

LOCAL GOVERNMENT STANDARDS PANEL

Established under section 5.122 of the *Local Government Act 1995* (WA)

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| Complaint Number | SP 39 of 2016 DLGC 20160153 |
| Legislation | <i>Local Government Act 1995</i> (WA) |
| Complainant | Mr Mathew Humfrey |
| Subject of complaint | Cr Sandra Boulter |
| Local Government | Town of Cottesloe |
| Regulation | Regulations 10(1) and 11(2) of the <i>Local Government (Rules of Conduct) Regulations 2007</i> (WA) |
| Panel Members | Mr B Jolly (Presiding Member) Councillor P Kelly (Member) Ms R Yates (Member) |
| Heard | 25 January 2017 (Determined on the documents) |
| Outcome | Breach of Regulation 11(2) |

FINDINGS AND REASONS FOR FINDING

Published 07 April 2017

DEFAMATION CAUTION

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1. Summary of the Panel's Decision

1.1 The Panel found that Cr Sandra Boulter:

- (a) did not commit a breach regulation 10(1) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) (**Regulations**);
- (b) committed a breach of regulation 11(2) of the *Regulations* by failing to disclose an interest in a matter to be discussed at the ordinary council meeting of the Town of Cottesloe (**Town**) on 28 June 2016 (**June Meeting**).

2. Jurisdiction

2.1 On 15 August 2016 the Panel received a complaint of minor breach dated 15 August 2016 (**Complaint**) from the Complaints Officer of the Town.¹ In the Complaint, Mr Mathew Humfrey (**Complainant**), the Chief Executive Officer of the Town (**CEO**), alleges that Cr Boulter:

- (a) contravened regulation 10(1) of the *Regulations* through statements made in an email sent to the Complainant on 15 June 2016 in the circumstances described in paragraph 5.1 below (**Allegation 1**); and
- (b) contravened regulation 11(2) of the *Regulations* by failing to declare an interest in a matter discussed at the June Meeting in the circumstances described in paragraph 5.2 below (**Allegation 2**).

2.2 The Complaint was made within two years after the alleged breach of regulations 10(1) and 11(2) of the *Regulations* that were set out in the Complaint were alleged to have occurred.

2.3 Cr Boulter was elected as a council member on 17 October 2015 and has remained an elected member of the Town since that time.

2.4 A breach of regulation 10(1) and regulation 11(2) of the *Regulations* are each a "minor breach"² and the Panel is required to make a finding as to whether each breach occurred or to send the Complaint to the Chief Executive Officer of the Department of Local Government and Communities (**Department**) under section 5.111 of the *Local Government Act 1995* (WA) (**LG Act**).

2.5 The Panel finds that the Complaint was made and has been dealt with in accordance with the requirements of Division 9 of the *LG Act*, that the Complaint is not one that should be dealt with under section 5.111 and that the Panel has jurisdiction to determine whether each breach occurred.

¹ Document 1 of Attachment "A".

² *LG Act*, s 5.104 and s 5.105(1).

3. The Panel's Role

- 3.1 The Panel observes that its members are required to have regard to the general interests of local government in Western Australia;³ it is not an investigative body and determines complaints solely upon the evidence presented to it; a finding of a minor breach may affect an individual both personally and professionally and that in order for the Panel to make a finding that a minor breach has been committed, the finding is to be “based on evidence from which it may be concluded that it is more likely that the breach occurred than that it did not occur”⁴ (**Required Standard**).
- 3.2 When assessing whether it is satisfied to the Required Standard:
- (a) the Panel considers, amongst other things, the seriousness of the allegations made in the Complaint, the likelihood of an occurrence of the given description and the gravity of the consequences flowing from a particular finding; and
 - (b) where direct proof is not available, the Panel considers that it must be satisfied that the circumstances appearing in evidence give rise to a reasonable and definite inference of a breach, not just to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture.

4. Documents

- 4.1 The documents considered by the Panel are set out in Attachment “A” (**Documents**).

5. The Complaint

- 5.1 In relation to Allegation 1, the Complaint alleges that:
- (a) On 15 June 2016, Cr Boulter sent an email to the Complainant, in his capacity as the CEO (**Email**);
 - (b) The Email responded to an email exchange between the CEO and the Mayor of the Town, which the members of council had received as a carbon copy. The email exchange concerned a letter the Town received from a resident of the Town, whom the Town had warned to cease operating a short-stay accommodation business from a property where that particular use had not been approved;
 - (c) In the Email, Cr Boulter stated that:
 - (i) *‘I would like to be advised about who complained and why, in this instance at 9/34 Margaret Street, Cottesloe’;*
 - (ii) *‘Happy to ask the question formally on the Council agenda if that is what is required to for my questions to be answered’* (**Statements**);
 - (d) The apparent intent of the Statements is that *‘the CEO is to provide the required information and failure to do so will result in the meeting process being used to force the CEO to comply’;*

³ Clause 8(6) of Schedule 5.1 of the *LG Act*.

⁴ *LG Act*, s 5.106.

- (e) Cr Boulter continued on the same point in an email exchange over 15 and 16 June 2016.

5.2 In relation to Allegation 2, the Complaint alleges that:

- (a) On 16 June 2016, Cr Boulter gave notice to the CEO of a motion to be moved (**Motion**) at the June Meeting;
- (b) The Motion was listed on the agenda for the June Meeting as item 11.4: ‘Councillor Motion – Short Stay Accommodation’;
- (c) Cr Boulter moved the Motion at the June Meeting (which was defeated);
- (d) At no point did Cr Boulter declare that she had an approval for a bed and breakfast at a property that she owned for the period that the Motion would be applied to;
- (e) Cr Boulter had previously been provided with notice of the approval and gave written notice of the Motion, so none of the exemptions provided under regulation 11(4) of the *Regulations* would apply.

5.3 On 23 November 2016, the Department requested and received further clarification from the Complainant by email in relation to Allegation 2.⁵ This clarification was to the effect that:

- (a) The Town was developing a ‘*short stay policy*’ during the time of the alleged conduct;
- (b) It was alleged that:
 - (i) the Motion was not ‘*in any way related to the development of the short stay policy*’ and was moved as a result of a complaint that had been received by the Town that Cr Boulter sought access to, but had been denied;
 - (ii) the Motion defined ‘*short stay accommodation*’ to include ‘*bed and breakfast*’.

6. The Response

6.1 By letter dated 7 November 2016, the Department wrote to Cr Boulter to provide her with the Complainant’s allegations and an opportunity to provide comments and any information she desires in relation to the matter.⁶

6.2 On 23 November 2016, Cr Boulter provided her response to the Panel by email to the Department.⁷

6.3 In her response to the Panel, in relation to Allegation 1, Cr Boulter:

- (a) Admits that she sent the Email and that it contained the Statements;
- (b) Denies having committed the minor breach alleged in the Complaint;

⁵ Document 4 of Attachment “A”.

⁶ Document 2 of Attachment “A”.

⁷ Document 3 of Attachment “A”.

- (c) Says that:
 - (i) The Complainant has misconstrued the apparent intent of the Statements;
 - (ii) That it *'was my intent to try to understand why the CEO believed that I was not entitled to that information because of my honestly held belief that I am entitled to the information I sought, in the public interest and to ensure good governance standards'* within the Town and that she was *'trying to find out from the CEO how I could be given properly the information that I sought'*.

6.4 In her response to the Panel, in relation to Allegation 2, Cr Boulter:

- (a) Admits that she:
 - (i) Gave notice of the Motion for the June Meeting and that the Motion was discussed at the June Meeting;
 - (ii) Received a development approval from the Town on 23 June 2015 for a bed and breakfast land use;
- (b) Denies having committed the minor breached alleged in the Complaint;
- (c) Says that:
 - (i) At a council meeting on 23 February 2016 (**February Meeting**), the council *'resolved to request the CEO to prepare a short stay policy'*;
 - (ii) At the February Meeting, she *'declared an impartiality interest'* in relation to that item *'due to having planning approval for short-stay accommodation'*, which was *'an error arising out of an overabundance of caution'* on her part at the time;
 - (iii) She has a *'planning approval but not a building licence for a B&B, which is expressly not a short stay-accommodation land use'*;
 - (iv) *'A short-stay accommodation land use is quite a different and separately defined land use from a bed and breakfast land use'* under the Town's Local Planning Scheme No 3 (**'LPS'**);
 - (v) The *'B&B development approval was never effective to operate a B&B'* because other licences were also required, being a building licence and kitchen registration, but these were never obtained.

7. Essential elements of a contravention of regulation 10(1)

7.1 The Complaint does not specify which paragraph of regulation 10(1) of the *Regulations* that Cr Boulter is alleged to have contravened. However, the Complaint does not particularise that Cr Boulter made any threat or the promise of a reward and so the Panel considered Allegation 1 as an alleged breach of regulation 10(1)(a) of the *Regulations*.

- 7.2 In the Panel's view, the following elements must be established, to the Required Standard, before a contravention of regulation 10(1)(a) of the Regulations is established:
- (a) firstly, that the person the subject of the Complaint engaged in the alleged conduct;
 - (b) secondly, that the person the subject of the Complaint was a council member both at the time of the alleged conduct and the time when the Panel makes its determination;
 - (c) thirdly, that the person gave or tried or made an effort to give a direction or an order or command (**Direction**);
 - (d) fourthly, that the Direction was given to another person, who was an employee of his or her local government;
 - (e) fifthly, the Direction was to do or not do something in the other person's capacity as a local government employee; and
 - (f) the Direction was not part of anything the person did as part of the deliberations at a council or committee meeting (which may include something he or she did as a part of his or her preparation for any such deliberation).

8. Findings in relation to Allegation 1

- 8.1 Having reviewed the Documents, the Panel is satisfied to the Required Standard that the first and second elements are satisfied in that:
- (a) Cr Boulter made the Statements;⁸
 - (b) Cr Boulter did so in her role as a council member and she continues to be a member of council.
- 8.2 On the evidence before it, the Panel is not satisfied that the third element has been established, in that Cr Boulter did not make a Direction to the Complainant, because:
- (a) In the context of the email exchange on 15 and 16 June 2016, the Statements constituted a persistent request for information;
 - (b) However, the Statements did not amount to a direction or order or command to the Complainant or an attempt to do so;
 - (c) The Statements were consistent with Cr Boulter seeking to clarify if there was a process available to authorise the Town to release the information sought to council members.
- 8.3 It follows that if Cr Boulter did not make a Direction to the Complainant, the remaining elements that must be established for a contravention of regulation 10(1)(a) of the *Regulations* cannot be satisfied.
- 8.4 It follows that the Panel finds that Cr Boulter did not commit a breach of regulation 10(1) of the *Regulations* as alleged in Allegation 1.

⁸ See Document 1(b) of Attachment "A".

9. Essential elements of a contravention of regulation 11(2)

9.1 In the Panel's view, the following elements must be established, to the Required Standard, before a contravention of regulation 11(2) of the Regulations is established:

- (a) a person who is a current council member;
- (b) had an interest in a matter to be discussed at a council meeting;
- (c) the matter was discussed at a council meeting at which the person attended; and
- (d) the person did not disclose the nature of his or her interest in either of the ways required by regulation 11(2)(a) or 11(2)(b) of the *Regulations*.

10. Factual Findings in relation to Allegation 2

10.1 Having reviewed the Documents, the Panel is satisfied to the Required Standard that:

- (a) On 23 June 2015, the Town granted planning approval to Cr Boulter for a 'Bed & Breakfast' usage in an existing dwelling that was the subject of the application. The approval was for a period of 6 months, with a further approval required to continue the usage (**B&B Approval**);⁹
- (b) The B&B Approval required that before the usage commenced, the dwelling was required to '*comply with all necessary Building and Environment Health requirements of the Town*';¹⁰
- (c) At the February Meeting a resolution was passed that the Town would prepare a short stay policy. At that time, Cr Boulter declared an impartiality interest in the item;¹¹
- (d) The short stay policy continued to be under development at the time of the June Meeting;¹²
- (e) Cr Boulter gave notice of the Motion on 16 June 2016 and moved the Motion at the June Meeting. The terms of the Motion were:
 - 1. *'That the Town of Cottesloe administration advise Council, in a confidential session to the July Council meeting, of all complaints that the Town of Cottesloe have received in the last two years about any form of short stay accommodation in the Town of Cottesloe including but not limited to short stay, bed and breakfast, and serviced apartment uses.*

⁹ See Document 1(d) of Attachment "A".

¹⁰ Ibid.

¹¹ See Document 3 of Attachment "A".

¹² See Documents 3 and 4 of Attachment "A".

2. *That the Town of Cottesloe administration advise Council, in a confidential session to the July Council meeting, in relation to the answer to question one, the date of the complaint, the name of the complainants, the short stay business to whom the complaint relates, the nature of the complaint and the Town of Cottesloe response to date of that complaint.*¹³

(f) Cr Boulter expressed the rationale for the Motion in the notice given and at the June Meeting as:

1. *I have had a complaint from a ratepayer that the way the Town of Cottesloe administration treats such complaints is not open and accountable, and that there are many short stay businesses operating in the Town of Cottesloe, which do not appear to have approval/cannot get approval who are not asked to explain, shut down and/or prosecuted by the Town of Cottesloe administration.*

2. *I need to understand how the process works within the administration in anticipation of/while waiting for the recommendations from the Town of Cottesloe administration – as requested by Council – as to how this Council should respond to any short stay businesses currently operating in Cottesloe without development approval.*¹⁴

(g) Cr Boulter did not disclose any interest in the Motion either prior to or at the June Meeting before the Motion was discussed;¹⁵

(h) The Motion was unsuccessful at the June Meeting.¹⁶

11. Findings in relation to Allegation 2

11.1 The Panel has considered the available evidence and the Panel is satisfied to the Required Standard, and accordingly finds, that:

- (a) as at the June Meeting, Cr Boulter was a member of the council, and remains currently a member of the council;
- (b) the Motion was discussed at the June Meeting and Cr Boulter attended the June Meeting;
- (c) neither prior to, by written notice to the CEO, nor during, the June Meeting did Cr Boulter disclose an interest pursuant to regulation 11(2) of the *Regulations*; and
- (d) each of the elements set out in paragraph 9.1 (a), (c) and (d) have been established.

11.2 The remaining issue is whether the interest of Cr Boulter as the holder of the B&B Approval, was an “interest” that she ought to have disclosed at or before the June Meeting pursuant to regulation 11(2).

¹³ See Document 1(a) and (c) of Attachment “A”.

¹⁴ Ibid.

¹⁵ Document 1(c) of Attachment “A”.

¹⁶ Ibid.

- 11.3 Regulation 11(2) requires the disclosure of an “interest”.
- 11.4 Regulation 11(1) defines an “interest” as meaning “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”.
- 11.5 In *Bradley and Local Government Standards Panel*, Member McNab found that an allegation that a council member has committed a breach of regulation 11(2) “is an allegation of undeclared conflict or bias (apparent or real) clouding the exercise of public duty”.¹⁷
- 11.6 When assessing if a disclosable interest arises for the purposes of regulation 11(2), the standard required “is generally an objective standard – one that can be satisfied without the need for proof” that the relevant Councillor “had any direct, conscious or actual knowledge of the relevant conflict. The conflict arises from objective or constructive circumstances, not from the subjective knowledge of the particular Councillor”.¹⁸
- 11.7 The Panel finds that when viewed objectively, in the context of the facts found by the Panel that:
- (a) the Motion expressly required the production of confidential information in relation to complaints received by the Town over the preceding two years in relation to ‘bed and breakfast’ uses;
 - (b) the express terms of the Motion were not confined to ‘short stay accommodation’ land uses as that term is defined in the LPS;
 - (c) by virtue of Cr Boulter being the recipient of the B&B Approval, which was obtained within the two years preceding the June Meeting, she had a personal or private interest that could, or could reasonably be perceived to, adversely affect her impartiality when determining the matter the subject of the Motion;
 - (d) this was therefore an interest that she was obliged to have disclosed pursuant to regulation 11(2).
- 11.8 The exception in regulation 11(4) of the *Regulations* does not apply to these circumstances, because:
- (a) Cr Boulter knew of the B&B Approval;
 - (b) Cr Boulter gave notice of the Motion and knew that it would be discussed at the June Meeting.

¹⁷ [2012] WASAT 44 (7 March 2012), [42].

¹⁸ *Corr and Local Government Standards Panel* [2014] WASAT 86 (7 July 2014), [24] (Member McNab).

- 11.9 For the above reasons, the Panel is satisfied and finds that Cr Boulter has committed a breach of regulation 11(2) of the *Regulations* by failing to disclose an interest in a matter to be discussed at the June Meeting as alleged in Allegation 2.



Brad Jolly (Presiding Member)



Paul Kelly (Member)



Rachel Yates (Deputy Member)

Date of Reasons for Finding - 06 April 2017

Attachment "A"

| Doc ID | Description |
|------------|--|
| Document 1 | <p>Copy of complaint of Minor Breach dated 15 August 2016 made by Mr Humfrey and supporting information received by the Panel on 15 August 2016, being:</p> <ul style="list-style-type: none"> (a) an email dated 16 June 2016 from Cr Boulter; (b) an email exchange dated 15 and 16 June 2016; (c) an extract of the minutes of the June Meeting; and (d) a letter from the Town to Ms S L Boulter dated 23 June 2015. |
| Document 2 | <p>Copy of request for comments letter from the Department of Local Government and Communities to Cr Boulter dated 7 November 2016 including attachments</p> |
| Document 3 | <p>Copy of Cr Boulter's response received by the Department of Local Government and Communities dated 23 November 2016</p> |
| Document 4 | <p>Copy of email from Mr Humfrey to the Department dated 23 November 2016 clarifying Allegation 2</p> |
| Document 5 | <p>Statement of Particulars</p> |