



Local Government Standards Panel

Complaint Number	SP 2020 -029
Legislation	<i>Local Government Act 1995</i>
Complainant	Mr Stephen Cain
Respondent	Councillor Lee-Anne Smith
Local Government	City of Cockburn
Regulation	Regulation 6 Regulation 7 Regulation 11 of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mr Tim Fraser (Presiding Member) Mrs Emma Power (Member) Cr Peter Rogers (Member)
Heard	24 June 2021 Determined on the documents
Finding	No Breach Regulation 6 1 x Breach Regulation 7 1 x Breach of Regulation 11

FINDING AND REASONS FOR FINDING

Delivered 12 August 2021

DEFAMATION CAUTION

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Summary of the Panel's decision

1. On 24 June 2021, the Panel found that Councillor Lee-Anne Smith a councillor of the City of Cockburn (**"the City"**):
 - a. did not commit a minor breach pursuant to the *Local Government Act 1995 (WA)* (**"the Act"**) and regulation 6 of the *Local Government (Rules of Conduct) Regulations 2007* (**"the Regulations"**) when she disclosed allegedly confidential personal information about the health of the Complainant on her Facebook page on 5 November 2019;
 - b. did commit a minor breach pursuant to the Act and Regulation 7 of the Regulations when she wrote remarks regarding the health of the Complainant on her Facebook Page on 5 November 2019;
 - c. did not commit a minor breach pursuant to the Act and Regulation 7 of the Regulations when she:
 - i. she wrote remarks regarding the Complainant on her Facebook Page on 4 November 2019;
 - ii. she wrote remarks regarding the Complainant on her Facebook Page on 13 November 2019;
 - d. did commit three minor breaches pursuant to the Act and Regulation 11 of the Regulations when she failed to declare an impartiality interest in respect to the performance appraisal process for the Chief Executive Officer of the City at each of:
 - i. the Ordinary Council Meeting of 4 November 2019;
 - ii. the Ordinary Council Meeting of 4 December 2019; and
 - iii. the Ordinary Council Meeting of 13 January 2020,as further specified in paragraph 18 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 provides for the circumstances in which a council member commits a minor breach.¹
4. 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.²
5. 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.
6. 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,

¹ Section 5.105 of the Act

² Section 5.106 of the Act



- inference or evidence relied upon is more likely than not to have occurred or be accurate³; and
- b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding⁴.
7. The Panel does not possess investigative or supervisory powers.⁵ The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials published by the relevant local authority's website.
 8. 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.
 9. The Panel also must have regard to the general interests of local government in Western Australia⁶.
 10. 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

11. On 9 April 2020 the Panel received an email from Mr Don Green acting as complaints officer of the City ("**the Complaints Officer**"). The same enclosed a Complaint of Minor Breach Form dated 2 April 2020.
12. Due to the fact that Cr Smith had been found to have committed five prior minor breaches, at its meeting of 16 June 2020 the Panel made the decision:
 - a. that if the alleged minor breach was found to have been committed, the same may be a recurrent breach; and
 - b. to send the complaint to the Departmental Chief Executive Officer ("**Department CEO**") under section 5.111 of the Act, to determine whether the Department CEO would make an allegation to the State Administrative Tribunal ("**SAT**") under section 5.112(2) of the Act.
13. The complaint was duly referred to the Department CEO on 19 June 2020.
14. On 20 April 2021 the Director General determined he would not make an allegation to SAT and referred complaint SP 2020-029 back to the Panel pursuant to section 5.112(4).
15. In the complaint form, the Complainant alleges that Cr Smith has breached:
 - a. Regulation 6 by disclosing confidential personal information about the health of Mr Stephen Cain on her Facebook page on or about 5 November 2019 ("**Allegation 1**");
 - b. Regulation 7 by causing a detriment to the City of Canning's Chief Executive Officer, Mr Cain ("**the CEO**") by writing remarks regarding the CEO on her Facebook page on each of:
 - i. 4th November 2019 ("**Allegation 2**");
 - ii. 5th November 2029 ("**Allegation 3**"); and

³ Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1

⁴ Briginshaw v Briginshaw (1938) 60 CLR 336

⁵ Re and Local Government Standards Panel [2015] WASC 51 (at paragraph 24)

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



- iii. 13 November 2019 (“**Allegation 4**”);
 - c. Regulation 11 by failing to declare a conflict of impartiality interest at Special Council Meetings held each of:
 - d. 4th November 2019 (“**Allegation 5**”);;
 - e. 4th December 2019 (“**Allegation 6**”); and
 - f. 13th January 2020 (“**Allegation 7**”).
- as set out in paragraph 18 below (together “**the Complaint**”).
16. The Panel convened 24 June to consider the Complaint.
17. The Panel:
- a. accepted the advice of the Department that, based on information published on the Western Australian Electoral Commission’s website, Cr Smith was:
 - i. was elected to the Council of the City in in October 2017 for a term expiring in October 2021;
 - ii. a Councillor at the time of the alleged breach; and
 - iii. a Councillor when the Panel met on 24 June 2021;
 - b. was satisfied the part of the Complaint was made within six months after the alleged breach occurred⁷;
 - 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 breach⁸;
 - d. was satisfied the Department had provided procedural fairness to Cr Smith; and
 - e. found it had jurisdiction to consider the Complaint.

The Specifics of the Complaint

18. The Complainant makes the following particular arguments and allegations in respect to the Complaint as summarised by the Panel:

Background - Chronology of Events

- a. *8 August 2019* at the City of Cockburn’s August Ordinary Council Meeting
 - i. Council resolved to extend the contract of the City’s CEO, Mr Stephen Cain
 - ii. in a decision 7:3. Cr Smith, Cr Allen and Mayor Logan Howlett voted against this resolution.
 - iii. later that evening Cr Smith and Cr Allen engaged in an email diatribe about the decision, making derisory remarks about Mr Cain. Both indicated that they had wanted Mr Cain replaced as CEO and Mr Stuart Downing to replace him.
- b. *6 September 2019* - Due to the enforcement of Standards Panel sanctions at SAT against Cr Smith the attitude of Cr Smith towards Mr Cain became more hostile.

⁷ Section 5.107(4) and 5.109(2) of the Act

⁸ Section 5.107 and 5.109 of the Act



- c. *20 September 2020* - Mr Cain sent an email to Cr Smith and Cr Philip Eva with regard their behaviour in front of staff and visitors at a briefing session for Elected Members held on 19 September 2019. Cr Eva expressed remorse however Cr Smith did not accept any responsibility for the breach of the Code of Conduct.
- d. *1 October 2019* - Mr Cain appeared in person at a Directions Hearing in SAT.
- e. *14 October 2019* - Cr Smith sent an email to Mr Cain, copying his Executive and the City's Communications Manager, entitled Stalking. The email irrationally accused Mr Cain's of stalking Cr Smith on Facebook.
- f. *23 October 2019* - Mr Cain sent an email to all Elected Members about the impact that the continued behavioural issues of Elected Members had had on his ability to perform his job, as well as his health and well-being.
 - i. While Cr Smith was not specifically named, that email identified that it was predominantly coming from one individual; it also referenced a series of false allegations that had previously made against Mr Cain (by Cr Smith) as well as the recent email entitled 'Stalking' stating she had sent:
 - ii. The email also noted the impact on Mr Cain's health stating:

“ This situation has had a sustained and substantial impact on my mental and physical health.”
- g. *24 October 2019* - Mayor Howlett called a meeting of Elected Members to discuss Mr Cain's complaint. After that meeting Cr Smith sent the Mayor and the other Elected Members an email complaining that:

“ I strongly believe I am unjustly and unfairly accused of bullying and harassment.”
- h. 4 November 2019 – a Special Council Meeting (“**the November SCM**”) had been called to deal with Mr Cain's complaint.
 - i. On that date Cr Smith chose to post link to the November SCM agenda for that evening on her Facebook page stating:

“ Special Council Meeting relating on the CEO's allegations of an unsafe workplace and unfit to attend work”
 - ii. Despite having asserted her own concerns on 24 October 2019 that the bullying involved her behaviour, Cr Smith participated in the November SCM, which set the Terms of Reference (TOR) into the bullying complaint, by Mr Cain.
 - iii. As noted in the Agenda for the meeting Mr Cain's email of 23 October 2019 was attached as a confidential attachment to the agenda item.
 - iv. Having participated in the debate on this item Cr Smith also specifically requested that her vote against the motion to be recorded in the Minutes. Further demonstrating her awareness of the connection between the complaint by Mr Cain and her direct involvement in these matters.
- i. *5 November 2019* - Cr Smith posted the following comment on her Facebook page:

“ I look forward to any investigation triggered by the CEO's workplace claims and wish him well in his mental health recovery”

 - i. With respect to Mr Cain's health status the agenda item had not mentioned mental health issues, only the following material:



“Mr Cain provided Council with a doctor's note stating he was unfit to attend work for the period 23 October to 8 November due to the issues associated with the Statement from the CEO”.

- j. 13 November 2019 - Cr Smith posted comments of on her Facebook page including extracts of articles that had appeared in the West Australian on 11 November 2019 about Mr Cain with the following disparaging remark:
 - “ So far as the CEO goes what a way to end a career. I wish you well in your recovery journey and ask everyone to be careful with your comments.”*
- k. 4 December 2019 - Cr Smith participated in the City's Special Council Meeting of this date (**“the December SCM”**), which put allegations of misconduct against Mr Cain and set the term of reference for an investigation into these matters.
 - i. The resolution of the SCM was also to suspend Mr Cain's employment.
- l. 10 January 2020 - Mr Cain's lawyers sent Cr Smith correspondence with a draft Fair Work Commission (**“FWC”**) application by Mr Cain seeking orders against Cr Smith and other to 'Stop Bullying' him.
 - i. The letter clearly states:
 - “Please note that you are one of the named respondents to the application.”*
- m. 13 January 2020 - Cr Smith participated in a Special Council Meeting of this date (**“the January SCM”**).
 - i. This concerned confidential matters including the investigation into misconduct against Mr Cain.
- n. 4 February 2020 - the SAT delivered its decision against Cr Smith suspending her for a period of 2 months and ordering she pay costs to the City of \$6,000.

Alleged Breach Regulation 6

- o. The agenda item for the November SCM included Mr Cain's email of 23 October 2019.
- p. That document had been given a confidential status.
- q. The agenda item for that meeting that referred to this included some health-related information about Mr Cain, but no reference to any mental health concerns.
- r. The meeting conducted discussion on this matter in a closed session.
- s. Cr Smith's posting of personal remarks about Mr Cain that referenced the impact on his mental health directly disclosed information to the public that Cr Smith had acquired from a confidential document presented to and discussed at the closed meeting.

Alleged Breaches Regulation 7(1)(b) x 3

- t. Cr Smith published comments on her Facebook page on 4, 5 and 13 November 2019 that were specifically designed to cause Mr Cain embarrassment.
- u. 4 November 2019 - there had been no need for Cr Smith to post a link to an SCM that dealt with a confidential item involving Mr Cain, other than for the purpose of giving this matter publicity in order to undermine Mr Cain.



- v. The further remarks on 5 November about Mr Cain's mental health were also intended to disparage him and his capacity to do his job.
- w. The derogatory nature of the remarks in the 13 November 2019 post are particularly reflective of Cr Smith's deep bias against Mr Cain.
- x. Cr Smith is well aware of the provisions of the City's Elected Members Code of Conduct (the Code) and has received training on the provisions specifically relating to social media. In particular, clause 5.2(c) of the Code applies to social media use.
- y. Cr Smith's actions show complete disregard for the provisions of the Code and were intended to cause Mr Cain significant disadvantage.

Alleged breaches Regulation 11 x 3

- z. Cr Smith's behaviour has demonstrated a strong and persistent bias against Mr Cain, specifically including:
 - i. Email exchange wanting Mr Cain's employment to be terminated and for him to be replaced by Mr Downing;
 - ii. False allegation that Mr Cain had stalked her;
 - iii. Email to fellow Elected Members of 24 October 2019 where she asserts her awareness of bullying (identified by Mr Cain);
 - iv. Facebook post of 13 November 2019 with comments that demonstrated her preconception that Mr Cain had committed misconduct (ending his career), prior to any such matter being put to Council;
 - v. Continuous lack of compliance with the Standards Panel Order necessitating Mr Cain to take lengthy action against Cr Smith through the SAT;
- aa. The Minutes of the three Special Council Meetings (November SCM, December SCM and January SCM) show that Cr Smith was in attendance and each meeting and that she did not make any declaration of interest (impartiality or otherwise) prior to or during the conduct of these meetings.
- bb. Under the Rules of Conduct and the City's Standing Orders, Cr Smith was obliged to make a declaration of 'Impartiality':
 - i. at the November SCM that set the terms of reference for a bullying complaint that directly involved Cr Smith and had clearly referenced behaviour (stalking allegation) that she knew she alone was responsible for;
 - ii. at the December SCM that made allegation of misconduct against Mr Cain and resolved to suspend him knowing that she had previously expressed her strong desire to see Mr Cain's employment terminated and for him to be replaced as CEO along with comments she had made on her Facebook page (13 November) talking about the end of Mr Cain's career; and
 - iii. at the January SCM, prior to that meeting, she had received a draft FWC application that specifically named Cr Smith in an application (to stop bullying) by Mr Cain.

Pattern of Bullying Behaviour

- cc. On 11 March 2020 the City held an SCM to consider a report prepared by Dr Helen Sitlington ("**Sitlington Investigation**") and the City's lawyers (Messrs Jackson McDonald) into the bullying complaint that had been made by Mr Cain.



That report validated the complaint that had been brought by Mr Cain and determined that there had been a pattern of bullying applied to him by Cr Smith.

- dd. Cr Smith's behaviour is substantial failure of the requirements of the Elected Members Code of Conduct and in particular clause 3.1 of the Code.
- ee. This Sitlington Investigation report is confidential, but by direction of Council has been provided to the Crime and Corruption Commission and the Department. That report should be accessed to add context to the matters raised in this complaint.
- ff. Noting also that the matters referred to in the Sitlington Investigation all pre-date the allegations raised in this Complaint, the actions of Cr Smith outlined in this complaint are seen by Mr Cain as further bullying of him. This represents an ongoing pattern of behaviour by Cr Smith that extends over many years

Recurrent Breaches, and Consideration as Serious Breach

- gg. Mr Cain considers that the above allegation of 7 minor breaches, individually and more so collectively, represent a serious breach of the standards of behaviour expected of Elected Members.
 - hh. Noting that Cr Smith has previously been sanctioned on several occasions for breaches of Regulation 7, these new allegations represent consideration by the Standards Panel to be viewed as recurrent breaches of the Regulations by Cr Smith;
 - ii. The failure by Cr Smith to abide by previous Orders issued by the Standards Panel and need for the SAT to determine this matter (which elevated this to the status of a Serious Breach), with the SAT's subsequent decision placing it in this category; also require this complaint to be similarly considered at the standard of a Serious Breach of the Rules of Conduct by Cr Smith.
19. The Complainant also supplied the following supporting documentation to the Panel:
- a. Email exchange between Cr Smith, Cr Kevin Allen and former Cr Carol Reeve-Fowkes (entitled Slap in the Face) dated 8 August 2019;
 - b. Email from Mr Cain to Cr Smith and Cr Philip Eva (entitled Conduct at Briefing Sessions- CONFIDENTIAL) dated 20 September 2019;
 - c. Email exchange to Mr Cain and staff from Cr Smith (entitled Stalking) dated 14 October 2019;
 - d. Email from Mr Cain to Elected Members (entitled Statement from the CEO - CONFIDENTIAL) dated 23 October 2019;
 - e. Email from Cr Smith to Elected Members dated 24 October 2019;
 - f. Minutes SCM held on 4 November 2019;
 - g. Extracts from Facebook page of Cr Smith 4 and 5 November 2019;
 - h. Extracts from Facebook page of Cr Smith 13 November 2019;
 - i. Minutes SCM held on 4 December 2019;
 - j. Letter from Allion Partners to Cr Smith dated 10 January 2020;
 - k. Minutes SCM held on 13 January 2020;
 - l. Decision of the State Administrative Tribunal (SAT) (2020 WASAT 18 Stephen Cain as CEO City of Cockburn v Smith) dated 4 February 2020;



- m. Extract from City of Cockburn Local Laws Standing Orders 2016, Part 21 - Declaration of Impartiality Interest; and
- n. City of Cockburn Elected Members Code of Conduct adopted May 2018.

Respondent's Response

- 20. By an email dated 2 June 200, Cr Smith provided a response to the Complaint.
- 21. Cr Smith provided the following comments and arguments regarding the Complaint:
 - a. Cr Smith hopes the Panel takes into consideration the Fairwork outcome attached agreeing all matters have been dealt with administratively.
 - b. Cr Smith was believed and while there was some questionable behaviour, they believed measures had been put in place to ensure no further risk of repeated behaviour.
 - c. All of this information has also been read by the Minister of Local Government who felt no remedial action was warranted, nor suspension.
 - d. These complaints have caught Cr Smith unawares.
- 22. Cr Smith also provided:
 - a. a spreadsheet of emails showing the more than positive relationship Mr Cain and Cr Smith;
 - b. a letter dated 2 December 2019 from Hon David Templeman MLA providing a "show cause notice" to Cr Smith; and
 - c. Fair Work Commission Decision [2020] FWC 1914 - Stephen Cain v Stuart Downing; Logan Howlett; Lee-Anne Smith; Kevin Allen (AB2020/244).

PANEL'S CONSIDERATION

Regulation 6

- 23. Regulation 6 prevents the disclosure of confidential or restricted information obtained by a councillor and reads as follows:

"(1) In this regulation —

***"closed meeting"** means a council or committee meeting, or a part of a council or committee meeting, that is closed to members of the public under section 5.23(2) of the Act;*

***"confidential document"** means a document marked by the CEO to clearly show that the information in the document is not to be disclosed;*

***"non-confidential document"** means a document that is not a confidential document.*

(2) A person who is a council member must not disclose —

(a) information that the council member derived from a confidential document; or



- (b) *information that the council member acquired at a closed meeting other than information derived from a non-confidential document.*
- (3) *Sub regulation (2) does not prevent a person who is a council member from disclosing information —*
- (a) *at a closed meeting; or*
- (b) *to the extent specified by the council and subject to such other conditions as the council determines; or*
- (c) *that is already in the public domain; or*
- (d) *to an officer of the Department; or*
- (e) *to the Minister; or*
- (f) *to a legal practitioner for the purpose of obtaining legal advice; or*
- (g) *if the disclosure is required or permitted by law.”*
24. To make a finding of a minor breach in respect to regulation 6 the Panel must be satisfied that:
- a. Cr Smith was an elected member at the time of the breach and at the time the matter was determined; and
- b. that it is more likely than not that:
- i. Cr Smith disclosed information to someone who at the time was not also a Councillor of the same local government; and
- ii. the disclosed information was acquired by Cr Smith either:
- A. from a confidential document; or
- B. at a council or committee meeting, or a part of a council or committee meeting, that was closed to members of the public under section 5.23(2) of the Act; and
- iii. if the information was acquired at a closed council or committee meeting, Cr Smith did not derive the disclosed information from a non-confidential document; and
- iv. the disclosed information was not information already in the public domain or the disclosure did not occur in any of the ways identified in regulation 6(3).

Regulation 6 – Allegation 1

Cr Smith was an elected member at the relevant times

25. Cr Smith was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.
26. This element is met.

The disclosed information was information Cr Smith acquired:

- **from a confidential document; or**
- **at a council or committee meeting (or part thereof) that was closed to members of the public under section 5.23(2) of the Act**



27. The Complainant has alleged that Cr Smith included information in her Facebook Post of the 5 November 2019 that was sourced from Mr Cain's email of 23 October 2019 which was a confidential attachment to the Agenda for the November SCM.
28. The text of the relevant Facebook Post is as follows:
- “ I look forward to any investigation triggered by the CEO's workplace claims and wish him well in his mental health recovery”*
- (“the 5 November Post”).**
29. In this case, the Panel notes that the events occurred as follows:
- a. Mr Cain sent an email to all elected members and on 23 October 2019 (**“the 23 October Email”**). The 23 October Email:
- i. was entitled “Statement from the CEO” in large font;
 - ii. had a subject line of *“Private and Legal Inconfidence - Statement from the CEO”*;
 - iii. included the following paragraph near the end of the email:

“ Please note that this information is being circulated under confidential cover. I am not advising staff of these concerns, but have informed the Executive.”
- b. The Agenda for the November SCM was published prior to the November SCM.
- i. The 23 October Email was annexed as a confidential attachment to the Agenda;
 - ii. The Minutes included the following text as part of the relevant report on the matter:

“ The Chief Executive Officer, Mr Stephen Cain, issued a statement by email to all Elected Members on the 23 October 2019 titled “Statement from the CEO” in which Mr Cain made claim that the City of Cockburn, as his employer, is not providing him with a safe working place.

Mr Cain provided Council with a doctor's note stating he was unfit to attend work for the period 23 October to 8 November 2019 due to the issues associated with the Statement from the CEO.

The Mayor wrote to the Chief Executive Officer on the 28 October 2019 acknowledging the email and medical certificate. The Mayor assured the CEO the City was committed to providing a safe workplace and the Elected Members will be collectively addressing the CEO's concerns with the utmost seriousness and urgency with the primary focus being on his health and wellbeing.”
- c. As part of the Fair Work Commission Decision [2020] FWC 1914 (**“the FWC Decision”**) it was established that a copy of an email substantially similar to the 23 October Email, was also sent by Mr Cain to persons working at other local government locations such as Swan, Kalamunda, Rockingham and Gosnells and a person involved with the media on 23 October 2019.
30. It appears the nature of the complaint is that Cr Smith included the word *“mental health”* rather than just the CEO's health in general.
31. A *“confidential document”* is defined in the Regulations as a document marked by the CEO to clearly show that the information in the document is not to be disclosed.



32. In this case, it is clear that from the date of the November SCM the 23 October Email was being treated as a confidential document on the basis that the document was presented as confidential at a council meeting that was closed to members of the public under section 5.23(2) of the Act.
33. Despite this there are three complicating factors:
 - a. whether, prior to the November SCM, the 23 October Email was of the nature that can be considered “to meet the technical requirements of being “confidential” under the Act; and
 - b. whether the disclosed information was already in the public domain due to the additional emails Mr Cain provided to other parties on 23 October 2019; and
 - c. whether the nature of Mr Cain’s health problems were implicitly related to his “mental health” due to the language used in the Minutes.
34. With respect to the 23 October Email itself, the Act requires that a document is marked by the CEO to clearly show that the same is intended to be confidential.
35. In this case, the Panel does not consider that the nature of the marking of the 23 October Email was enough to make the same confidential at that stage.
36. Although the matter was clearly of personal import to Mr Cain, and he indicated in the text of the email that he would like the same to be considered confidential, Cr Cain clearly stated in the document that he had:
 - a. reached out to the Director General of the Department; and
 - b. informed “the executive”.
37. The further action of Mr Cain sending a version of the 23 October Email to other parties in other local governments indicates that he was not intending for the contents of the same to be treated as a confidential document in relation to the City as contemplated under the Act, but rather a personally confidential document.
38. As such, the Panel finds to the required standard that prior to the November SCM it is more likely than not that the 23 October Email was not a confidential document as defined in the Regulations.
39. This element is not met.

Cr Smith did not derive the disclosed information from a non-confidential document or the information was not disclosed as set out in regulation 6(3).

40. As noted above, the Panel finds that the relevant information was acquired from a non-confidential source (despite the later intention to make the 23 October Email confidential).
41. The Panel further notes that by Mr Cain’s own actions, in sending a similar email to third parties, such information was already in the public domain.
42. This element is not met.

Conclusion

43. The elements required to find a breach of regulation 6 of the Regulations have not been met.



Regulation 7

44. Regulation 7 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:

“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 —*

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

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

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

45. The Complainant has not made any allegation that there was any intention to provide an advantage to any particular party, so the Panel has only considered regulation 7(1)(b) of the Regulations in this decision.
46. To make a finding of a minor breach of regulation 7(1)(b) of the Regulations the Panel must be satisfied to the required standard that:
- a. Cr Smith was an elected member at the time of the alleged breach and the time of the determination;
 - b. Cr Smith made use of her office as Council member of the City;
 - c. when viewed objectively, such use was an improper use of Cr Smith’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 Smith engaged in the conduct in the belief that detriment would be suffered by another person.
47. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or a lack of wisdom⁹. 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.
48. Impropriety does not depend on a councillor’s consciousness of impropriety. It is to be judged objectively and does not involve an element of intent¹⁰.
49. 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.
50. 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

⁹ Complaint of Minor Breach No. SP 3 of 2013

¹⁰ *Chew v R* [1992] HCA 18



exercised and his purpose or intention in exercising the power will be important factors in determining whether the power has been abused¹¹.

51. A councillor's use of his or her office can be improper even though it is for the purpose or with the intention of benefiting the Council¹².
52. "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.
53. It is not necessary to find whether any detriment was actually suffered¹³, but an intent to cause such detriment must be established.
54. The City of Cockburn Elected member Code of Conduct ("**the Code**") relevantly provides as follows:

" 3. Conduct

3.1 Elected Members shall act and be seen to act;

- *properly and in accordance with the requirements of the law and the terms of this Code;*

.....

- *to make no allegations which are improper or derogatory and refrain from any form of conduct, in the performance of their official or professional duties, which may cause any reasonable person unwarranted offence or embarrassment.*

3.2 Elected Members shall observe the highest standards of honesty and integrity and avoid conduct which might suggest any departure from these standards and be frank and honest in their official dealing with staff."

" 5. Media and External Communication

.....

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

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

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

¹¹ 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].

¹² Chew v the Queen [1992] HCA 18 at 634 (Mason CJ, Brennan, Gaudron and McHugh JJ)

¹³ Yates and Local Government Standards Panel [2012] WASAT 59 at [72]



As civic leaders, Elected Members must comply with the requirements of the Local Government Act 1995 and the Local Government (Rules of Conduct) Regulations 2007 and such obligations extend to when Elected Members use social media to communicate with the community.

In particular, the Local Government (Rules of Conduct) Regulations 2007 require that Elected Members must not:

- *gain directly or indirectly an advantage for themselves or any other person (Regulation 7 (1) (a))*
- *cause detriment to the City or any other person (Regulation 7(1) (b));*
-
- *disclose information derived from a confidential document or acquired from a closed meeting, or otherwise considered confidential in nature. (Regulation 2).*

(b) In view of this, Elected Members when using social media must:

- *only disclose and discuss publicly available information;*
- *ensure that all content published is accurate and not misleading and complies with all relevant City policies and legislative requirements;*
- *be polite and respectful to all people they interact with;*
- *avoid making negative comments about the Elected Members or Administration of the City of Cockburn or members of the community;*
- *avoid making any comment or post any material that might otherwise cause damage to other persons, or bring the City's reputation into question;*
- *comply with their record keeping responsibilities when using social media for Elected Member activities and Council related matters by providing a copy of the post to the City's Administration;*

(c) Elected Members when using social media must not:

-
- *post material that is offensive, obscene, defamatory, threatening, harassing, bullying, discriminatory, hateful, racist, sexist, or otherwise unlawful;*
-
- *use or disclose any confidential information obtained in their capacity as an Elected Member of the City, or release information to the public before it has been dealt with by Council or approved for release by the City;*
- *mention or disclose staff members names or positions publicly or through private means (direct message) via social media*
-”



Regulation 7(1)(b) – Allegation 2 – 4 November Facebook Post

Cr Smith was an Elected Member at the relevant times

55. Cr Smith was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.
56. This element is met.

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

57. In this case the relevant conduct was a Facebook post made by Cr Smith on 4 November 2019 (“the 4 November Post”).
58. The 4 November Post was posted by Cr Smith on a Facebook Page entitled “*The Word in the East*”.
59. Various elements may indicate whether a Councillor is acting in their capacity as a councillor when making public comment such as:
 - a. the name or title attributed to the Councillor in the communication;
 - b. the subject matter or contents of the communication and the degree to which the same are related to the Council or City or local community;
 - c. the public or private nature of the communication; and
 - d. the audience with which the communication is shared.
60. In this case:
 - a. the title “The Word in the East” is a reference to Cr Smith’s role as councillor of the East Ward of the City;
 - b. the identifying photo of Cr Smith shows her standing behind a lectern with the words “City of Cockburn”;
 - c. the subject matter of the relevant post was in relation to the City and the CEO of the City; and
 - d. the audience of the post was clearly intended to be the electors of the local community.
61. Given the above, the Panel finds to the required standard that Cr Smith acted in her capacity as an elected member and therefore made use of her office as a council member of the City.
62. This element is met.

Cr Smith’s use was improper

63. Mr Cain asserts that the 4 November Post is improper as:
 - a. there had been no need for Cr Smith to post a link to the November SCM that dealt with a confidential item involving Mr Cain, other than for the purpose of giving this matter publicity in order to undermine Mr Cain; and
 - b. it was in breach of clause 5.2(c) of the Code applies to social media use.
64. The 4 November Post reads as follows:

“ Special Council Meeting relating to the CEO's allegations of an unsafe workplace and unfit to attend work.



Here is a copy of the agenda and details:

COCKBURN.WA.GOV.AU
www.cockburn.wa.gov.au ”

65. In this case the Panel does not find that the 4 November Post is in breach of the Code.
66. Although clause 5.2(c) of the Code notes mentioning or disclosing “*staff members names or positions publicly*” the Panel does not consider that such prohibition would reasonably extend to the position of CEO. Unlike other administrative or internal staff positions, the CEO is a highly public position of the City and members of the public would be aware of who the CEO was and the position that he occupied.
67. There is no further referral to any negative or derogatory opinion or any confidential material.
68. The nature of the 4 November Post is simply a referral to the publicly available documents issued by the City. There is nothing improper in providing these details to electors.
69. The Panel finds that it is more likely than not that conduct by Cr Smith by posting the 4 November Post was not improper as:
 - a. the conduct was not in breach of the Code; and
 - 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.
70. This element is not met.

Cr Smith intended to cause a disadvantage

71. The Complainant has argued there was no other reason to make the 4 November Post other than for the purpose of giving this matter publicity in order to undermine Mr Cain.
72. With due respect to Mr Cain, the temporary leave of the CEO of the City on a medical basis would be a matter that would reasonably be seen to be of interest to the general public.
73. Further, a certain amount of publicity was going to be inevitable, given the nature of the leave Mr Cain as taking and the (public) accusations in respect to the City not providing a safe workplace.
74. In this case, Cr Smith passed on information to electors that was likely to be of interest to them and, given the passive and benign nature of this particular post, there is nothing in the 4 November Post which supports any argument that the information as passed on in order to cause a detriment to Mr Cain.
75. The Panel finds to the required standard that by posting the 4 November Post, Cr Smith did not have an intention to cause a detriment to the CEO.
76. This element is not met.

Conclusion

77. Given the above, the elements required to find a breach of regulation 7(1)(b) of the Regulations have not been met.



Regulation 7(1)(b) – Allegation 3 – 5 November Facebook Post

Cr Smith was an Elected Member at the relevant times

78. Cr Smith was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.
79. This element is met.

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

80. In this case the relevant conduct was a Facebook post made by Cr Smith on 5 November 2019 (“**the 5 November Post**”).
81. For the same reasons as set out in paragraphs 59 and 60 above, the Panel finds to the required standard that Cr Smith acted in her capacity as an elected member and therefore made use of her office as a council member of the City.
82. This element is met.

Cr Smith’s use was improper

83. Mr Cain asserts that the 5 November Post is improper as the same was intended to disparage him and his capacity to do his job.
84. The relevant portion of the November 5 Post reads as follows:

“ I look forward to any investigation triggered by the CEO’s unsafe workplace claims and wish him well in his mental health recovery!”
85. This Post was made in the context that:
 - a. the Council had recently met at the November SCM;
 - b. Cr Smith had received the 23 October Email from the CEO which included the CEO’s desire to keep this highly personal matter confidential;
 - c. the 23 October Email had been attached to the Agenda for the November SCM as a confidential attachment;
 - d. the portion of the November SCM dealing with the matter was closed to the public; and
 - e. the words “mental health” were used in the 23 October Email, but not included in the public portion of the Agenda or Minutes of the November SCM.
86. The Panel notes that, although the 23 October Email does not meet the technical requirements for being a confidential document as defined under the Regulations, Cr Smith was on clear notice that there was an intention to keep certain portions of the matter private.
87. Further, at this stage, Cr Smith was aware that her actions were alleged to be a substantial reason for Mr Cain taking leave.
88. On the face of the 5 November Post, Cr Smith is wishing the CEO well. To a member of the public, this would likely appear to be the case. However, the relevant context was that following receipt of the 23 October Email and after attending the November SCM, Cr Smith would have been aware that her:
 - a. past interactions with Mr Cain were going to be examined in detail in the circumstances she was accusing of engaging in sustained bullying and harassment; and



- b. further conduct with respect to Mr Cain was highly likely to be closely scrutinised in the context of any interactions with or mention of Mr Cain.
89. In this context the Panel finds that it is more likely than not that the 5 November Post was in breach of the Code in that the comment:
 - a. although dressed up in well wishes, was a comment containing a negative inference in relation to the current health status of a member of the Administration of the City;
 - b. did not avoid including material that might cause damage to the CEO by projecting a certain impression as to his health to the public before any investigation or finding had taken place; and
 - c. in the context of the allegations made by Mr Cain against Cr Smith, was likely to be considered by Mr Cain a continuation of harassing and bullying conduct.
90. The Panel finds that it is more likely than not that conduct by Cr Smith by posting the 4 November Post was improper as:
 - a. the conduct was in breach of the Code; and
 - b. the conduct not of such a nature that a reasonable individual (were they aware of all of the circumstances surrounding the matter) 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.
91. This element is not met.

Cr Smith intended to cause a disadvantage

92. Although on a shallow perspective, it may have appeared Cr Smith wanted to wish the CEO well, given the history of animosity between the parties and the contents of the 23 October Email, Cr Smith should have reasonably foreseen that, in reading the 5 November Post, Mr Cain would have considered:
 - a. the mention of his “mental health” as well as the tone of the post was a sarcastic and unkind dig at his circumstances; and
 - b. that Cr Smith had purposefully revealed information he had identified as being considered private and confidential.
93. Cr Smith was also aware that this stage that Mr Cain held Cr Smith’s behaviour responsible for a large part of his reason to take medical leave from his role.
94. Although it is unfortunate, it must be acknowledged that mental health issues are still the subject of enormous stigma and discrimination and that when connecting Mr Cain to “mental issues” rather than just “health issues” (as was then currently publicly released by the City) Cr Smith was exposing Mr Cain to such prejudice.
95. In the circumstance that the 5 November Post was made, the Panel finds that it was more likely than not that Cr Smith did have an intention to cause a detriment to Mr Cain, or was recklessly indifferent to causing a detriment, by referring to his circumstances in a derogatory and sarcastic manner.
96. This element is met.

Conclusion

97. Given the above, the elements required to find a breach of regulation 7(1)(b) of the Regulations have been met.



Regulation 7(1)(b) – Allegation 4 – 13 November Facebook Post

Cr Smith was an Elected Member at the relevant times

98. Cr Smith was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.
99. This element is met.

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

100. In this case the relevant conduct was a Facebook post made by Cr Smith on 13 November 2019 (**“the 13 November Post”**).
101. For the same reasons as set out in paragraphs 59 and 60 above, the Panel finds to the required standard that Cr Smith acted in her capacity as an elected member and therefore made use of her office as a council member of the City.
102. This element is met.

Cr Smith’s use was improper

103. Mr Cain asserts that the 13 November Post is improper as the same is disparaging and its derogatory nature are particularly reflective of Cr Smith’s deep bias against Mr Cain.
104. The relevant portion of the 13 November Post alleged to be improper reads as follows:

“ So far as the CEO goes what a way to end a career. I wish you well in your recovery journey and ask everyone to be careful with your comments.”
105. The 13 November Post also included links to a media article dated 11 November 2019 in the West Australian (**“the Article”**) which contained a copy of what appeared to be the 23 October Email with redacted portions.
106. As noted above, it was determined in the FWC Decision that Mr Cain had likely supplied to third parties correspondence that was largely similar to the 23 October Email that gave rise to the Article.
107. In this case, the circumstances are slightly different to the 5 November Post. The Article had put much of the information in respect to Mr Cain’s leave and allegations against the City in the public domain.
108. In considering the Code, the Panel is of the view that although the relevant comment would be considered discourteous and flippant, it does not amount to being in breach of the Code as it:
 - a. did not include inaccurate or misleading content;
 - b. was not expressly negative towards Mr Cain;
 - c. although it was possible it would cause Mr Cain embarrassment, it was not likely to cause damage to Mr Cain;
 - d. was not likely to bring the City’s reputation into question;
 - e. did not amount to being derogatory in content;
 - f. did not reveal any confidential material; and
 - g. did not amount to being offensive, obscene, defamatory, threatening, harassing, bullying, discriminatory, hateful, racist, sexist, or otherwise unlawful.



109. Given the above, the Panel characterises the comment as unkind and imprudent, but not amounting to being improper.
110. The Panel finds that it is more likely than not that conduct by Cr Smith by posting the 13 November Post was not improper as:
- the conduct was not in breach of the Code; and
 - 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
 - the conduct is not deserving of a penalty.
111. This element is not met.

Cr Smith intended to cause a disadvantage

112. As set out above, due to the existing animosity and interactions between the parties, it is hard for the Panel to characterise the 13 November Post as anything but an attempt to:
- make people think less of Mr Cain due to the circumstances of his taking leave; and
 - personally embarrass Mr Cain if he was to read the 13 November Post.
113. In the circumstance that the 13 November Post was made, the Panel finds that it was more likely than not that Cr Smith did have an intention to cause a detriment to the CEO by referring to his circumstances in a derogatory and sarcastic manner.
114. This element is met.

Conclusion

115. Given the above, the elements required to find a breach of regulation 7(1)(b) of the Regulations have not been met.

Regulation 11

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

“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 —*
- in a written notice given to the CEO before the meeting; or*
 - at the meeting immediately before the matter is discussed.*
- (3) *Subregulation (2) does not apply to an interest referred to in section 5.60 of the Act.*



(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.”

117. To make a finding of a minor breach of regulation 11 of the Regulations the Panel must be satisfied that it is more likely than not that:

- a. Cr Smith was an elected member at the time of the alleged breach and the time of the determination;
- b. Cr Smith attended the council or committee meeting and was present when the relevant matter came before the meeting and was discussed;
- c. subject to regulation 11(3), Cr Smith had a private or personal interest in a matter in which an apparent or real conflict of interest or a bias arises that does, or might, adversely affect the member's impartiality in considering such matter;
- d. Cr Smith did not disclose the nature of the relevant interest in the matter in either of the ways required by regulation 11(2)(a) or regulation 11(2)(b); and
- e. regulation 11(4) does not apply.

Regulation 11 - Allegation 5, Allegation 6 and Allegation 7

118. As the circumstances surrounding the November SCM, December SCM and January SCM are substantially the same, the Panel has considered these together below.

Cr Smith was an elected member at the time of the alleged breach and the time of the determination

119. Cr Smith was a councillor at the time of the alleged breaches and at the time the Panel considered the Complaint.



120. This element is met.

Cr Smith attended at the council or committee meeting and was present during discussion of the matter

121. The relevant matter the subject of the Complaint was discussed at each of:

- a. the Special Council Meeting of 4th November 2019 (November SCM);
- b. Special Council Meeting of 4th December 2019 (December SCM); and
- c. Special Council Meeting of 13th January 2020 (January SCM)

122. The evidence provide to the Panel indicates that each of the Special council meetings were expressly held to discuss confidential matters relating to Mr Cain variously being his employment, his allegations of bullying and harassment and also allegations of purported misconduct by Mr Cain.

123. The Minutes indicate that with respect to each of the November SCM, the December SCM and the January SCM Cr Smith was present during the discussion of the relevant item.

124. This element is met.

Subject to Regulation 11(3), Cr Smith has an interest in the matter

125. In regulation 11(1) an “interest” is defined as:

*“**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.”*

126. This is commonly referred to as an “impartiality interest”.

127. In order for there to be a declarable impartiality interest either:

- a. it must be more likely than not that, when viewed objectively, the relevant interest is one that a fair-minded informed observer might reasonably apprehend or perceive might be a conflict of interest or a bias; or
- b. an existing association to, or with, a councillor exists which might adversely affect the councillor’s impartiality in considering the matter on the basis that:
 - i. the councillor’s mind might not be open to persuasion in regard to the matter; or
 - ii. the member might not be willing to give genuine and appropriate consideration to the matter, the matters required by law to be taken into account or any recommendation of council officers or a committee, as the case requires.

128. It is asserted that Cr Smith had a declarable interest as she:

- a. had demonstrated a strong and persistent bias against Mr Cain by her prior actions and;
- b. was aware that the bullying complaint discussed at the November SCM directly involved allegations against Cr Smith.

129. The Panel is satisfied that Cr Smith was aware that any bullying allegation against the City would involve scrutiny of her conduct as:

- a. the 23 October Email referenced:
 - i. the stalking allegation that Cr Smith knew she had made; and



- ii. that the harassment had “*mostly come from one individual*” which it is reasonable to conclude was likely a reference to Cr Smith given the incidents listed; and
 - b. she had sent an email to the City on 24 October 2019 which expressly referred to the accusations of bullying and harassment;
 - c. at the November SCM Cr Smith requested that her vote against the motion to be recorded in the public minutes, which indicates Cr Smith was aware that her conduct in the matter may be scrutinised;
 - d. by the time of the January SCM, Cr Smith had been expressly given written notice that she was a named respondent in a Fair Work Commission application by Mr Cain.
130. In order for an impartiality interest to arise, the association must be able to be reasonably seen, by a fair minded observer, to create a situation where there may be a conflict of interest.
131. Generally speaking, a history of adversarial interactions or minor conflict between two parties is not enough to be considered a sufficiently close and personal relationship to create an impartiality interest of a level that is required to be declared.
132. It is to be expected that certain Councillors and the CEO may be involved, at times, in robust disagreement.
133. However, in this case, the relationship between the parties was more than a mere history of disagreement or conflict. This this case, Cr Smith was on clear notice that:
 - a. Mr Cain considered her conduct to constitute bullying;
 - b. one of the grounds that Mr Cain had taken medical leave was due to the alleged bullying behaviour;
 - c. the allegations by Mr Cain were serious, would be required to be formally investigated and could possibly constitute a breach of the *Occupational Health and Safety Act* by the Council and/or City and would likely have financial implications for the City;
 - d. it was highly likely that as part of any investigation into Mr Cain’s allegations, Cr Smith’s conduct would be closely examined by the City; and
 - e. from 10 January 2020, her actions were to be formally reviewed by the Fair Work Commission.
134. Given the above, the Panel finds that it is more likely than not that a fair-minded informed observer would reasonably perceive there might be a conflict of interest or a bias on the part of Cr Smith when considering matters related to:
 - a. Mr Cains medical leave; and
 - b. allegations of bullying or harassment made by Mr Cain.
135. This element is met with respect to each of the November SCM, the December SCM and the January SCM.

Cr Smith did not disclose the nature of the relevant interest in the matter

136. It is clear on perusal of the Minutes of the November SCM that Cr Smith did not make any disclosure as to an impartiality interest.
137. Cr Smith makes no assertion to the contrary.



138. This element is met with respect to each of the November SCM, the December SCM and the January SCM.

Regulation 11(4) does not apply.

139. A party is not required to disclose where:

- a. the person did not know they had an interest in the matter; or
- b. 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.

140. The first exception applies where the councillor in question does not have a reasonable apprehension that an interest may exist.

141. In this case Cr Smith should have reasonably understood that the serious nature of the bullying and harassment accusations, and her alleged involvement in the same, would give rise to a perception of bias.

142. The Panel considers that the second exception does not apply. Cr Smith was evidently aware of the nature of each of the Special Council Meetings prior to the same occurring.

143. A such, in this case the Panel finds to the required standard that these exceptions do not apply as Cr Smith was aware of the above factors and no disclosure was made.

144. The Panel notes that a declaration of does not restrain a councillor from speaking on or voting on a matter. It is simply a function to give notice to parties of an existing relationship and to promote transparency and confidence in Council decisions.

145. This element is met with respect to each of the November SCM, the December SCM and the January SCM.

Conclusion

146. The elements required to find a breach of regulation 11 of the Regulations at the November SCM have been met.

147. The elements required to find a breach of regulation 11 of the Regulations at the December SCM have been met.

148. The elements required to find a breach of regulation 11 of the Regulations at the January SCM have been met.

Panel's Findings

149. In respect to Allegation 1 Cr Smith did not breach Regulation 6 of the Regulations and therefore did not commit a minor breach.

150. In respect to Allegation 2 Cr Smith did not breach Regulation 7 of the Regulations and therefore did not commit a minor breach.

151. In respect to Allegation 3 Cr Smith did breach Regulation 7 of the Regulations and therefore did commit a minor breach.

152. In respect to Allegation 4 Cr Smith did not breach Regulation 7 of the Regulations and therefore did not commit a minor breach.



153. In respect to Allegation 5 Cr Smith did breach Regulation 11 of the Regulations and therefore did commit a minor breach.
154. In respect to Allegation 6 Cr Smith did breach Regulation 11 of the Regulations and therefore did commit a minor breach.
155. In respect to Allegation 7 Cr Smith did breach Regulation 11 of the Regulations and therefore did commit a minor breach.

Signing

A handwritten signature in black ink, appearing to be 'T Fraser', written above a horizontal line.

Tim Fraser (Presiding Member)

A handwritten signature in black ink, appearing to be 'E Power', written above a horizontal line.

Emma Power (Member)

A handwritten signature in black ink, appearing to be 'P Rogers', written above a horizontal line.

Peter Rogers (Member)



Local Government Standards Panel

Complaint Number	SP 2020-029
Legislation	<i>Local Government Act 1995 (WA)</i>
Complainant	Mr Stephen Cain
Respondent	Former Councillor Lee-Anne Smith
Local Government	City of Cockburn
Regulation	Regulation 6, 7 and 11 of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members for Penalty Consideration	Mr Tim Fraser (Presiding Member) Councillor Peter Rogers (Member) Ms Elanor Rowe (Deputy Member)
Heard	24 June 2021 Determined on the documents
Penalty Considered	11 November 2021
Outcome	No Sanction

DECISION AND REASONS FOR DECISION

Delivered 15 December 2021

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 24 June 2021, the Panel found that Councillor Lee-Anne Smith (“Cr Smith”), a councillor for the City of Cockburn (“the City”), committed two minor breaches under the Local Government Act 1995 (WA) (“the Act”) and Regulations 7(1)(b) and 11 of the *Local Government (Rules of Conduct) Regulations 2007* (“the Regulations”) when she:
 - a. wrote remarks regarding the health of the Complainant on her Facebook Page on 5 November 2019 (one breach of Regulation 7(1)(b)); and
 - b. failed to declare an impartiality interest in respect to the performance appraisal process for the Chief Executive Officer of the City at each of:
 - i. the Ordinary Council Meeting of 4 November 2019;
 - ii. the Ordinary Council Meeting of 4 December 2019; and
 - iii. the Ordinary Council Meeting of 13 January 2020;

(together the “Minor Breaches”).

2. On 12 August 2021, the Panel published its Finding and Reasons for Finding (“Findings”) stating that Cr Smith had breached Regulation 7(1)(b) and Regulation 11. The Panel reviewed all the evidence presented to it and made the following observations:

“Regulation 7(1)(b) - Allegation 3 – 5 November Facebook Post

89. *In this context the Panel finds that it is more likely than not that the 5th November Post was in breach of the Code in that the comment:*

- a. *although dressed up in well wishes, was a comment containing a negative inference in relation to the current health status of a member of the Administration of the City;*
- b. *did not avoid including material that might cause damage to the CEO by projecting a certain impression as to his health to the public before any investigation or finding had taken place; and*
- c. *in the context of the allegations made by Mr Cain against Cr Smith, was likely to be considered by Mr Cain a continuation of harassing and bullying conduct.*

.....

Regulation 11 – Allegation 5, Allegation 6, and Allegation 7

133. *However, in this case, the relationship between the parties was more than a mere history of disagreement or conflict.”*

Jurisdiction and Law

3. Cr Smith was a councillor at the time of the alleged breaches and was still a councillor when the Panel met on 24 June 2021 to consider whether the alleged breaches in the Complaint occurred.



4. However, at the time the Panel convened, on 11 November 2021, to consider how it should deal with the Minor Breaches, Cr Smith was no longer an elected member of the City.
5. Under the Act, if a Panel finds that a council member has committed a breach, it is required to determine how the breach should be dealt with¹. Therefore, the Panel proceeded to consider how it should deal with the Minor Breaches at the meeting on 11 November 2021.

Possible Sanctions

6. Section 5.110(6) of the Act provides that the Panel is to deal with a minor breach by:
 - (a) *ordering that no sanction be imposed; or*
 - (b) *ordering that —*
 - (i) *the person against whom the complaint was made be publicly censured as specified in the order;*
or
 - (ii) *the person against whom the complaint was made apologise publicly as specified in the order;*
or
 - (iii) *the person against whom the complaint was made undertake training as specified in the order;*
or
 - (iv) *the person against whom the complaint was made pay to the local government specified in the order an amount equal to the amount of remuneration and allowances payable by the local government in relation to the complaint under Schedule 5.1 clause 9;*

or

 - (c) *ordering 2 or more of the sanctions described in paragraph (b).*
7. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach. Under section 5.110(6)(a), the Panel may order that no sanction be imposed; not to reverse the finding of a breach, but to however indicate that in all the circumstances the relevant councillor should not be penalised further.
8. Sub-section 5.110(6)(b)(iv) (in respect of a monetary sanction) was introduced in 2019 to allow the Panel to require a councillor to personally bear the cost of dealing with a complaint, which in other circumstances, would be paid by the local government concerned. This ensures the cost of a breach is borne by the councillor individually, and not simply passed onto the local government and therefore, ultimately, rate payers.

¹ *Local Government Act 1995 (WA)*, s 5.110(6).



Cr Smith's Submissions

9. 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).²
10. In a letter dated 9 September 2021, Cr Smith was:
 - i. notified of the Panel's Finding of the Minor Breaches;
 - ii. provided with a copy of the Panel's Findings; and
 - iii. offered an opportunity to make submissions as to how the Minor Breaches should be dealt with under section 5.110(6) of the Act.
11. The Department did not receive a response from Cr Smith in relation to the Panel's Findings.

Panel's Consideration

12. The purpose of the imposition of a sanction under the Act is generally for the protection of the public and the maintenance of standards of council members. Furthermore, it reflects the disapproval of a contravention of the Regulations, dissuades councillors from other local governments from engaging in similar conduct and facilitates the maintenance of appropriate standards of behaviour by councillors. Guidance on the factors which the Panel may consider in determining the appropriate penalty to impose, include, but are not limited to:
 - 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. the likelihood or not of the councillor committing further breaches of the Act;
 - g. the councillor's personal circumstances at the time of the conduct, and at the time of imposing the sanction;
 - h. the 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.

² *Local Government Act 1995 (WA)*, s 5.110(5).



13. In this case, the Panel found that Cr Smith breached Regulation 7(1)(b) and Regulation 11 when she:

- a. wrote remarks regarding the health of the Complainant on her Facebook Page on 5 November 2019 (one breach of Regulation 7(1)(b)); and
- b. failed to declare an impartiality interest in respect to the performance appraisal process for the Chief Executive Officer of the City at each of:
 - i. the Ordinary Council Meeting of 4 November 2019;
 - ii. the Ordinary Council Meeting of 4 December 2019; and
 - iii. the Ordinary Council Meeting of 13 January 2020.

14. The subject of the Minor Breach Findings, was viewed by the Panel as, and considered, a serious matter. On that basis, the Panel considered it reasonable that a penalty may have been warranted.

15. However, as stated above, at the time when the Panel convened to decide how the breaches were to be dealt with, Cr Smith had ceased to be an elected member. Therefore, in the circumstances, the Panel finds that the imposition of a penalty would be futile.

Panel's Decision

16. Having regard to the Findings, the matters set out herein, and the general interests of local government in Western Australia, the Panel's decision on how the Minor Breach is to be dealt with under s5.110(6)(a) of the Act, is that no sanction is to be imposed against Cr Smith.

Tim Fraser (Presiding Member)

Peter Rogers (Member)

Elanor Rowe (Deputy Member)



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."*