



Local Government Standards Panel

Complaint Number	SP 57 of 2017 [DLGSC 20170196]
Legislation	<i>Local Government Act 1995</i>
Complainant	Shire President Gordon Houston
Respondent	Councillor Donald Gibson
Local Government	Shire of Chittering
Regulation	Regulations 4(2), 7(1)(b), 10(3), 11(2) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mrs Sheryl Siekierka (Presiding Member) Ms M Strauss (Member) Councillor P Kelly (Member)
Heard	8 March 2018 Determined on the documents
Outcome	Breaches of regulations 4(2), 7(1)(b), 11(2) No breach of regulation 10(3)

FINDING AND REASONS FOR FINDING

Published 17 April 2018

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Summary of the Panel's finding

1. Under the provisions of the *Local Government Act 1995* (WA) (the Act) the Panel decided that Councillor Donald Gibson, a Councillor for the Shire of Chittering (the Shire), breached regulations 4(2), 7(1)(b) and 11(2) of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) at the Shire's ordinary council meeting on 15 November 2017 (the OCM) when Council was considering a motion concerning Cr Gibson's email account and data allowance (the Complaint).

Jurisdiction and procedural fairness

2. The Act provides for the circumstances in which a council member commits a minor breach.¹
3. On 17 November 2017 the Panel received a Complaint of Minor Breach Form dated 17 November 2017 signed by Councillor Gordon Houston, the Shire President (the President) alleging Cr Gibson breached regulations 4, 7, 10 and 11 of the Regulations at the OCM when it moved behind closed doors to discuss a motion (the Motion) that:

"Council resolves that the Chief Executive Officer to reinstate Cr Gibson's email account and data allowance."
4. The President provided copies of the following documents with his Complaint Form:
 - an extract from the "Confidential Minutes For Ordinary Meeting of Council Wednesday 15 November 2017" (the Confidential Minutes) recording the part of the OCM during which Council considered the Motion; and
 - an extract from the Shire's *Local Government (Council Meetings) Local Law 2014* (the Local Law).
5. On 30 November 2017 the Department of Local Government, Sport and Cultural Industries (the Department) sent Cr Gibson copies of the Complaint Form and the documents listed in paragraph 4 above, inviting Cr Gibson to respond to the Complaint.
6. 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 breach occurred.
7. The Panel convened on 8 March 2018 to consider the Complaint. The Panel:
 - accepted the advice of the Department that, based on information published on the Western Australian Electoral Commission's website, Cr Gibson was a Shire Councillor at the time of the alleged breaches and was still a Councillor when the Panel met on 8 March 2018;
 - was satisfied the Complaint was made within two years after the alleged breaches occurred² and that the Shire's Complaints Officer had dealt with the Complaint in

¹ Section 5.105 of the Act.

² Section 5.107(4) of the Act



- accordance with the administrative requirements in the Act for dealing with complaints of a minor breach³;
- noted that Cr Gibson responded to the Complaint in an email dated 12 December 2017 and an Elected Member's Response Form sent later and received by the Department on 21 December 2017 (the Response);
- was satisfied the Department had provided procedural fairness to Cr Gibson; and
- found it had jurisdiction to consider the Complaint.

Panel's role

8. The Panel is not an investigative body.⁴ It makes decisions about complaints of minor breaches solely upon the evidence presented to it and, when relevant, information published on a local government's website, such as agendas for and minutes of council meetings, local laws, policies and codes of conduct. For the Panel to find that a councillor committed a minor breach it must be satisfied on the evidence before it that it is more likely than not that the alleged breach occurred.⁵ This is commonly referred to as "the required standard" or "the required standard of proof".
9. The Panel cannot rely on an alleged fact unless it is satisfied that it is more likely than not that the alleged fact is true.⁶ The Panel cannot merely choose between two or more conflicting but equally possible versions of events.⁷ To accept one of the competing versions of events it must be satisfied that one is more likely to be the correct version.
10. For a finding that a councillor has breached a particular regulation the Panel must be satisfied to the required standard that every element of that regulation has been established.
11. Where the complainant submits the Panel should come to a particular conclusion, such as that the evidence establishes an element of the regulation, the Panel must be satisfied, after weighing up all the evidence and applying the relevant legal principles, that its conclusion is the one best supported by the evidence.⁸

The Complaint

12. The President asserts:
 - Council had supplied Cr Gibson with an iPad for the purposes of Council business.
 - Once issued, the iPad remained the property of the Shire, which Cr Gibson refused to acknowledge.
 - Cr Gibson has refused to enable the Shire to reset his password and ascertain the reason for what the President refers to as "excessive broadband usage charges".

³ Sections 5.107, 5.108, 5.109 of the Act.

⁴ *Re and Local Government Standards Panel* [2015] WASAC 51, paragraph 24.

⁵ Section 5.106 of the Act.

⁶ The effect of section 5.106 of the Act.

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

⁸ The effect of section 5.106 of the Act.



- When Council came to consider the Motion another Councillor asked Cr Gibson whether he wished to disclose an interest in the Motion, after which Cr Gibson declined to do so, thereby breaching regulation 11.
- During debate on the Motion Cr Gibson said the Shire's Chief Executive Officer (the CEO) was providing misinformation, failing in his Key Performance Indicators (KPIs) and lying, thereby breaching regulations 4 and 10.
- The President called a point of order under the Local Law, directing Cr Gibson to withdraw his statements about the CEO and apologise to him. Cr Gibson refused to do so.
- Cr Gibson deliberately sought to discredit the CEO in front of his fellow Councillors by claiming he had failed to meet his KPIs, despite him having met his KPIs, inferring the CEO was failing to adequately perform his role, thereby breaching regulation 7.
- Cr Gibson called the President a liar, which conduct amounted to further breaches of regulations 4 and 10.

The Response

13. Cr Gibson denies he committed the alleged breaches but does not deny that he engaged in the alleged conduct at the OCM. Cr Gibson relies on the previous chief executive officer's views about the ownership and use of iPads issued to Councillors and says that although the CEO has drafted a new policy "it is not retrospective and does not alter the facts of the previous arrangement".
14. Cr Gibson says the CEO has been dishonest and has persuaded the "weak" President to "join in his campaign".
15. Cr Gibson submits that he did not have any interest to disclose because "all Councillors have a common interest in receiving information on their iPads".

Findings of fact

16. When documenting its Reasons for Finding the Panel is always careful about referring to any Council deliberations held behind closed doors, in this case provided to the Panel as part of the Confidential Minutes. The Panel decided, after considering the content of the Confidential Minutes and their context that it was appropriate to refer to the Confidential Minutes.
17. Having considered the President's statement in the Complaint Form, the Confidential Minutes, the published minutes of the OCM (the Published Minutes) and Cr Gibson's Response the Panel is satisfied to the required standard that:
 - Item 11.1.1, titled "Email account" was on the agenda for the OCM as part of item 11, "Motions of which previous notice had been given". Item 11.1.1 concerned only Cr Gibson's email account.
 - The Motion was moved during part of the OCM open to the public. Cr Gibson seconded the Motion.



- After the Motion had been moved the President, as the Presiding Member, under clause 6.2 of the Local Law deemed that item 11.1.1 be dealt with behind closed doors. The Motion was later dealt with as part of item 14 "Meeting closed to members of the public" and designated item 14.1.3.
- The CEO was present when Council considered the Motion as items 11.1.1 and 14.1.3.
- When Council came to consider the Motion behind closed doors a Councillor suggested Cr Gibson should disclose an interest in the Motion because it concerned him personally. Cr Gibson chose not to disclose any interest.
- Cr Gibson did not make any disclosures of any type of interest in the Motion, either before the OCM began, at any time when the OCM was open to the public or when Council dealt with the Motion behind closed doors.
- Cr Gibson was in the chamber while Council discussed the Motion behind closed doors.
- During Council's discussion Cr Gibson made the following comments (the Comments), or said words to similar effect:
 - the CEO was providing incorrect information;
 - the CEO was lying; and
 - the CEO was not meeting his KPIs.
- Immediately after Cr Gibson made the Comments the President called a point of order⁹ and directed Cr Gibson to withdraw the Comments and apologise to the CEO¹⁰. Cr Gibson refused to do either of these things.
- Cr Gibson then called the President "a liar".
- The Council had formally assessed the CEO's performance against his KPIs in September 2017. The CEO was considered to have met or exceeded his KPIs.

Allegation 1 – breach of regulation 4

18. Regulation 4 provides:

"4. Contravention of certain local laws

(1) In this regulation —

'local law as to conduct' means a local law relating to conduct of people at council or committee meetings.

(2) The contravention of a local law as to conduct is a minor breach for the purposes of section 5.105(1)(b) of the Act."

First element – whether the Local Law is a "local law as to conduct" within the meaning of regulation 4(1)

⁹ Under clause 9.2 of the Local Law, part of Part 9, Preserving Order.

¹⁰ Under clause 8.15 of the Local Law, "Withdrawal of offensive language".



19. Clause 1.3 of the Local Law provides:

"1.3 Application and intent

(1) This local law provides rules and guidelines which apply to the conduct of meetings of the Council and its committees and to meetings of electors.

(2) All meetings are to be conducted in accordance with the Act, the Regulations and this local law."

20. Clearly the Local Law is a law about councillors' conduct at meetings and applied at the OCM when Cr Gibson made the Comments. This element is established.

Second element – whether Cr Gibson contravened the Local Law at the OCM

21. The relevant parts of clause 8.14 of the Local Law provide:

"8.14 Adverse reflection

...

(2) A Member is not—

(a) to reflect adversely on the character or actions of another Member or Officer; or

(b) to impute any motive to a Member or Officer,

unless the meeting resolves, without debate, that the motion then before the meeting cannot otherwise be adequately considered.

(3) A Member is not to use offensive or objectionable expressions in reference to any Member, Officer or other person.

(4) If a Member specifically requests, immediately after their use, that any particular words used by a Member be recorded in the minutes—

(c) the Presiding Member is to cause the words used to be taken down and read to the meeting for verification; and

(d) the Council may, by resolution, decide to record those words in the minutes."

22. The Panel is satisfied to the required standard that the comment that the CEO was lying reflected adversely on his character. The comment that the CEO had failed to meet his KPIs, when he had done so, reflected adversely on his performance, thus on his actions. There is no evidence that Council made any resolutions of the type referred to in clause 8.14(2) that would excuse Cr Gibson for making the Comments.

Further, when the Presiding Member directed Cr Gibson to withdraw the remarks in accordance with clause 8.15(1), he refused to do so.¹¹

23. Cr Gibson breached clause 8.14 of the Local Law. This element is established.

¹¹ Confidential Minutes



Finding in relation to regulation 4(2)

24. Cr Gibson breached regulation 4(2) because he contravened a local law as to conduct.

Allegation 2– breach of regulation 7(1)(b)

25. The President does not specify whether he alleges a breach of regulation 7(1)(a), 7(1)(b) or both. Based on the information in the Complaint Form and the accompanying documents the Panel treated the Complaint as an allegation of a breach of regulation 7(1)(b).

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

“7. Securing personal advantage or disadvantaging others

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

...

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

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

27. Regulation 7(2) does not exclude the operation of regulation 7(1)(b) in this case because the alleged conduct is not conduct that could contravene the parts of the Act and *The Criminal Code* referred to in regulation 7(2).

First element – whether Cr Gibson was a councillor when he made the Comments

28. Clearly this element is established.

Second element - whether Cr Gibson used his office as a councillor when he made the Comments

29. This element is also established because Cr Gibson attended the OCM and contributed to the discussion about the Motion in his capacity as a councillor.

Third element – whether Cr Gibson made improper use of his office as a councillor

30. The dictionary definition of “improper” is “not in accordance with propriety of behaviour, manners, etc.; unsuitable or inappropriate for the purpose or occasion; abnormal or irregular.”¹²

31. Whether there is impropriety is to be assessed objectively: would a reasonable person with knowledge of the duties, powers and authority of a councillor, and all the circumstances of the particular case, form the view that the councillor had breached the standards of conduct expected of a councillor?¹³ “For behaviour to be improper it must be such that a right-thinking person would regard the conduct as so wrongful and

¹² Macquarie Dictionary, Revised Third Edition.

¹³ *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 27, referring to *R v Byrnes* (1995) 183 CLR 501.



inappropriate in the circumstances that it calls for the imposition of a penalty.”¹⁴ Councillors have a duty to be faithful to the proper workings of the local government and their council.¹⁵

32. Under the Act Panel members must have regard to the general interests of local government in Western Australia.¹⁶ It is in the interests of local government that councillors are, and are seen to be, professional and to act consistently with authorised decisions of Council and the administration. Councillors must also respect, and be seen to respect, the local government’s processes and the roles of its officers and their lawful decisions.
33. Regulation 3 of the Regulations sets out general principles to guide councillors’ behaviour, although contravention of any of any of these does not amount to a minor breach.¹⁷ Regulation 3 provides, among other things, that councillors should act with reasonable care and diligence, act with honesty and integrity and treat others with respect and fairness.
34. The meaning of “improper” must be considered in the context of relevant legislation, such as the Act and the Regulations, other rules and standards that apply to a councillor’s role and conduct, such as the local government’s Code of Conduct, and the circumstances and context of the case.¹⁸
35. Conduct can be improper even though the councillor’s judgment is that it isn’t improper. A councillor’s use of his or her office can be improper even though the councillor is intending to benefit the local government, the council or the ratepayers and residents.¹⁹
36. It is Council’s role to formally assess the CEO’s performance. There is no evidence to indicate that Cr Gibson raised his concerns about the CEO’s performance during the September 2017 performance review. It was not appropriate to challenge the CEO’s performance against formal performance criteria when Council was not considering an agenda item dedicated to the issue of the CEO’s performance.
37. After applying the tests for impropriety outlined above the Panel finds Cr Gibson breached the standards of conduct expected of a councillor when accusing the CEO and President of lying; and when questioning the CEO’s performance when Council had as recently as September 2017 formally assessed his performance and found him to have met or exceeded his KPIs.
38. Any reasonable person hearing Cr Gibson’s comments and knowing the standards of conduct that apply to Councillors in their dealings with Shire employees and fellow Councillors would find Cr Gibson’s comments to be personal, unprofessional, offensive and disrespectful towards the CEO. Cr Gibson breached the standards of conduct expected of a councillor at the closed part of the OCM, amounting to improper

¹⁴ *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 9, referring to *Robbins v Harness Racing Board* [1984] VR 641.

¹⁵ *Yates and Local Government Standards Panel* [2012] WASAT 59 paragraph 64(5), *Treby and Local Government Standards Panel* [2009] WASAT 224 paragraph 19.

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

¹⁷ Regulation 13.

¹⁸ *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 10, referring to *Treby and Local Government Standards Panel* [2010] WASAT 81 (*Treby* 2010).

¹⁹ *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64(4), referring to *Treby* 2010.



use of his office.

39. This element is established.

Fourth element – whether Cr Gibson intended to cause detriment to the local government or any other person

40. “Detriment” means loss, damage or injury.²⁰ It includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage. A person or organisation can suffer detriment through others thinking less favourably of them/it.²¹
41. For regulation 7(1)(b) to be satisfied it is not necessary to show that the local government or the person concerned actually suffered detriment.²² And it is not enough to show that the local government or the person concerned suffered detriment, or could have suffered detriment. The Panel must find that the councillor believed that his or her actions would cause detriment and took the action to cause detriment.²³
42. “To cause detriment” means “in order to” or “for the purpose of” causing detriment, or “with the will to” cause detriment.²⁴ There can be a finding of intent if, after considering all the evidence, the only reasonable inference is that the councillor intended to cause detriment.²⁵
43. Cr Gibson accused the CEO of being dishonest and incompetent. He does not resile from this in his Response. Cr Gibson makes a further accusation in his Response – that the CEO had “recently enlisted the weak President” to “join in (the CEO’s) campaign” to mislead Council.
44. Cr Gibson seconded the Motion, which ensured it was debated by Council. He would have known that Council, through a formal assessment, found the CEO had performed well. The only reasonable conclusion is that Cr Gibson wanted to use the debate on the Motion to target the CEO, to attack him personally and challenge his integrity in front of the other Councillors. The Panel is satisfied that Cr Gibson set out to damage the CEO.
45. On balance, the Panel is not satisfied to the required standard that Cr Gibson formed the intention to damage the President by calling him a liar. This may have been an impulsive comment made in the heat of the moment.
46. This element is established because Cr Gibson intended to cause detriment to the CEO.

Finding in relation to regulation 7(1)(b)

47. Cr Gibson breached regulation 7(1)(b).

²⁰ Macquarie Dictionary Revised Third Edition, 2001.

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

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

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

²⁴ *Chew* 2010.

²⁵ *Treby* 2010.



Allegation 3 – breach or regulation 10(3)

48. The President does not specify whether he alleges a breach of regulation 10(1) or 10(3) [regulations 10(2) and 10(4) provide exemptions] but based on the content of his Complaint Form the Panel treated the Complaint as an allegation that Cr Gibson breached regulation 10(3).

49. Regulations 10(3) provides²⁶:

“10. Relations with local government employees

...

(3) If a person, in his or her capacity as a council member, is attending a council meeting, committee meeting or other organised event and members of the public are present, the person must not, either orally, in writing or by any other means —

(a) make a statement that a local government employee is incompetent or dishonest; or

(b) use offensive or objectionable expressions in reference to a local government employee.

First two elements – whether Cr Gibson was attending a council or committee meeting, or an organised event, in his capacity as a council member

50. Cr Gibson was attending a council meeting (the OCM) in his capacity as a councillor. These elements are established.

Third element - whether members of the public were present

51. Cr Gibson made the Comments behind closed doors. Members of the public were excluded. This element is not established. It is not necessary to consider the other elements of regulation 10(3).

Finding in relation to regulation 10(3)

52. Cr Gibson did not breach regulation 10(3).

Allegation 4 – breach or regulation 11(2)

53. Regulation 11 requires a councillor to disclose what is commonly referred to as an “impartiality interest”. The relevant parts of regulation 11 provide:

²⁶ In this case regulation 10(4) [which provides that regulation (3)(a) does not apply to conduct that is unlawful under *The Criminal Code* Chapter XXXV] does not exclude the operation of regulation 10(3)(a).



54. Regulation 11 provides:

"11. Disclosure of interest

(1) In this regulation —

interest means an interest that could, or could reasonably be perceived to, adversely affect the impartiality of the person having the interest and includes an interest arising from kinship, friendship or membership of an association.

(2) A person who is a council member and who has an interest in any matter to be discussed at a council or committee meeting attended by the member must disclose the nature of the interest —

- (a) in a written notice given to the CEO before the meeting; or*
- (b) at the meeting immediately before the matter is discussed."*

...

(4) Subregulation (2) does not apply if —

(a) a person who is a council member fails to disclose an interest because the person did not know he or she had an interest in the matter;

or

(b) a person who is a council member fails to disclose an interest because the person did not know the matter in which he or she had an interest would be discussed at the meeting and the person disclosed the interest as soon as possible after the discussion began.

(5) If, under subregulation (2)(a), a person who is a council member discloses an interest in a written notice given to the CEO before a meeting then —

(a) before the meeting the CEO is to cause the notice to be given to the person who is to preside at the meeting; and

(b) at the meeting the person presiding is to bring the notice and its contents to the attention of the persons present immediately before a matter to which the disclosure relates is discussed.

(6) If —

(a) under subregulation (2)(b) or (4)(b) a person's interest in a matter is disclosed at a meeting; or

(b) under subregulation (5)(b) notice of a person's interest in a matter is brought to the attention of the persons present at a meeting,

the nature of the interest is to be recorded in the minutes of the meeting."



55. The Published Minutes for item 11 set out clause 5.3 of the Local Law, which requires councillors to give at least 7 days notice of a motion they wish Council to consider, and that the motion be included in the agenda.²⁷
56. The Published Minutes for item 11 indicate that a Councillor other than Cr Gibson had given notice of his intention to move the Motion. The Panel is satisfied that the Motion appeared in the agenda for the OCM, thus was available to the public before Council moved behind closed doors to debate the Motion.
57. A councillor must disclose an impartiality interest even if council moves behind closed doors to consider the matter, as regulation 11(2) requires a councillor to disclose an interest just before council considers the matter, unless he or she has disclosed it before the start of the meeting.

First element - whether the Cr Gibson had an "interest" in the Motion within the meaning of "interest" in regulation 11(1)

58. The test is objective. It is not necessary to establish that a councillor intended to vote, or was likely to vote, in a particular way. The question is whether it would be reasonable for a person who knows about a councillor's particular connection to the business coming before Council to perceive that the councillor may not be impartial when discussing the issues or voting on a motion.
59. It was reasonably foreseeable that Cr Gibson may not be impartial when voting on the Motion because it was about Cr Gibson's own email account and data allowance. He would be directly affected by the vote.
60. This element is established.

Second element - whether Cr Gibson disclosed his impartiality interest

61. Neither the Published nor Confidential Minutes record any disclosure of interest by Cr Gibson to the CEO before the OCM commenced [under regulation 11(2)(a)] or by Cr Gibson during any part of the OCM [under regulation 11(2)(b)]. This is consistent with Cr Gibson declining to disclose any interest behind closed doors when invited to do so, and with his Response.
62. The Panel is satisfied that Cr Gibson did not disclose his impartiality interest as required by regulation 11(2).

Whether regulation 11(4) excused Cr Gibson from having to disclose his impartiality interest.

63. The Panel is satisfied to the required standard that the Motion was included in the agenda for the OCM. There is no evidence to support a finding that Cr Gibson did not know he had an impartiality interest in item 11.2.3 [regulation 11(4)(a)] or that the Motion was to be discussed at the OCM [regulation 11(4)(b)].

²⁷ Clause 5.3(2) of the Local Law provides that "a notice of motion under ... is to be given at least 7 clear working days before the meeting at which the motion is moved". Clause 5.3(1) provides that "a Member may raise at a meeting such business as he or she considers appropriate, in the form of a motion, of which notice has been given in writing to the CEO and which has been included on the agenda".



64. Regulation 11(4) did not excuse Cr Gibson from his duty to disclose the interest.

Finding in relation to regulation 11(2)

65. Cr Gibson breached regulation 11(2).

Panel's finding

66. The Panel finds that Cr Gibson breached regulations 4, 7(1)(b) and 11(2). Cr Gibson did not breach regulation 10(3). Therefore Cr Gibson committed three breaches of the Regulations.

S. Siekierka

Sheryl Siekierka (Presiding Member)

Paul Kelly

Paul Kelly (Member)

Merran Strauss

Merran Strauss (Member)

Date of Reasons 10 April 2018