understood or utilised.

Selection Panel

- m. Council is authorised to establish committees, by absolute majority, to assist Council.
- n. The CEO selection panel is a Council committee established under the authority of Act.
- o. The Minutes of the meeting of the Council on 22 November 2022 record that there were six nominations for the Selection Panel (from the Mayor and five Councillors) prior to the resolution appointing the 3 parties was made.



- p. It might be inferred from the Minutes that the Council voted directly for the Selection Panel members immediately following the nominations. This inference would be wrong.
- q. There was a secret ballot took place between the five persons nominating for the two Selection Panel positions.
- r. There is no record of the secret ballot intermediate step or its outcome.in the Minutes.
- s. Cr Zilani has concerns as to the legitimacy of the manner in which the committee was elected and appointed.

Apprehended Bias

- t. The Complainant is an appointed member of the Standards Panel.
- u. Cr Zilani is concerned that the Complainant might be part of the Standards Panel, which decides the Complaint, or that the Complainant is in a position to influence the Standards Panel members who decide the Complaint and/or the DLGSC public servants who will provide administrative support to the Standards Panel.

Response to Complaint

- v. The Complainant was elected to the Selection Panel by Councillors, not by Council, by a process that was not recorded in the Minutes. The Complainant's Post was inaccurate and arguably misleading as to the unanimous support the Complainant enjoyed by Councillors in the matter of the Complainant's election to the Selection Panel.
- w. The secret ballot electing the Complainant to the Selection Panel was undertaken by individual Councillors, and not by the Council. The Election by Council colleagues was not unanimous.
- x. The Council approved the Election outcome unanimously, but the Council did not elect the Complainant.
- y. The Complainant's Post stated that he was "*unanimously appointed by my Council colleagues*" not that he was appointed by Council unanimously.
- z. The Post was inaccurate, if only by omission of relevant details and arguably misleading to potential electors about the support the Complainant had from all Councillors in the matter of the Election.
- aa. Cr Zilani was accurately correcting an arguably misleading statement made by the Complainant in the course of an election campaign, and thus properly and respectfully exercising his right to freedom of political communication.
- bb. Cr Zilani did not make improper use of his office because he did not reflect adversely on the character or actions of the Complainant or impute any motive to the Complainant.
- cc. Cr Zilani was truthful in the Comments, did not intend detriment or any loss to the Complainant and did not cause actual detriment or loss to the Complainant.
- dd. In the alternative, if there was any detriment to the Complainant by the Cr Zilani's Facebook comments, which Cr Zilani does not concede, it was neither intended



nor was there any reckless indifference in relation to the words of the Zilani Facebook comments.

- ee. Cr Zilani respectfully corrected a statement made by the Complainant that might have misled electors during an election campaign, about the level of support the Complainant enjoyed from his fellow Council colleagues.
 - ff. Furthermore, if there was any detriment suffered by the Complainant was self-inflicted detriment not caused by Cr Zilani.
 - gg. Standards Panel can and should refuse to deal with the Complaint because it is without substance, vexatious, misconceived and/or without substance or frivolous and/or trivial
 - hh. As a result of the possible reputational harm caused to Cr Zilani, the Standards Panel can and should recommend to Departmental CEO that it is in the public interest to remove the confidentiality attaching to all the circumstances of this minor breach complaint and outcome.
 - ii. Cr Zilani invites the Standards Panel and the Departmental CEO to consider whether or not the Complainant has given information in the Complaint that is misleading in a material particular by omission of the secret ballot step from the Complaint.
25. Cr Zilani also provided:
- a. A copy of the minutes of the Council Meeting of 22 November 2022;
 - b. Copy of the City's document - Standards for CEO Recruitment, Performance and Termination.

Regulation 18

26. 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.”

27. 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 Zilani was an elected member or a candidate at the time of the alleged breach and the time of the determination;
 - b. Cr Zilani made use of his office as Council member or candidate of the City;



- c. when viewed objectively, such use was an improper use of Cr Zilani'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 Zilani engaged in the conduct in the belief that detriment would be suffered by another person.
28. 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.

Code of Conduct

29. The City has an adopted *Code of Conduct for Council Members, Committee Members and Candidates* ("**the Code of Conduct**") which governs the conduct of elected members.
30. A breach of the Code of Conduct may indicate that an elected member has acted improperly in breach of Regulation 18.
31. The relevant provisions of the Code of Conduct Code 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 local government.*
- ..."

"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."*

" 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.

(2) A council member or committee member —

....

(b) must comply with all policies, procedures and resolutions of the local government.”

“9. Relationship with others

A council member, committee member or candidate —

(a) must not bully or harass another person in any way; and

(b) must deal with the media in a positive and appropriate manner and in accordance with any relevant policy of the local government; and

(c) must not use offensive or derogatory language when referring to another person; and

(d) must not disparage the character of another council member, committee member or candidate or a local government employee in connection with the performance of their official duties; and

(e) must not impute dishonest or unethical motives to another council member, committee member or candidate or a local government employee in connection with the performance of their official duties.”

PANEL’S CONSIDERATION

Regulation 18(1)(b)

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

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

33. This element is met.

Cr Zilani made use of his office as Council Member of the City

34. Due to the fact that:

- a. Comment 1 and Comment 2 (together “**the Comments**”) were made using Cr Zilani’s councillor Facebook account;
- b. the Facebook Comments were commenting on a City matter; and
- c. Cr Zilani was purporting to communicate with and guide the community in the local municipality,

the Panel finds that it is more likely than not that Cr Zilani was acting in his capacity as an elected member and made use of his office as a council member when undertaking the conduct.



35. This element is met.

Cr Zilani's use was improper.

36. 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.
37. 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.
38. 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.
39. 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 abused⁸.
40. It is alleged by the Complainant that Cr Zilani acted improperly as he breached the Code by incorrectly stating the Post was incorrect, unethical and dishonest and was designed to mislead the community.
41. Cr Zilani denies the breach and asserts that:
 - a. he was respectfully correcting the Post which was inaccurate as it did not address the secret ballot process; and
 - b. he was exercising his right to political freedom of speech.
42. Firstly, the Panel wishes to address certain of Cr Zilani's responses. Although the Panel has read the arguments, they are not applicable to the Panel's decision regarding the alleged minor breach. The Panel comments as follows:
 - a. The reference to the act of signing a letter in a councillor's name not being considered improper and its similarity to making a Facebook post is not applicable in this case. The Complainant is not alleging it was improper for Cr Zilani to use his Councillor name or identity to write the Comments, it is the contents of the Comments that are in contention;
 - b. Cr Zilani has alleged that the process for appointing the relevant committee was flawed. This is not a matter that falls under the scope of the Panel's powers and does not, in any event, impact the finding of a minor breach. If Cr Zilani considers that the appointment process was incorrectly undertaken then his recourse is to attempt to have that matter reversed or reconsidered by Council using the revocation process provided for under the Act.
43. For ease of reference the Panel has referred to Allegation 1 and Allegation 2 together in this part of the findings as the majority of observations overlap.

⁸ 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]).



44. Cr Zilani has stated that the freedom of political expression allows for the criticism of others. Generally, Cr Zilani is correct that it is open for councillors to disagree with each other or to highlight inappropriate conduct.
45. Without getting mired in the complex law as to the implied right of political freedom of speech here, the Panel refers to the following relevant extracts from *Treby and Local Government Standards Panel [2010] WASAT 81* as they relate to what was then regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* but is now Regulation 18(1)(b) of the *Local Government (Model Code of Conduct) Regulations 2021* (emphasis included by the Panel):
- a. *“implied freedom of communication which the Constitution protects is not absolute.... The implied freedom is limited to what is necessary for the effective operation of the system of government established by the Constitution.”* (at 48);
 - b. *“.....there is room for argument as to whether communications of the kind involved in the applicants' remarks would be subject to the implied freedom of political communication. It is difficult to immediately see any connection between those remarks, the subjects of them, or the context in which they were made, on the one hand, and the system of government established under the Constitution on the other hand..... it suffices to say that even if the implied freedom of political communication applies to communications of the present kind, reg 7(1)(b) does not need to be construed in a manner different from the ordinary and natural construction outlined above, in order to operate consistently with the implied freedom.”* (at 53);
 - c. *“...reg 7 does not prohibit a council member from discussing council business, to question, and in some cases, no doubt, to criticise, the actions of others which impact on matters relevant to the affairs of a local government and the community it serves.”* (at 56); and
 - d. *“...reg 7(1)(b) only limits the freedom of a councillor to engage in such communications in two ways: by doing so in a way which constitutes an improper use of a councillor's office, and by doing so in a way which causes detriment to another person. Provided that the communication does not constitute an improper use of a councillor's office, the fact that the communication causes detriment to another person will not be sufficient to contravene reg 7(1)(b). Similarly, even if the communication involves conduct which is judged to be an improper use of a councillor's office, that would not result in a contravention of reg 7(1)(b) unless the communication is also made to cause detriment to another person.”* (at 58)
46. As such, any right of political expression does not give free rein to any councillor to say *anything* they like, when the same would be considered in breach regulation 18.
47. The Panel notes that the Post contained the following statement:
- “I was honoured to have been unanimously appointed by my Council colleagues to the selection panel for our new CEO....”*
48. The process to appoint the members of the relevant selection panel was:
- a. firstly, a nomination was made by 6 councillors, three of which were elected by a blind vote by councillors; and



- b. secondly, Council unanimously appointed the successful candidates as the panel members.
49. The Minutes relating to the relevant item:
 - a. note that there were nominations by 6 parties or 3 positions;
 - b. does not refer to any election process; and
 - c. sets out that the final resolution to appoint the 3 parties was “unanimous”.
50. Given this, although it was technically the case that Cr Rogers was unanimously “appointed”, he was not in fact unanimously “elected” as part of the blind vote.
51. The Panel acknowledges that, therefore, the Post could be seen to be misleading in some respects as it did not give a whole picture as to the appointment process, only the final, outcome.
52. The relevant wording used in Comment 1 was:

“ This statement is 100% incorrect and misleading to the community.”
53. With respect to Cr Zilani, the Post cannot be seen as “100% incorrect”. It is technically correct in that Cr Rogers was unanimous “appointed”.
54. Comment 1 goes further than *“accurately correcting an arguably misleading statement”*.
55. Due to this the Panel considers that Cr Zilani should have been more careful in the language he used in using the words “100% incorrect” he clearly implies that Cr Rogers was completely fabricating the Post.
56. In respect to Cr Zilani’s argument that the vote was made by individual “councillors”, not “Council”, the Panel considers that this is a spurious argument based merely on semantics. If the Councillors are all voting on a matter on the agenda, then the final decision is made by “Council”, even where those councillors may have voted differently.
57. The Panel considers this statement was in breach of the Code as follows:
 - a. Clause 4(1)(a) to *“Act with reasonable care and diligence”*:
 - i. It was not acting with reasonable care and diligence to assert the Post was 100% incorrect.
 - b. Clause 5(1)(a) to *“treat others with respect, courtesy and fairness”*:
 - i. Wrongly stating that the Post was incorrect without any explanation was not fair or respectful to Cr Rogers. Comment 1 was not expressed in a respectful manner.
 - c. Clause 8(1)(a) to *“ensure that their use of social media and other forms of communication complies with this code”*:
 - i. Due to the above breaches, the communication does not comply with the Code.
 - d. Clause (8)(1)(b) to *“only publish material that is factually correct”*.
 - i. Comment 1 was not technically factually correct.



- e. Clause 9(e) to not *“impute dishonest or unethical motives to another council member”*.
 - i. The Panel considers in this case that Comment 1 was more likely than not to impute that the Post by Cr Rogers was dishonest by being deliberately false.
58. The Panel does not find that the posts go so far as to breach the following clauses of the Code:
 - a. Clause 4(1)(b) to *“Act with honesty and integrity”*
 - i. Although Cr Zilani used inappropriate language, the Panel does not consider that he did not act with honesty and integrity in attempting to clarify what he genuinely considered to be an incorrect and misleading comment by Cr Rogers.
 - b. clause 4(1)(c) to act lawfully.
 - c. clause - 4(1)(e) to avoid damage to the reputation of the local government.
 - d. clause 5(2) to fail to contribute to a harmonious, safe and productive work environment.
59. With respect to Allegation 2 and Comment 2, the same is much more measured.
60. Cr Zilani sets out the reasoning he considers the Post to be incorrect based on the appointment process and then states the statement:

“...might mislead the entire process.”
61. The Panel finds that Comment 2 does not breach the Code and was reasonable in the circumstances.
62. With respect to Allegation 1, the Panel finds that it is more likely than not that Comment 1 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.
63. With respect to Allegation 2, the Panel finds that it is more likely than not that Comment 2 was not improper as:
 - a. the conduct was not in breach of the Code of Conduct;
 - 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.
64. This element is met with respect to Comment 1 only. .
Regulation 18(1)(b) – Cr Zilani intended to cause a disadvantage.



65. “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.
66. It is not necessary to find whether any detriment was actually suffered, but an intent to cause such detriment must be established.
67. Cr Zilani asserts that he:
 - a. did not intend detriment or any loss to the Complainant; and
 - b. did not act with reckless indifference,and that any detriment caused to Cr Rogers was self-inflicted.
68. In this case, also the Panel acknowledges that part of the reason Cr Zilanli made the Comments was to clarify what he saw as an incorrect assertion by Cr Rogers, however, in using the strong language in Comment 1 that the Post was “*100% incorrect and misleading to the community*” without any qualifying examination, the Panel finds that it is more likely than not that Cr Zilani intended to publicly criticise Cr Rogers by implying he was being untruthful, and to therefore make the public think less of him.
69. The Panel therefore finds it was more likely than not that the predominate purpose of making Comment 1 was to cause a detriment to Cr Rogers.
70. The Panel finds in respect to Comment 2 that the predominant purpose of making that comment was to specify the process that was used to appoint the members of the selection committee and to clarify and modify his initial response in Comment 1.
71. This element is met with respect to Comment 1 only.

Conclusion

72. Given the above, the elements required to find a breach of regulation 18(1)(b) of the Regulations have been met with respect to Allegation 1 only.



Panel's Findings

73. With respect to Allegation 1, Cr Zilani did commit a breach of Regulation 18(1)(b) of the Regulations and therefore did commit a minor breach.
74. With respect to Allegation 2, Cr Zilani did not commit a breach of Regulation 18(1)(b) of the Regulations and therefore did not commit a minor breach.

Signing

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

Tim Fraser (Presiding Member)

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

Emma Power (Member)

A handwritten signature in black ink, appearing to be 'R McClennan'.

Renee McClennan (Deputy Member)



Local Government Standards Panel

Complaint Number	20230316
Legislation	<i>Local Government Act 1995 (WA)</i>
Complainant	Councillor Peter Rogers
Respondent	Councillor Ahmed Zilani
Local Government	City of Mandurah
Regulation	Regulation 18 <i>of the Local Government (Model Code of Conduct) Regulations 2021</i>
Panel Members for Penalty Consideration	Mr Tim Fraser (Presiding Member) Mrs Emma Power (Member) Cr Renee McLennan (Member)
Heard	8 December 2023 Determined on the documents
Penalty Considered	14 March 2024
Outcome	Public Apology

DECISION AND REASONS FOR DECISION

02 April 2024

DEFAMATION CAUTION

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Introduction

1. At its meeting on 8 December 2023, the Panel found that Councillor Ahmed Zilani, a councillor of the City of Mandurah (“**the City**”), committed a 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 he made a comment on a Facebook Post by the Complainant which caused a detriment to the Complainant (“**the Minor Breach**”).

Jurisdiction and Law

2. The Panel convened on 14 March 2024 to consider how it should deal with the Minor Breaches.
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 Zilani 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).¹
5. By a letter dated 12 January 2024, Cr Zilani was:
 - a. notified of the Panel’s finding of the Minor Breaches;
 - b. provided with a copy of the Panel’s Findings and Reasons for Findings; and
 - c. offered an opportunity to make submissions as to how the Minor Breaches 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

¹ *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 Zilani's Submissions

7. By an email dated 12 February 2024 the Department received a response Cr Zilani.
8. Cr Zilani provided the following comments and arguments, as summarised by the Panel:
 - a. Cr Zilani has addressed the applicable principles for deciding a sanction for minor breaches as set out in Jacob and Local Government Standards Panel [2022] WASAT 66.

Nature and seriousness of the breach

- b. While the Panel has held that my conduct was improper, it was not a serious impropriety, which is a relevant consideration in deciding the sanction.
- c. The Panel decision is that Cr Rogers' post was technically correct but could be seen to be misleading in some respects and that Cr Zilani should have been more careful in the language he used.
- d. The context of Cr Zilani's statement is required to be taken into account by the Panel in deciding a sanction, if any.
- e. The context of minor breach context, was that Cr Zilani was correcting a statement by a candidate in an election campaign, which might have influenced the deliberations of voters and ultimately the outcome of the election, in a way that Cr Zilani then believed to be a proper exercise of his constitutional right to freedom of political communication.
- f. Free speech on political matters is essential to and necessary for our system of representative government.
- g. Due to various legal precedent, the rules are so unclear about the scope of Elected Members political communications, no sanction should be imposed for the minor breach held to have been committed in all the context of Cr Zilani's conduct.

Motivation for the contravention

- h. Cr Rogers made an incorrect assertion, which could have been misleading by the omission of certain facts, as found by the Panel.
- i. Cr Zilani's motivation was, to correct a candidate's statement of an incorrect assertion during an election campaign that might or could have misled voters as to how they would vote.

Insight and remorse

- j. Cr Zilani should have been more careful to relate his "100% statement" to the first step ballot count, and regret that despite his best efforts to do that, it has been decided that objectively he did not do so, for which Cr Zilani is sorry.



- k. On reflection, a better approach might have been to ask Cr Rogers for a correction or explanation of his election statement.

Knowing, careless breach

- l. Cr Zilani did not make a knowing or careless breach. He made the best use of his English skills to convey a possibly misleading statement made in an election campaign, which he now accepts could have been misconstrued.

Disciplinary History

- m. Cr Zilani has been an Elected Member for 4 years and 3 months. There is no disciplinary history against him.

Likelihood of further breach

- n. Cr Zilani has always done and will always do his best to exercise his Elected Member role within the conduct rules which is important to him. .

Personal circumstances

- o. Other than as set out in his initial response to the Complaint, there are no other relevant circumstances other than the minor breach that occurred during an election campaign.

Deterrence

- p. Cr Zilani did not intend to commit a minor breach and am mortified that he did so. Accordingly, a deterrence effect on Cr Zilani of a sanction will be of little if any effect.
- q. The published decision is sufficient general and personal deterrence. The decision contributes to all Elected Members' better understanding of the ambit of freedom of political communication within a local government election campaign. Accordingly, imposing a sanction on Cr Zilani would not have any further general deterrence effect.

Aggravating Factors

- r. None

Mitigating Factors

- s. What is permitted as political communication during Local Government election campaigns is, to Cr Zilani's knowledge, not the subject of Elected Member mandatory training, and has not been clarified by the WA superior courts. Accordingly, this is an unclear area of law.
- t. Cr Zilani's 100% statement, found to be a minor breach, was made to clarify an election campaign statement by a candidate that might have been misinterpreted by voters, which in turn might have affected their vote.
- u. The Panel found that Cr Rogers' post could have been misleading and did not give the whole picture. This post was made during an election campaign, which could have affected the election outcome.
- v. Regulations are not intended to be unworkable rules that inhibit Elected Members' political free speech and political communication, and Cr Zilani believed at the time he was meaningfully and honestly participating in the local government system, which in Cr Zilani's opinion includes a fair and transparent election campaign.



- w. Cr Zilani did not impugn the character of Cr Rogers.
 - x. An Elected Member, in some cases, can criticise actions of others relevant to LG affairs, and those circumstances are unclear and without hard and fast rules.
 - y. Cr Zilani's social media statement was neither aggressive nor intimidating.
 - z. Cr Zilani did not impute a motive to Cr Rogers's statement.
 - aa. The distinction between "appointment" and "election" is not one that would be of interest to voters using Facebook for their electoral information. It was an important electoral issues as to whether or not Cr Rogers had unanimous support of other Councillors, which Cr Zilani was seeking and intending to clarify.
9. As the Panel is not able to reconsider its decision as to a breach at this stage of proceedings, the Panel has not included Cr Zilani's comments disagreeing to the Panel's findings on the issue of freedom of political speech.

Panel's Consideration

10. Section 5.110(6) is solely about penalty. The Panel does not have the power to review any finding of a breach.
11. 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.
12. 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 seriousness².
13. In this case the Panel notes that, Cr Zilani has shown some insight and remorse as to his conduct.

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



14. However, the Panel notes that Cr Zilani's continued insistence that the concept of freedom of political speech would allow Cr Zilani to make any statement whatsoever is misconceived. Compliance with regulation 18 of the Regulations is still required.
15. Despite this, the Panel considers that Cr Zilani is unlikely to commit a similar breach under the Regulations and will consider the context and possible interpretations of his comments more carefully in the future.
16. Despite the above, as the conduct was undertaken in a public forum and questioned the integrity of the Complainant, the Panel considers that a public apology is the appropriate sanction in the circumstances.
17. Making a public apology is a significant sanction, being a personal admission by the individual of wrongdoing³. It is a suitable and appropriate penalty when a councillor's conduct:
 - a. adversely affects particular individuals⁴; and/or
 - b. does not meet the standards other councillors seek to uphold.
18. 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 Zilani recoup to the City the costs of the Department incurred with respect to the Complaint.

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

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



Panel's decision

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

Signing

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

Tim Fraser (Presiding Member)

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

Emma Power (Member)

A handwritten signature in black ink, appearing to be 'R McClennan'.

Renee McClennan (Deputy Member)



ORDER

02 April 2024

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THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor Ahmed Zilani, a councillor for the City of Mandurah **publicly apologise** as specified in paragraph 3; OR
2. Failing compliance with paragraph 3 within the specified timeframe, then paragraph 4 shall apply.

Public Apology

3. On the ordinary council meeting of the City of Mandurah first occurring after the expiration of **28 days** from the date of service of this Order on him, Cr Zilani shall:
 - i. attend the relevant ordinary council meeting;
 - ii. ask the presiding person, or acting 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 the *Local Government (Model Code of Conduct) Regulations 2021*, when, I made a comment relating to a Facebook Post by Cr Peter Rogers.
- ii. The Panel found that I breached Regulation 18 by my conduct as my comment was not correct and disparaged Cr Rogers.
- iii. I acknowledge that I should have not made the Facebook comment and I now apologise to Cr Rogers and my fellow councillors."



4. If Cr Zilani fails to, or is unable to, comply with the requirements of paragraph 3 above in the required time frame THEN, within the next **28 days** following the ordinary council meeting referred to in paragraph 3 above the Chief Executive Officer of the City of Mandurah shall arrange for the notice of public apology to be published:
 - a. on the Facebook Page of the City of Mandurah shall be in no less than 10-point font size; and
 - b. in an appropriate place on the website of the City of Mandurah shall be in no less than 10-point font size; and
 - c. in the next occurring issue of any City of Mandurah shall the public newsletter (if any) whether in electronic or print copy) in no less than 10-point font size.

PUBLIC APOLOGY BY COUNCILLOR AHMED ZILANI

A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened Regulation 18 of the *Local Government (Model Code of Conduct) Regulations 2021*, when, I made a comment relating to a Facebook Post by Cr Peter Rogers.

The Panel found that I breached Regulation 18 by my conduct as my comment was not correct and disparaged Cr Rogers.

I acknowledge that I should have not made the Facebook comment and I now apologise to Cr Rogers and my fellow councillors.

Appeal

5. In the event that, prior to the date for compliance with the above Orders, Cr Zilani:
 - a. commences an appeal the decision of the Standards Panel to the State Administrative Tribunal in accordance with section 5.125 of the Local Government Act 1995; and
 - b. notifies the Complaints Officer of such appeal in writing,THEN:
 - c. compliance with the above Orders may be delayed until the State Administrative Tribunal has made a finding in respect to the decision; and
 - d. Such orders may be amended by an order of the State Administrative Tribunal.



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.”*