

LOCAL GOVERNMENT STANDARDS PANEL

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

Complaint Number	SP 7 and 15 of 2014 DLG 20140080 and 20140103
Legislation	<i>Local Government Act 1995</i> (WA)
Complainant	John Leslie McCleary
Subject of complaint	Councillor Peter John Tegg
Local Government	Shire of Cue
Regulations	Regulations 7(1)(b) and 10(1) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mr B Jolly (Presiding Member) Paul Kelly (Member) Mr P Doherty (Member)
Heard	19 November 2014 (Determined on the documents)
Outcome	Two breaches of regulation 10(1) established

FINDINGS AND REASONS FOR FINDING

DEFAMATION CAUTION

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1. Summary of the Panel's Decision

1.1 The Panel found Cr Tegg:

- (a) committed a breach of regulation 10(1)(b) of the Local Government (Rules of Conduct) Regulations 2007 by sending the 13 April 2014 Letter to the Complainant; and
- (b) committed a breach of regulation 10(1)(a) of the Local Government (Rules of Conduct) Regulations 2007 by sending the 28 April 2014 Letter to the Complainant.

2. Introduction

2.1 In these Reasons unless otherwise indicated:

- (a) a reference to a regulation is a reference to the corresponding regulation of the *Local Government (Rules of Conduct) Regulations 2007 (Regulations)*, and a reference to a section is a reference to the corresponding section of the *Local Government Act 1995 (Act)*;
- (b) "viewed objectively" means "as viewed by a reasonable person" (the reference to a reasonable person being a reference to a hypothetical person with an ordinary degree of reason, prudence, care, self-control, foresight and intelligence, who knows the relevant facts);
- (c) "CEO" means the Chief Executive Officer of the Shire;
- (d) "Complainant" means John Leslie McCleary, the CEO of the Shire;
- (e) "Council" means the Shire's Council;
- (f) "Department" means the Department of Local Government;
- (g) "OCM" means Ordinary Meeting of the Council;
- (h) "Panel" means the Local Government Standards Panel; and
- (i) "Shire" means the Shire of Cue.

3. Jurisdiction

3.1 In accordance with the requirements of section 5.107:

- (a) on 23 June 2014 the Presiding Member of the Panel received from Mr John McCleary, the CEO and Complaints Officer of the Shire, a complaint dated 20 June 2014 made by the CEO in that capacity, concerning two alleged breaches of regulation 10(1) by Cr Peter John Tegg, a member of the Council (**First Complaint**); and
- (b) on 25 July 2014 the Presiding Member received from the CEO as the Shire's Complaints Officer, a complaint dated 22 July 2014 made by the CEO in that capacity, concerning an alleged breach of regulation 7(1)(b) by Cr Tegg (**Second Complaint**).

- 3.2 In the First Complaint and the Second Complaint (**Complaints**) the Complainant complains about Cr Tegg's conduct in sending three letters, two of them to the Complainant and the other to the Shire President and Councillors in the period between 13 April 2014 and 5 May 2015.
- 3.3 Regulations 6 to 12 (both inclusive) are rules of conduct for the purposes of section 5.104(1) of the *Act*.
- 3.4 A breach of the rules of conduct is a 'minor breach' as defined in section 5.105(1)(a).
- 3.5 The CEO is the "complaints officer" for the Town under section 5.120.
- 3.6 Pursuant to section 5.110(2), the Panel is required to make a finding as to whether the breaches alleged in the Complaints occurred or to send the Complaints to the Department's Chief Executive Officer under section 5.111.
- 3.7 The Panel had been informed by the Department, and so finds that Cr Tegg:
- (a) was at the relevant times (i.e. 13 April 2014, 28 April 2014 and 5 May 2014) and remains currently, elected as a member of the Council; and
 - (b) satisfies the requirements of being an elected member of the Council as:
 - (i) he is qualified to be an elector of the district under section 2.19(1)(b);
 - (ii) there is no evidence to indicate that he is disqualified for Council membership under sections 2.21, 2.22, 2.23 or 2.24; and
 - (iii) he is not disqualified from continuing his membership of the Council under section 2.25.
- 3.8 The Panel also finds that:
- (a) the Complaints are made in writing in the form approved by the Minister pursuant to section 5.107(2);
 - (b) the Complaints were made by the CEO within two years after the breaches alleged in the Complaints occurred, as required by section 5.107(4);
 - (c) the Complaints are not ones that ought to be sent to the Chief Executive Officer of the Department under section 5.111; and
 - (d) it has jurisdiction to determine whether the breaches alleged in Complaints occurred.

4. Legislative background

4.1 Regulation 7(1)(b) provides:

"7. Securing personal advantage or disadvantaging others

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

... ; or...

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

4.2 Regulation 10(1) provides

“10(1) A person who is a council member must not —

- (a) direct or attempt to direct a person who is a local government employee to do or not to do anything in the person’s capacity as a local government employee; or
 - (b) attempt to influence, by means of a threat or the promise of a reward, the conduct of a person who is a local government employee in the person’s capacity as a local government employee.
- (2) Subregulation (1) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.”

5. The Panel’s Role

5.1 The Panel observes that:

- (a) clause 8(6) of Schedule 5.1 of the *Act* requires the Panel’s members to have regard to the general interests of local government in Western Australia;
- (b) a finding of a minor breach is a serious matter as it may affect an individual both personally and professionally;
- (c) by section 5.106, in order for the Panel to make a finding that a minor breach has been committed by a council member, 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”; and
- (d) when making this determination:
 - (i) the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the [determining body]”, such as the Panel: *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J in at 362; and
 - (ii) where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture. But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise: *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5.

- 5.2 The Panel also observes that:
- (a) it is not an investigative body;
 - (b) it determines complaints upon the evidence presented to it; and
 - (c) 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.

6. The Response

- 6.1 By letters dated 14 July 2014 and 4 August 2014, the Department sent a copy of the Complaints (together with a Complaint Summary in relation to each) to Cr Tegg.
- 6.2 In the Complaint Summary relating to the First Complaint, the allegations were summarised as follows:

“The complainant alleges that you, Councillor Peter John Tegg, a member of the Council of the Shire of Cue ...:

[Allegation 1]

1. On 13 April 2014 contravened regulation 10(1) [of the *Regulations*] in that:
 - (a) you sent a letter of that date to Mr John McCleary ... ; and
 - (b) the contents of such letter or a part of it amount to both or either:
 - (i) a direction or attempted direction by you to the CEO to do or not to do something in the CEO's capacity as a Shire employee; and/or
 - (ii) an attempt by you to influence, by means of a threat, the conduct of the CEO in the CEO 's capacity as a Shire employee.

[Allegation 2]

2. On 28 April 2014, you contravened regulation 10(1)(a) [of the *Regulations*] in that;
 - (a) you sent a letter of that date to the CEO; and
 - (b) the contents of such letter or a part of it amount to a direction or attempted direction by you to the CEO to do or not to do something in the CEO's capacity as a Shire employee.”

6.3 In the Complaint Summary relating to the Second Complaint, the allegations were summarised as follows:

[Allegation 3]

“The complainant alleges that on 5 May 2014 you, Councillor Peter John Tegg, a member of the Council of the Shire of Cue, contravened regulation 7(1)(b) [of the *Regulations*] in that:

- (a) you sent a letter of that date to the Shire's President and its Councillors; and
- (b) in or by sending such letter you made improper use of your office as a Council member to cause detriment to Mr John McCleary, the Shire's Chief Executive Officer.”

6.4 Cr Tegg's response to the three allegations set out above was received by the Department on 20 August 2014 and consisted of:

- (a) completed Elected Member's Responses to the Matters set out in the Complaint Summary (**Form A**) in relation to Allegations 1 and 2;
- (b) a copy of an email from the Complainant to “Roger/Fred” (which Cr Tegg advised was sent on 12 June 2013 at 11.00am);
- (c) a copy of an email from the Water Corporation to Terence Bragg dated 2 December 2013;
- (d) a copy of a letter from the Water Corporation to 'PJ & PL Tegg dated 2 December 2013; and
- (e) a completed Form A in regard to Allegation 3.

(Response)

6.5 Where relevant, extracts from Cr Tegg's response are referred to or reproduced below.

7. Documents

7.1 Save for the information provided to the Panel by the Department (as set out under the heading “Jurisdiction” above), the Panel determined the Complaints after considering copies of the following documents:

- (a) the Complaints, which included;
 - (i) copy letter dated 22 July 2014 from the Complainant, in his capacity as CEO, to the Department;
 - (ii) copy of printouts of an email chain, commencing with Cr Tegg's email of 12 March 2014 to the Complainant, and ending with the Complainant's email of that date to all Council members;
 - (iii) copy of a letter from Cr Tegg to the Complainant dated 13 April 2014;
 - (iv) copy of a letter from the Complainant to Cr Tegg dated 15 April 2014;

- (v) copy of a letter from Cr Tegg to the Complainant dated 28 April 2014;
- (vi) copy of a letter from Cr Tegg to the Shire's President and Councillors dated 5 May 2014;
- (vii) copy of a Report dated 28 April 2014 by the Shire CEO to the Shire Council;
- (b) copy letter and attachment from the Department to Cr Tegg dated 14 July 2014 in relation to Complaint SP 7 of 2014;
- (c) copy letter and attachment from the Department to Cr Tegg dated 4 August 2014 in relation to Complaint SP 15 of 2014;
- (d) the Response;
- (e) copies of pages 1 and 7 and 22 to 24 of the Minutes of the OCM of 20 May 2014; and
- (f) copies of pages 1, 7 and 8 of the Minutes of the OCM of 17 June 2014.

8. Factual Findings

8.1 On the evidence available to the Panel, it is satisfied that it is more likely than it is not that:

- (a) at 10:53 am on 12 March 2014 Cr Tegg sent an email to the Complainant, and sent a copy of it to the Shire President and the other Shire Councillors, on the subject "cue hall", the substance of which read:

"Hello John as disgusted (sic. discussed) at the meeting of 11/03/2014

- 1) what grants we got re the hall upgrade
- 2) the tender as to what work is to be done on the hall;
- 3) what was the budget for this work
- 4) where are we now as to the completion of this work
Regards Cr Peter Tegg"

- (b) at 11:41 am on 12 April 2014, the City's Chief Financial Officer sent an email to Cr Tegg, and sent a copy of it to the Complainant and Mr Philip Swain, on the subject "cue hall", the substance of which read:

"Hi Peter, Please find answer to your queries below:

1) what grants we got re the hall upgrade

Midwest Development Commission - \$50,000.

We received:

24/10/13 - \$30,000

12/0/314 - \$15,000

Total \$45,000

The balance of \$5,000 will be received upon grant acquittal (currently waiting for the auditor's report).

2) the tender as to what work is to be done on the hail

3) what was the budget for this work

Town Hall Kitchen Upgrade Budget 22013/2014 = \$155,034.00

Actual amount spent YTD \$154,522,64

**4) where are we now as to the completion of this work
Regards Cr Peter Tegg..."**

Completed, Kind regards"

(c) on 13 April 2014 Cr Tegg sent a letter of that date to the Complainant as follows:

'VARIOUS ISSUES AS LISTED.

Dear John,

I refer to the above and remain concerned over the following matters, all of which now require urgent attention, resolution, and response.

...

2. Electors Meeting record.

Given the critical and essential need for these notes to be compiled and, where allegedly the recording facility failed to function, it is paramount that all councillors convene urgently in an endeavour to re-construct the details from that meeting from our collective memory and empirical data in order to address the issues at the next council meeting, as required by the provisions of the Local Government Act 1995 and thus avoid the humiliation of admitting our incompetence as a Government. I suggest you convene a meeting in the next few days so as to give the community some confidence that the process of Government is still functional in Cue. Please respond to this comment to me, in writing within 48 hours of receipt of these advices.

3. Expenditure on the Kitchen renovation - \$169,000

This disturbing issue alarms me, not only that the total seems excessive but that you seem unable to provide a detailed schedule of the components constituting this value.

As a councillor, I am required to answer to the constituents and without hard-copy evidence supporting this cost-centre; I am unable to respond to the members of the public, who are entitled to know the facts.

Thus it is requested you furnish me a detailed printout from the general/job ledger of this exorbitant line item within 48 hours of the receipt of this letter ***or I will have no choice but to advise the Ministers' office of your failure to provide such a fundamentally simple report upon request.***

Your earliest response will be appreciated" ***[emphasis added]***

(13 April 2014 Letter)

- (d) on 15 April 2014 the CEO sent a letter of that date to Cr Tegg, which provided:

"Dear Councillor Tegg

I refer to your letter dated the 13th of April 2014 where you seek answers to three items; namely:

...

2. Electors Meeting Record

I refer to various verbal discussions we have had about this issue. You are advised that despite your assertions that these minutes are to be prepared within 10 days that your interpretation is wrong. Please refer to section 5.32 and 5.33 of the Local Government Act 1995 where it specifically talks about minutes of electors meetings. It is further advised that as no decisions were resolved at this meeting that there are no items to go before Council as required under the Act,

As informed I will have these minutes Completed as soon as possible.

3. Expenditure on the Kitchen Renovation \$169,000

It is acknowledged that you have previously been provided with financial documentation by our Finance Officer and me. At this stage you will not be provided with any further information unless directed by a resolution of Council. It is to be remembered that as an individual Councillor you have no authority to issue directions to me or my staff. I am only required to take directions from Council.

I trust these responses are sufficient to answer your questions."

- (e) on 28 April 2014 Cr Tegg sent a letter of that date to the CEO, which provided:

"RESPONSE TO COMMENTS RELATIVE TO THREE ISSUES, AS LISTED- PLUS A FURTHER ENQUIRY

Dear John,

I refer to the above and your response dated April 15th, 2014, where I remain surprised at same and comment as follows, for your prompt response:

...

2. Electors Meeting Records

Whilst I acknowledge receipt of a copy of the minutes resulting from the annual meeting of electors as conducted in January 2014, it is noted the heading refers to the "Agenda", where this should be amended to display "Minutes". Furthermore, the general business section fails to articulate the comments made at this meeting and does not include the responses made to the enquirer, where only the heading is recorded, it is customary and indeed most important that the question/concern (or at the very least the comment presented) as raised by the elector is clearly displayed and with the response provided. Often the response from the President is that the issue will be addressed for attention at the next council meeting for decision and formal response to the elector.

Thus, the concerns are that we are in breach of the legislation by not presenting these minutes to the next council meeting as required and that furthermore, as the specific question/comment raised was not included, the issue cannot be addressed at council as we don't know what the question is or who asked it, so we can't direct a response to that person. Thus, those minutes need to be revisited and suitably edited to ref/act basic correctness to enable attention at the next council meeting. Please provide all councillors with the edited version in the earliest course.

3. Expenditure of the Kitchen Renovations.

In this disturbing matter, you seem to misinterpret a simple request for clear financial information on a budgeted item to enable me to respond to inquiries from the constituents as some form of "direction", where I am (as a councillor) entitled, to be provided with accurate and correct information when requested, I advise not being in receipt from either you or your finance officer a detailed account of the expenditure for this cost centre as requested, where this request is again formalized. Furthermore as this item has exceeded budget by \$19,000 it is incumbent on you to present an Item to council seeking a budget amendment to vary the parameter of this project to accommodate this excess, as the funds have to now be applied in reduction of another cost centre, where this variation remains the province of council and requires an absolute majority decision of council. ***Thus, is expected that you will prepare a suitable report to reflect the need for this amendment with supporting justification as to how the \$169,000 was expensed and if further funding is required to complete the project and where the funds are coming from to maintain control of the budget. Please ensure this is presented to the next council meeting.***

4. Tender for the Construction of Three Houses.

I refer to this project and ask for your views on the current status of this matter as understood a tender for these constructions was advertised and I enquire as to the current status of this project.

Thus, your response is requested again, relative to the above within 48 hours". ***[emphasis added]***

(28 April 2014 Letter)

- (f) on 5 May 2014 Cr Tegg sent a letter to the Shire President and Councillors which provided:

“REQUEST FOR INFORMATION - Kitchen Renovation Cost, Electors Meeting Minutes, Housing.

Dear Councilors,

I refer to the above, wherein some basic details were recently requested from the C.E.O. where I note that three councillors do not support the provision of this information, where it is now requested that the information be provided by the councillors, as this is information that all councillors should be in possession of, as follows:

1. Annual Meeting of Electors Minutes

The statutory requirement of the conduct of this meeting is to receive comment from the public and present the minutes of this meeting to the next meeting of council for consideration/action in terms of Section 5.32 of the Act and to respond to those making enquiry so the questions raised will be addressed at council and in doing so will give guidance to the CEO as to how to respond.

Given we have already breached (sic breached) the legislation by not presenting the minutes the the next meeting (and hopefully the meeting was conducted within 56 days of the adoption of the Annual Report as required by Section 5.27) it is important we promptly respond to the enquirers as to their questions raised, but without a record of their questions, it will not be possible for the CEO to respond, and where we will likewise be unable to comment.

Therefore, please explain to me promptly how each of you individually intends to address this matter in council and how to respond to the public and preserve our integrity with this community when we don't have a record of the questions raised. Your urgent response is therefore requested,

2. Town Hall Upgrade

The reason I enquire over this project is that the suggestion is that the cost has exceeded the budget approved for this upgrade, where the funds have to be funded from within existing resources, where a budget review item will address this and requires an absolute majority of council resolution to vary the budget.

Since you oppose this information being provided to me, please explain to me your understanding of how much this project has cost to date and where the funds were spent, as members of the public will shortly be asking you for this information, where you may be embarrassed at not knowing the answer. Furthermore, please (all six of you) advise me in writing as to how you intend to maintain a balanced budget when one project is over-budget by an estimated amount of \$20,000 without a budget review being presented to council to reduce another area of cost where each of you should know to expect this to be presented to council with a current schedule of expenditure to date being presented to evidence where the funds were applied to justify the amendment to the budget; yet you oppose it!!

Do remember we all must be able to respond to comments from the community as to why any project is over budget and where the funds were spent, as the community are entitled to know. Accordingly, since it seems you have this information and confident to respond to member s (sic) of this community, the information is requested of each of you within 24 hours.

3. Housing Project

The seriousness of this seems to me to commence with a breach of legislation wherein terms of the requirements of the Function and General Regulations clause 11 clearly requires that where any project is anticipated to exceed the threshold of \$100,000 the project is to be advertised by tender.

Furthermore, whilst the CEO is empowered to call the tender, he is not empowered to accept the tender, where this aspect remains the authority of council alone and the results recorded in the tender register as required by clause 17 of the Local Government (Functions and General) Regulations 1996 and where the CEO is required to maintain the register. It seems however that recent purchases have not been recorded in the register as is statutorily required and may not have been resolved by council, which the register would have clarified, if recorded. Accordingly, since I have not seen a council resolution to reflect approval of this construction, and upon inspection, the register failed to record entries for recent purchases, it seems the advertisement for the housing may have failed to produce tender submissions, where the CEO may, as a result, have contracted a builder to build the three houses without Council authority.

Since you seem to oppose the provision of this essential data for me via the administration, then I assume you are fully aware of this contract arrangement and ask you to please provide me your understanding of how this contract was entered into within 24 hours from the date of this letter, as this seems to be a breach of the regulations at clause 11.

General Remarks.

The opposition to the provision of this basic data from some councillors surprises me, and now alarms me, where the allegation of opposition from the alleged overwhelming view of council seems untrue, where I am only in receipt of the opposing views from three Councillors, which is not even a simple majority of council; where I remain unconvinced at the suggestion of an 'Overwhelming Opposition' from most councillors.

Similarly, this letter is not in any way intended to reflect a "Disrespect of the Majority of Councillors", but to ensure compliance is supported, which should be the intent of all councillors.

Furthermore, it is interesting to note the view of the President that councillors cannot direct the CEO, (which is quite correct), yet he provides comment recommending to the CEO to not respond to my questions, which I am entitled to ask (and so should all of you) in order to ensure compliance is maintained and responses to the public can be provided. It seems the President has entered into the area of the operations of the Shire by giving guidance to the CEO on an operational matter, where this aspect is not the President's role and only contributes to an element of raising concern.

Furthermore, I assure my intent and purpose in my enquiry is to assist in compliance and correctness in our conduct as a Shire, so our endeavours are fundamentally the same, where your opposition is most disturbing to me at (sic) it presents as though you are not in favour of legislative compliance with the law, where I encourage you to - , convince me otherwise.

Since, it seems some of the councillors are of the view that my enquiries somehow adversely impact on the time constraints of the CEO; then please comment on why he wants to drive a truck for a day with the works crew and can do without a Deputy CEO and also wants to assume control of the Works Manager's position??

If he can allegedly manage this volume of additional duties, he assuredly can provide a simple printout from the accounting for the kitchen renovation and a copy of the contract of the construction of three houses. Thus, it seems the CEO is not under any time constraints, where your allegations to the contrary seem to be without foundation.

Should you have concerns over my request of you in these matters: then feel free to undertake your own research through the Department of Local Government, the W.A.L.G.A. Office, or councillors in other shires, and enquire if my requests are reasonable as we all need to be on the same page and working together co-operatively towards the same goals. Thus, your earliest response will indeed be gratefully (sic) received,

Yours sincerely”

(5 May 2014 Letter)

(g) at the OCM held on 5 May 2014 the following resolution was passed by a majority of 3 to 2 (with Cr Tegg voting against it):

“That Council instruct the CEO to;

1. Provide no further information to Councillor Tegg in respect to the Town Hall tip, Grade.
2. Provide no further information to Councillor Tegg in respect to the Staff housing project.”

9. Elements of regulation 10(1) of the *Regulations*

9.1 Regulation 10 provides:

“10(1) A person who is a council member must not —

- (a) direct or attempt to direct a person who is a local government employee to do or not to do anything in the person’s capacity as a local government employee; or
- (b) attempt to influence, by means of a threat or the promise of a reward, the conduct of a person who is a local government employee in the person’s capacity as a local government employee.

(2) Subregulation (1) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.”

9.2 The essential elements of regulation 10(1)(a) are that it is more likely than not that a person who is currently a council member:

- (a) directed or attempted to direct;
- (b) another person, who is a local government employee;
- (c) to do or not to do anything in the other person’s capacity as a local government employee;

- (d) where the direction or attempted direction was not part of anything that the council member did as part of the deliberations at a council or committee meeting; and when the council member directed or attempted to direct the employee concerned, the member did so with the belief that the intended result would be (i.e. the member's intent, purpose and aim was) **(Intent)** giving the employee, or trying or making an effort to give the employee, an instruction in relation to an employee's act or omission in his or her capacity as a local government employee.

9.3 For present purposes, the essential elements of regulation 10(1)(b) are that it is more likely than not that a person who is currently a council member:

- (a) attempted to influence;
- (b) by means of a threat or the promise of a reward;
- (c) the conduct of a person, who is a local government employee, in the person's capacity as a local government employee;
- (d) the member's attempt was not part of anything that the council member did as part of the deliberations at a council or committee meeting; and
- (e) when the council member made the threat concerned, he or she did so with the Intent of intimidating or overcoming of the will of the local government employee to influence the conduct of a local government employee as a local government employee.

9.4 A person's motive is different than his or her Intent. Broadly, a person's motive is the thing or things that prompt or induce the person to do or omit to do an act, or to form an intention.

9.5 In *De Gruchy v R* [2002] HCA 33 at paragraph [51] Kirby J said (without footnote references):

"Distinguishing between the usually essential ingredient of a criminal intention and a person's desire, purpose or motive will sometimes be important. But, as such, motive is rarely, if ever, an element of a criminal offence. Motive must not, therefore, be confused with intention. Motive may be "the reason that nudges the will and prods the mind to indulge the criminal intent" ... It may be the feeling that prompts the operation of the will, the ulterior object of the person willing. It generally has two evidential aspects. These will be the emotion that is supposed to have led to the act and the external fact that is the possible exciting cause of such emotion, but not identical with it."

9.6 The member's Intent may be inferred from both or either of the member's motives and/or the other circumstantial evidence, if such inference is more likely than not the only reasonable and definite inference to be drawn from such motives and/or such circumstantial evidence, as the case may require¹.

¹ *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5.

10. Allegation 1 – the Panel’s Findings

10.1 Allegation 1 alleges a breach of regulation 10(1) by sending the 13 April 2014 Letter to the Complainant.

10.2 It is alleged this letter constituted a direction or attempted direction for the purposes of regulation 10(1)(a) or a threat contrary to regulation 10(1)(b).

Direction – regulation 10(1)(a)

10.3 In this regard, the 13 April 2014 Letter contained the following words:

“Thus it is requested you furnish me a detailed printout from the general/job ledger of this exorbitant line item within 48 hours of the receipt of this letter **or I will have no choice but to advise the Ministers’ office of your failure to provide such a fundamentally simple report upon request.**”

10.4 A council member may be treated as having *directed* a local government employee if the council member, with the necessary Intent, gave the employee an instruction in relation to an employee’s act or omission in his or her capacity as a local government employee.

10.5 A council member may be treated as having *attempted to direct* a local government employee if the council member, with the necessary Intent, has tried or made an effort to give the employee an instruction in relation to the employee’s act or omission in his or her capacity as a local government employee.

10.6 The Panel considers that the 13 April 2014 Letter constituted a request for information, rather than a direction or instruction to the Complainant to provide that information. A mere request is not a direction.

10.7 As an essential element of regulation 10(1)(a) has not been established, the Panel finds that Cr Tegg did not breach regulation 10(1)(a) by sending the 13 April 2014 Letter..

Threat – regulation 10(1)(b)

10.8 A council member may be treated as having attempted to influence the conduct of a local government employee if the council member, with the necessary Intent, has tried or made an effort to affect, sway or produce an effect on a local government employee’s conduct as a local government employee.

10.9 A council member may be treated as having made an attempt under regulation 10(1)(b) “by means of a threat” where:

- (a) the council member’s effort to affect, sway or produce an effect on the local government employee is made by the council member’s declaration of an intention to inflict punishment, pain or loss on, or to take any action detrimental or unpleasant to, the local government employee (or on someone, or to something, that he or she cares about) in retaliation for, or conditionally upon, some action or course; and
- (b) that effort and declaration of intent was made by the council member with the intention and belief that the intended result would be the intimidating or overcoming of the will of the local government employee.

10.10 The Panel is satisfied that it is more likely than not that when Cr Tegg sent to 13 April 2014 Letter to the Complainant:

- (a) Cr Tegg was a councillor of the Shire;
- (b) the Complainant was an employee of the Shire;
- (c) the provision of the information sought in the 13 April 2014 Letter (**Information**) was information which the Complainant, in his capacity as CEO of the Shire, could obtain and provide to Cr Tegg;
- (d) the words:

“I will have no choice but to advise the Ministers’ office of your failure to provide such a fundamentally simple report upon request.”

constituted a “threat” to the Complainant in the event that he did not provide the Information (in that such a report to the Minister’s office had the potential to be detrimental to the CEO’s reputation) (**Threat**);

- (e) the Threat was not part of anything that the Cr Tegg did as part of the deliberations at a council or committee meeting; and
- (f) when Cr Tegg made the Threat he did so with the Intent of intimidating or overcoming of the will of the Complainant to influence the him to provide the Information.

10.11 **Accordingly the Panel finds that the by sending the 13 April 2014 Letter, Cr Tegg breached regulation 10(1)(b).**

11. Allegation 2 – the Panel’s Findings

11.1 Allegation 2 alleges a breach of regulation 10(1) by sending the 28 April 2014 Letter to the Complainant.

11.2 It is alleged this letter constituted a direction or attempted direction for the purposes of regulation 10(1)(a) or a threat contrary to regulation 10(1)(b).

11.3 The 28 April 2014 Letter relevantly provides as follows:

“In this disturbing matter, you seem to misinterpret a simple request for clear financial information on a budgeted item to enable me to respond to inquiries from the constituents as some form of “direction”, where I am (as a councillor) entitled, to be provided with accurate and correct information when requested, I advise not being in receipt from either you or your finance officer a detailed account of the expenditure for this cost centre as requested, where this request is again formalized. Furthermore as this item has exceeded budget by \$19,000 it is incumbent on you to present an Item to council seeking a budget amendment to vary the parameter of this project to accommodate this excess, as the funds have to now be applied in reduction of another cost centre, where this variation remains the province of council and requires an absolute majority decision of council.

Thus, is expected that you will prepare a suitable report to reflect the need for this amendment with supporting justification as to how the \$169,000 was expensed and if further funding is required to complete the project and where the funds are coming from to maintain control of the budget. Please ensure this is presented to the next council meeting. [Emphasis added]

- 11.4 The Panel is satisfied that by sending the 28 April 2014 Letter Cr Tegg went beyond making a mere request for the specified report and gave or attempted to give a direction or instruction to the Complainant to prepare that report.
- 11.5 The Panel is also satisfied that when the 28 April 2014 Letter was sent:
- (a) Cr Tegg was a councillor of the Shire;
 - (b) the Complainant was an employee of the Shire;
 - (c) the direction was not part of anything that Cr Tegg did as part of the deliberations at a council or committee meeting; and
 - (d) when Cr Tegg directed the Complainant, he did so with Intent of giving or attempting to give the Complainant an instruction in relation to an act of the Complainant in his capacity as a local government employee.
- 11.6 **Accordingly the Panel finds that the by sending the 28 April 2014 Letter, Cr Tegg breached regulation 10(1)(a).**

12. Elements of regulation 7 of the Regulations

- 12.1 That regulation provides that “[a] person who is a council member must not make improper use of the person’s office as a council member ... to cause detriment to the local government or any other person.”
- 12.2 Where, as in the present case, there is no indication from the evidence that the conduct complained about is conduct that contravened section 5.93 of the Act or section 83 of *The Criminal Code* the essential elements of regulation 7(1)(b) are that it is more likely than it is not that:
- (a) a person who is currently a council member committed conduct;
 - (b) the person’s conduct was a use of his or her office of council member;
 - (c) viewed objectively, that use was an improper use of the person’s office of council member; and
 - (d) the person committed his or her conduct to cause detriment to the local government or any other person.

13. Allegation 3 - the Panel's Findings

- 13.1 Allegation 3 alleges a breach of regulation 7(1)(b) by sending the 5 May 2014 Letter to the Shire's President and Councillors.
- 13.2 The word "to" in the phrase "to cause detriment" has been interpreted as meaning "in order to", "for the purposes of" or "with the intent, purpose and aim": see *Chew v R* [1992] HCA 18; (1992) 173 CLR 626 at [2] – [3]; *Ryan and Local Government Standards Panel* [2009] WASAT 154 at [31] - [32]; *Steck and Local Government Standards Panel* [2011] WASAT 117 [50].
- 13.3 The word "detriment" is to be constructed widely, and includes a financial or a non-financial loss, damage, or injury, of any state, circumstance, opportunity or means specially unfavourable. Accordingly, "detriment" may include a tendency for others to think less favourably of a person, humiliation, denigration, intimidation, harassment, discrimination, disadvantage, adverse treatment, and dismissal from, or prejudice in, employment: *Ryan and Local Government Standards Panel* [2009] WASAT 154 at [31] - [32].
- 13.4 While a contravention of regulation 7(1)(b) does not depend on actual detriment being suffered by a person, it must be established that the councillor believed that the *intended* result of his or her conduct would be that the other person would suffer detriment: *Treby and Local Government Standards Panel* [2010] WASAT 81 [96]; *Steck and Local Government Standards Panel* [2011] WASAT 117 [50]; *Re and Local Government Standards Panel* [2014] WASAT 111 [47].
- 13.5 In the Panel's view, the test for establishing whether a council member had the necessary subjective purpose or specific intent in order for him or her to be culpable (i.e. guilty, blameworthy or responsible) for a breach of regulation 7(1)(b) is whether the evidence demonstrates that in committing the relevant conduct the member believed that the intended result of such conduct would be (i.e. the member's intent, purpose and aim was) to cause detriment to the local government or any other person.
- 13.6 On the evidence before the Panel, the Panel:
- (a) is not satisfied that the only inference open was that it was more likely than not that by sending the 5 May 2014 Letter to the Shire's President and Councillors, Cr Tegg intended to cause detriment to the Complainant (or acted with reckless indifference that the detriment was a probable or likely consequence of that Conduct);
 - (b) considers that it may be reasonably inferred that by sending the 5 May 2014 Letter to the Shire's President and Councillors, Cr Tegg sought to gain access to information that he considered was necessary for him to adequately discharge his role as a Shire Councillor; and
 - (c) is not satisfied that it is more likely than it is not that by sending the 5 May 2014 Letter to the Shire President and Councillors, Cr Tegg engaged in the Conduct to cause, in the relevant sense, detriment to the Complainant.

13.7 Accordingly the Panel finds that the by sending the 5 May 2014 Letter, Cr Tegg did not breach regulation 7(1)(b).



Brad Jolly (Presiding Member)



Paul Kelly (Member)



Peter Doherty (Member)

