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## Local Government Standards Panel

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Complaint Number	SP 2018-099
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Councillor Jennifer Scott</b>
<b>Respondent</b>	<b>Councillor Michael Southwell</b>
Local Government	<b>Shire of Capel</b>
Regulation	Regulation 4 Regulation 6 Regulation 7 <i>of the Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mrs Sheryl Siekierka (Presiding Member) Mrs Emma Power (Member) Councillor Paul Kelly (Member)
Heard	5 March 2019 Determined on the documents
Finding	No Breach of Regulation 4 or Regulation 7 One minor breach of Regulation 6

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### FINDING AND REASONS FOR FINDING

Delivered 4 April 2019

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#### DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005*, 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.



## Summary of the Panel's decision

1. On 5 March 2019, the Panel found that Councillor Michael Southwell a councillor of the Shire of Capel (**"the Shire"**):
  - a. did not commit any minor breach pursuant to the Local Government Act 1995 (WA) (**"the Act"**), regulation 4 of the Local Government (Rules of Conduct) Regulations 2007 (**"the Regulations"**) or regulation 7 of the Regulations; and
  - b. did commit a minor breach in relation to regulation 6 of the Regulations, when he shared a comment on his Councillor Facebook page in relation to a motion passed at the Ordinary Council Meeting of 27 June 2018 and thereby passing on confidential information obtained in a closed meeting as set out in paragraph 26 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.<sup>1</sup>
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.<sup>2</sup>
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, inference or evidence relied upon is more likely than not to have occurred or be accurate<sup>3</sup>; and
  - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding<sup>4</sup>.
7. The Panel does not possess investigative or supervisory powers.<sup>5</sup> 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 Australia<sup>6</sup>.

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<sup>1</sup> Section 5.105 of the Act

<sup>2</sup> Section 5.106 of the Act

<sup>3</sup> Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1

<sup>4</sup> Briginshaw v Briginshaw (1938) 60 CLR 336

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

<sup>6</sup> Section 8(6) of Schedule 5.1 of the Act

10. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

#### **Regulation 4**

11. Regulation 4 reads:

*“(1) In this regulation —*

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

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

12. Section 5.105(1)(b) of the Act states as follows:

*“A council member commits a minor breach if he or she contravenes*

*...*

*“(b) a local law under this Act, contravention of which the regulations specify to be a minor breach.”*

13. The Complainant alleges that the Respondent has breach the following provisions of the Shire of Capel Standing Orders Local Law 2016 (**“the Standing Orders”**):

*“(1) A member must not reflect adversely on a decision of the Council or a Committee except on a motion that the decision be revoked or changed.*

*“(2) A member must not —*

*(a) reflect adversely on the character or actions of another member or employee; or ”*

#### **Regulation 6**

14. 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) Subregulation (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.”*
15. In this Complaint it is alleged that Cr Southwell obtained the relevant information from information that he acquired at a closed meeting, so the Panel has considered regulation 6(2)(b).

### **Regulation 7**

16. 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.*
17. It is not alleged that Cr Southwell or any other person received any advantage, so the Panel has only considered regulation 7(1)(b) in this Complaint.

### **Jurisdiction and Procedural Fairness**

18. On 16 October 2018 the Panel received an email from Mr Ian McCabe, acting as complaints officer of the Shire (**“the Complaints Officer”**). The same enclosed a Complaint of Minor Breach Form (with an explanatory letter and attachments) dated 8 October 2018.
19. In her letter of complaint Cr Scott alleges that Cr Southwell has breached:
- a. regulation 4 of the Regulations by breaching sections 7.4(1) and 7.4(2)(a) of the Shire’s Standing Orders (**“Allegation 1”**);
  - b. regulation 6(2)(b) of the Regulations by revealing information obtained in the closed portion of the Ordinary Council Meeting of 27 June 2018 (**“the OCM”**) by:
    - i. making the Post on his Councillor Facebook page (reproduced in paragraph 25) in which he made comments in relation to a motion passed during such portion of the OCM (**“Allegation 2”**); and
    - ii. by allegedly providing such information to the writers or administrators of the Gelorup Gazette Facebook page, which information was referred to in the Facebook post reproduced in paragraph 27 below (**“Allegation 3”**); and



- c. regulation 7(1)(b) of the Regulations by causing a detriment to the Council and other councillors by making the Post reproduced in paragraph 25 below (**“Allegation 4”**),  
(together **“the Complaint”**).
20. The Panel convened on 5 March 2018 to consider the Complaint.
21. The Panel notes that this conduct was the subject of a prior complaint (complaint SP 58 of 2018) where an allegation of a minor breach of each of regulation 6(2)(b) regulation 7(1)(b) was made in substantially similar terms to Allegation 2 and Allegation 4. In that case one breach of regulation 6(2)(b) was found. This decision replicates that finding and reasons.
22. The Panel:
- a. accepted the advice of the Department of Local Government, Sport and Cultural Industries (**“the Department”**) that, based on information published on the Western Australian Electoral Commission’s website, Cr Southwell was:
    - i. last elected to the Council of the Shire 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 5 March 2018;
  - b. was satisfied the Complaint was made within two years after the alleged breach occurred<sup>7</sup>;
  - c. was satisfied that the Shire’s Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of a minor breach<sup>8</sup>;
  - d. was satisfied the Department had provided procedural fairness to Cr Southwell; and
  - e. found it had jurisdiction to consider the Complaint.
23. A recurrent breach is a minor breach that has occurred after the council member has been found to have committed two or more other minor breaches.<sup>9</sup>
24. The Panel may send the complaint which if found would be a recurrent breach to the Chief Executive Officer of the Department assisting the relevant Minister at the time instead of considering the Complaint itself.<sup>10</sup>
25. Although Cr Southwell has previously committed ten minor breaches, the Panel did not find that the Complaint ought to be sent to the Chief Executive Officer of the Department as the alleged breaches, if found to have been committed, would not be recurrent breaches until after the Respondent has had an opportunity to review the past breaches and address their conduct<sup>11</sup>.

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<sup>7</sup> Section 5.107(4) and 5.109(2) of the Act

<sup>8</sup> Section 5.107 and 5.109 of the Act

<sup>9</sup> Section 5.105(2) of the Act

<sup>10</sup> Sections 5.110(2)(b), 5.111(1) of the Act.

<sup>11</sup> Sections 5.111 and 5.105(2) of the Act



## The Specifics of the Complaint

26. The relevant comments the subject of the Complaint are contained in a Facebook Post made by Cr Southwell on 28 June 2018 in relation to a motion passed at the OCM as follows:

 **Councillor Michael Southwell** shared Gelorup Gazette - Greater Bunbury Region's post.  
28 June at 17:07 · 🌐

This was a late Motion so wasn't in the Agenda. The President left the room because he had an obvious financial conflict of interest, the outgoing CEO declared a financial interest, but remained in the room. I questioned this and was told he did not have to leave the room.  
I spoke against and voted against this Motion.  
It was passed with the following councillors voting in favour:  
Jennifer Scott  
Barry Bell  
Douglas Kitchen  
Brian Heame  
Debra Radtsich  
Sebastian Shiano  
Peter McCleery

I can't comment on this decision, except to say I opposed it in the debate.  
The Council policy which says we will not fund defamation actions is easy to find on the website under Council/Policies.

 **Gelorup Gazette - Greater Bunbury Region**  
28 June at 15:55 · 🌐

**\*\*Capel Shire Rate Increase Update\*\***

I would like to let everyone know that at the Council Meeting on Wednesday a late motion was carried to allocate \$3000 each to the CEO, & Shire President for pursuing a defamation case against myself and the Sunday Times.

(“the Post”).

27. At the OCM in question, part of the meeting was closed to members of the public to consider Item 21.1 being a motion relating to a confidential new business matter of an urgent nature affecting a Shire employee (“the Motion”). The Minutes of the Council Meeting (“the Minutes”) were posted on the Shire’s website on Monday 2 July 2018. The relevant portion of the Minutes is as follows:

SHIRE OF CAPEL ORDINARY COUNCIL MINUTES – 27 JUNE 2018.....150

### ITEMS FOR CONSIDERATION BEHIND CLOSED DOORS

Cr McCleery declared an Impartiality interest in Item 21.1 Legal Action – Defamation Statements. The extent and nature of his interest is that his neighbour is one of the publishers mentioned in the item.

Mr Paul Sheedy and Cr Murray Scott declared a Financial interest in Item 21.1 Legal Action – Defamation Statements. The extent and nature of their interest is that they are the parties requesting Council to meet legal costs.

### OC0624 (21.1) Legal Action – Defamation Statements

Location:	Shire of Capel
Applicant:	Civic Legal
File Reference:	LI.AD.2/ILM471
Disclosure of Interest:	I wish to disclose a financial interest in this matter being one of the parties the subject of the legal advice.
Date:	25.06.18
Author:	Chief Executive Officer, PF Sheedy
Senior Officer:	Chief Executive Officer, PF Sheedy
Attachments:	Civic Legal – Legal Advice (CONFIDENTIAL)

### IN BRIEF

The legal advice provided by Civic Legal indicates that, in their view, potential defamatory statements have been made on Facebook posts, against the Shire President and Chief Executive Officer by alleged defamers, that Council Policy 1.5 allows the Council to agree to meet the legal costs involved in issuing “concerns notices”, with Council being requested to formally resolve to support the action.

### OC0626 OFFICER’S RECOMMENDATION – 21.1/COUNCIL DECISION

Moved Cr Bell, Seconded Cr J Scott

That Council resolves to:

- Support the Shire President and the CEO in obtaining advice and representation, from Civic Legal, to issue concerns notices on their behalf with a view to obtaining a public apology and other amends to a maximum combined cost of \$6,000 (i.e. a maximum of \$3,000 to support the Shire President and a maximum of \$3,000 to support the CEO); and
- Endorse the deeds between the Shire and Shire President and Chief Executive Officer (as tabled at the meeting) and authorise the President and Chief Executive Officer to affix the Common Seal to the deeds.

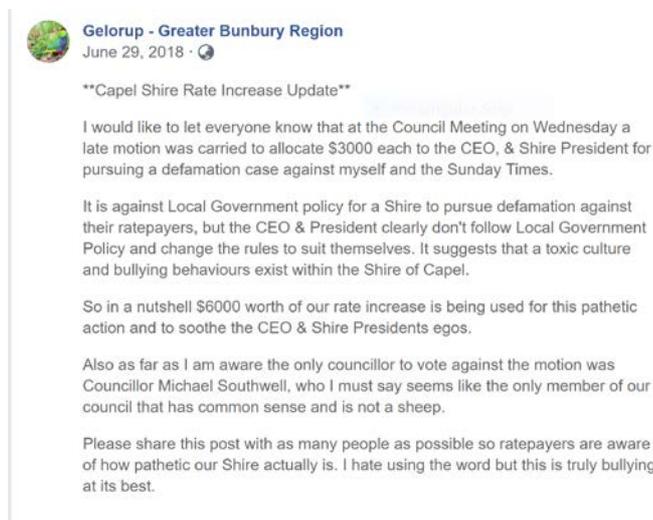
Carried 7/1

Cr Southwell requested that his vote against the Motion be recorded.

### VOTING REQUIREMENTS

Simple majority

28. In relation to the Post the Complainant alleges that:
- because the nature of the subject matter discussed at the closed meeting was confidential, it was very disturbing that Cr Southwell shared the Post on the next day to Facebook readers and, in particular, that he named the councillors that had voted for the Motion and noted that he didn't;
  - the public naming of councillors and how they voted would be considered an extreme breach of confidentiality and possibly vexatious; and
  - the only exception is that Cr Southwell requested his name and vote be recorded in the Minutes.
29. In addition, the initial post that was shared by Cr Southwell (written by the Gelorup Gazette - one of the alleged defamers) shows further information regarding the Motion and the closed portion of the OCM. The relevant post is as follows:



**(“the Gelorup Post”).**

30. The Complainant argues that:
- while no author name is mentioned in the Gelorup Post, it is the Complainant's view that it was made by one of the alleged defamers the subject of the Motion (who administers the Gelorup Gazette page); and
  - as the Minutes of the OCM were not published until 2 July 2018 she believes that the information in the Gelorup Post was given to the Gelorup Gazette by Cr Southwell as he was the only Councillor to oppose and vote against the confidential item and there would be no other person in council chambers at the time that would have been willing to give the information to the alleged defamers.
31. By making the Post and providing confidential information to the Gelorup Gazette Cr Southwell has:
- breached clause 7.4(1) and 7.4(2)(a) of the Shire's Standing Orders Local Law 2016 to not adversely reflect on a decision of the Council or Committee or the character or actions or another member or employee; and
  - caused detriment to the Shire of Capel and other elected members.
32. In the Complaint, the Complainant also provided:
- a copy of the Post; and
  - a copy of the extract of the Minutes; and

- c. a copy of the Gelorup Post.

### **Respondent's Response**

33. By an email dated 29 October 2018 Cr Southwell provided a response to the Complaint.
34. Cr Southwell denies that he has committed any minor breach.
35. Cr Southwell makes the following general comments and arguments in respect to the allegations of Minor Breach:
  - a. the Complaint is badly conceived and poorly executed and embarrassing for all concerned;
  - b. the Complaint is obviously vexatious and an example of the bullying behaviours of several Capel Councillors who seem to have engaged in a concerted effort to target him with frivolous and vexatious complaints to the Standards Panel;
  - c. the Complainant should be cautioned for the sloppy Complaint and warned not to repeat this kind of behaviour;
  - d. he urges the Panel to refuse to deal with the Complaint on the basis it is frivolous, trivial, vexatious, misconceived and without substance;
  - e. he should not have to defend his conduct in this instance as it is clear from the facts at hand that he has done nothing wrong;
  - f. at all times he has acted properly and lawfully carrying out his role as councillor as defined in the Act;
  - g. the Complainant has used one complaint form to mention the alleged 3 breaches which should not be permitted and is not the intended use of the form;
36. In relation to regulation 4, Cr Southwell notes that no details are provided in the Complaint regarding this regulation.
37. In respect to regulation 6 Cr Southwell states that:
  - a. no details are provided;
  - b. the Complainant says that in her view information that was published by another person was given to that person by Cr Southwell. This is a serious claim without a shred of any evidence made on the basis of supposition and guesswork and is outrageous;
38. In relation to regulation 7 Cr Southwell argues that:
  - a. the Complaint is confusing and does not explain how the Post causes a detriment to the Shire of Capel and other elected members;
  - b. it is the role of the Panel to determine coherent complaints based on facts provided, not examine the information provided and then make out a complaint which can then be ascribed to a complainant;
  - c. the outcome of a confidential item which came before Council at the OCM was already in the public domain when the Post was made;
  - d. the Council items and decision are read out to the open Council Meeting and do not just get into the public domain upon the publication of the minutes;
  - e. only the deliberation and any documents submitted are behind closed doors are confidential and he specifically asked that his vote be recorded when the item



was passed 7/1 (with the President declaring a conflict and staying out of the room). As such, the identity of those who supported the Motion was in the public domain when the vote was announced;

- f. the Complainant appears to be suggesting that information about the way a councillor votes on an item should be confidential and can cause a detriment. If done properly the way a person voted cannot be of detriment to them; and
- g. the Complaint is so lacking in substance that it is obviously vexatious and concocted in a ham-fisted attempt to cause harm to his reputation.

### **Panel's Consideration**

#### **Regulation 4 – Allegation 1**

39. To make a finding of a minor breach of regulation 4 of the Regulations the Panel must be satisfied, to the required standard, that:
  - a. Cr Southwell was a councillor at the time of the alleged breach and the time of the determination;
  - b. the conduct occurred during a council or committee meeting; and
  - c. Cr Southwell breached a valid provision of the Shire of Capel's Standing Orders Local Law 2016.

#### **Was Cr Southwell a Councillor at the relevant times**

40. Cr Southwell was a councillor at the time of the alleged breach and at the date the Panel considered the Complaint.

#### **The conduct occurred at a council or committee meeting**

41. This element is not met as the conduct the subject of the Complaint occurred in making the comments in the Post.
42. This conduct occurred following the OCM, not during the same as required by the Regulations.
43. There is no allegation that Cr Southwell made any adverse reflection during the OCM.
44. This element is not met.

#### **Cr Southwell breached a valid provision of the Shire of Capel Standing Orders Local Law 2016**

45. As the above element cannot be met, it is not necessary to further consider this element.

#### **Conclusion**

46. Given the above, the elements required to find a breach of regulation 4 of the Regulations have not been met.

#### **Regulation 6(2)(b) – Allegation 2**

47. To make a finding of a minor breach in respect to regulation 6 the Panel must be satisfied that:



- a. Cr Southwell 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 Southwell disclosed information to someone who at the time was not also a Councillor of the same local government;
  - ii. the disclosed information was acquired by Cr Southwell either:
    1. from a confidential document; or
    2. 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;
  - iii. if the information was acquired at a closed council or committee meeting, Cr Southwell 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).

Cr Southwell was an elected member at the relevant times

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

Cr Southwell disclosed information to someone who at the time was not also a Councillor

49. The information the subject of the Complaint was provided by Cr Southwell by way of a public Facebook Post on his councillor Facebook page.
50. As this Post was available to all the members of the public following Cr Southwell, this element is met.

The disclosed information was information Cr Southwell acquired 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

51. Allegation 2 alleges that Cr Southwell disclosed in the Post certain confidential information that was acquired by Cr Southwell during the closed portion of the OCM.
52. In decision SP 58 of 2018, the Panel found to the required standard that although certain information the Post was in the public domain at the time the Post was made (including the manner in which certain councillors voted), certain information was not, being the facts that:
- a. the President left the room;
  - b. the Chief Executive Officer (“**the CEO**”) remained in the room;
  - c. Cr Southwell questioned why the CEO was allowed to remain in the room; and
  - d. Cr Southwell spoke against the Motion.
53. Taking into account the timing of the Post, the Panel finds it is more likely than not that some of the information in the Post was acquired at a council or committee meeting, or a part of a council or committee meeting, that was closed to the public.
54. This element is met.

Cr Southwell did not derive the disclosed information from a non-confidential document, or the disclosure did not occur in any of the ways identified in regulation 6(3)



55. Although Cr Southwell argues that the manner in which the other councillors voted was already in the public domain, he does not deny that that the Post was based upon his knowledge from the closed portion of the OCM.
56. Cr Southwell states that he was striving for openness and accountability.
57. There is no evidence put forward by either party that indicates that, in respect to the matters set out in paragraph 52 above, that such information was acquired in a non-confidential document, or that any of the other exceptions set out in regulation 6(3) apply.
58. The Panel finds that it is more likely than not that, in respect to the information referred to in paragraph 52 above:
  - a. such information was not derived from a non-confidential document; and
  - b. no exception set out in regulation 6(3) of the Regulations could reasonably apply to the release of the relevant information by Cr Southwell.
59. This element is met.

#### Conclusion

60. Given the above, the elements required to find a breach of regulation 6(2)(b) of the Regulations have been met.
61. Cr Southwell breached regulation 6(2)(b) of the Regulations.

#### **Regulation 6 – Allegation 3**

62. To make a finding of a minor breach in respect to regulation 6 the Panel must be satisfied that:
  - a. Cr Southwell 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 Southwell disclosed information to someone who at the time was not also a Councillor of the same local government;
    - ii. the disclosed information was acquired by Cr Southwell either:
      1. from a confidential document; or
      2. 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;
    - iii. if the information was acquired at a closed council or committee meeting, Cr Southwell 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).

#### Cr Southwell was an elected member at the relevant times

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

Cr Southwell disclosed information to someone who at the time was not also a Councillor



64. Allegation 3 alleges that Cr Southwell disclosed certain confidential information to the writers or administrators of the Gelorup Gazette, and that this was the source of the information contained in the Gelorup Post.
65. However, there is no evidence provided which would allow the Panel to come to the conclusion that it was more likely than not this occurred.
66. The Complainant has made an assumption and is merely speculating as to where the confidential information was sourced. This is not enough for the Panel to make a finding to the required standard that Cr Southwell disclosed the information.
67. This element is not met.

The disclosed information was information Cr Southwell acquired 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

68. The Complaint alleges that Cr Southwell disclosed confidential issues that were discussed in the closed portion of the OCM.
69. However, as the above element is not met and, further, there is no evidence provided that the relevant information was provided by Cr Southwell, the Panel has not further considered this element at this stage.

Cr Southwell did not derive the disclosed information from a non-confidential document, or the disclosure did not occur in any of the ways identified in regulation 6(3)

70. As the above elements are not met, it is not necessary to consider this element.

#### Conclusion

71. Given the above, the elements required to find a breach of regulation 6 of the Regulations in respect to Allegation 3 have not been met.

#### **Regulation 7 – Allegation 4**

72. 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 Southwell was an elected member at the time of the alleged breach and the time of the determination; and
  - b. Cr Southwell made use of his office as Council member of the Shire;
  - c. when viewed objectively, such use was an improper use of Cr Southwell'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 Southwell engaged in the conduct in the belief that detriment would be suffered by another person.

Cr Southwell was an Elected Member at the relevant times

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



Cr Southwell made use of his office as Council Member of the Shire

74. The Post was made using Cr Southwell's councillor Facebook Page;
75. In addition, the content of the Post directly related to the Shire and matters discussed at the OCM.
76. Given the above, the Panel finds, to the required standard, that any reasonable person would conclude that Cr Southwell made the comments in his capacity as an elected member and therefore made use of his office as a council member.
77. This element is met.

Cr Southwell's use was improper

78. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or a lack of wisdom<sup>12</sup>. 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.
79. Impropriety does not depend on a councillor's consciousness of impropriety. It is to be judged objectively and does not involve an element of intent<sup>13</sup>.
80. 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.
81. The Complainant alleges that the Post was improper as:
  - a. it indicates that Cr Southwell has breached his confidentiality obligations;
  - b. the naming of the manner in which councillors voted is vexatious; and
  - c. referring to the vote in an adverse and negative manner has caused detriment to the Shire and the relevant councillors.
82. In relation to the issue of confidentiality, the Panel has already found that certain of the information in the Post was obtained from a closed meeting.
83. Further, in decision SP 58 of 2018, the Panel found that Cr Southwell acted improperly due to the following factors:
  - a. in making the Post, he inappropriately disclosed information from the closed portion of the OCM and thereby failed to comply with the procedural requirements for closed meetings;
  - b. other parties present at the closed portion of the OCM would have been placed at a disadvantage as they would not have been able to comment on the matters raised in the Post without also potentially breaching the regulations;
  - c. in respect to his comment that it was Council policy that they "*will not fund defamation actions*", Cr Southwell did not take reasonable care and accurately advise what the Council policy is as reflected in the *Shire's Legal Representation Costs & Indemnification Councillors and Employees Policy*;
84. Given the above, the Panel finds that it is more likely than not that the Post made by Cr Southwell was improper in that it was:

<sup>12</sup> Complaint of Minor Breach No. SP 3 of 2013

<sup>13</sup> *Chew v R* [1992] HCA 18



- a. of such a nature that a reasonable individual would consider the same to be inappropriate and not in keeping with the conduct that would be expected of a councillor; and
- b. deserving of a penalty.

85. This element is met.

Cr Southwell intended detriment to be suffered by another person

86. "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.
87. It is not necessary to find whether any detriment was actually suffered<sup>14</sup>, but an intent to cause such detriment must be established.
88. The Panel is not satisfied to the required standard of proof that Cr Southwell intended to cause detriment to the Shire by publishing the Facebook Post as alleged.
89. The Panel refers to Cr Southwell's explanation in relation to his intention in publishing the Facebook Post that he was fulfilling his duty as a councillor to facilitate communication between the council and the community by publishing the Facebook Post.
90. While the Panel has already noted that it finds parts of Cr Southwell's Post to be improper, it is plausible that Cr Southwell's intention was to provide a brief summary of what occurred at the Council Meeting.
91. This was also the finding in decision SP 58 of 2018.
92. As such, the Panel finds that it is more likely than not that the Post by Cr Southwell was not intended to cause damage or detriment to the Shire or other Councillors of the Shire.
93. This element is not met.

Conclusion

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

**General Comments**

95. In addition to the above, the Panel makes the following comments regarding the manner in which Cr Southwell chose to respond to the Complaint.
96. Cr Southwell's argumentative tone, accusations of vexatiousness and comments regarding the "quality" of the Complaint indicate a clear lack of understanding as to the application of the Regulations, the complaints process and the role of the Panel.
97. Further, stating that a complainant should be cautioned for a sloppy complaint shows a vital misunderstanding of the role of the Panel and the intention of the Regulations to permit any person to make a legitimate complaint as to the conduct of elected members.

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<sup>14</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59 at [72]



98. The attitude by Cr Southwell is not helpful to the Panel and does not assist in the consideration of the evidence before the Panel.

### **Panel's Findings**

99. In respect to Allegation 1 Cr Southwell did not breach Regulation 4 of the Regulations and therefore did not commit a minor breach.
100. In respect to Allegation 2 Cr Southwell did breach Regulation 6 of the Regulations and therefore did commit a minor breach.
101. In respect to Allegation 3 Cr Southwell did not breach Regulation 6 of the Regulations and therefore did not commit a minor breach.
102. In respect to Allegation 4 Cr Southwell did not breach Regulation 7(1)(b) of the Regulations and therefore did not commit a minor breach.

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Sheryl Siekierka (Presiding Member)

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Emma Power (Member)

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Paul Kelly (Member)



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## Local Government Standards Panel

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Complaint Numbers	SP 58 of 2018 and SP 2018-099
Legislation	<i>Local Government Act 1995</i>
<b>Complainants</b>	<b>Councillor Brian Hearne</b> <b>Councillor Jennifer Scott</b>
<b>Respondent</b>	<b>Councillor Michael Southwell</b>
Local Government	<b>Shire of Capel</b>
Regulation	Regulation 6(2)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i>
Panel Members	Ms S Rizk (Presiding Member) Ms E Rowe (Deputy Member) Ms R Aubrey (Deputy Member)
Heard	23 May 2019 Determined on the documents
Outcome	Public censure Public apology

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### SANCTION DECISION AND REASONS FOR DECISION

Published 3 July 2019

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#### DEFAMATION CAUTION

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## Introduction

1. On 12 December 2018 the Panel found under Complaint Number SP58 of 2018 that Councillor Michael Southwell (“Cr Southwell”), a member of the Shire of Capel (“Shire”), committed one breach under the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) and regulation 6(2)(b) when he made comments on a Facebook post relating to the council meeting on 27 June 2018 (“Council Meeting”) thereby passing on confidential information obtained at a closed meeting. The Panel found that Cr Southwell did not breach regulation 7(1)(b) in relation to the same conduct.
2. On 5 March 2019, the Panel found under Complaint Number SP2018-099 that Cr Southwell committed one breach of regulation 6(2)(b) in relation to the same conduct by Cr Southwell as set out in Complaint Number SP 58 of 2018, when he made comments on a Facebook post relating to the Council Meeting thereby passing on confidential information obtained at a closed meeting. The Panel found that Cr Southwell did not breach regulations 4 and 7 in relation to the same conduct.

## Joint sanction decision

3. On 15 February 2019 the Panel published its Finding and Reasons for Findings in SP 58 of 2018 that Cr Southwell had breached regulation 6(2)(b). On 4 April 2019 the Panel published its Finding and Reasons for Finding in SP2018-099, again finding that Cr Southwell had breached regulation 6(2)(b). In both SP58 of 2018 and SP2018-099 (together “the Complaints”), the Panel found:
  - Regulation 6(2)(b) forbids the disclosure of information by a council member that they acquired at a closed meeting;
  - It was more likely than not that the essential elements that need to be established in order for a contravention of regulation 6(2)(b) to have occurred, had been satisfied in relation Cr Southwell’s conduct when he made comments on a Facebook post relating to the Council Meeting, thereby passing on confidential information obtained at a closed meeting.
  - The information was not derived from a non-confidential document and did not fall under any of the exceptions under regulation 6(3) (including the public domain exception) at the time the Facebook post was published.
4. Given that both Complaints relate to the same conduct by Cr Southwell, and on both occasions he was found to have breached regulation 6(2)(b), the Panel decided that the Complaints should be considered together for a joint sanction decision.

## Jurisdiction

5. The Panel convened on 23 May 2019 to consider how it should deal with the breaches. The Panel accepted the Department’s advice that on this date there was no available information to indicate that Cr Southwell had ceased to be or was disqualified from being a councillor.

## Possible sanctions



6. Section 5.110(6) of the Act provides that the Panel is to deal with a minor breach by —

“(a) *dismissing the complaint; 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*

(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. The Panel may dismiss a complaint under section 5.110(6)(a), not to reverse the Panel’s finding of a breach but to indicate that in all the circumstances the councillor should not be penalised and the breach should not be recorded against the councillor’s name.

### **Cr Southwell’s submissions**

8. 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)<sup>1</sup>:

i. In a letter dated 15 February 2019, the Department notified Cr Southwell of the Panel’s findings in relation to SP58 of 2018, providing him with a copy of its Findings published on 15 February 2019 and inviting him to make submissions on how the Panel should deal with the breach under section 5.110(6).

ii. In a letter dated 4 April 2019, the Department notified Cr Southwell of the Panel’s findings in relation to SP2018-099, providing him with a copy of its Findings published on 4 April 2019 and inviting him to make submissions on how the Panel should deal with the breach under section 5.110(6).

9. Cr Southwell sent his submissions to the Department by email on 16 April 2019 (SP58 of 2018) and 15 April 2019 (SP 2018-099) respectively. Cr Southwell submitted that the Complaints should be dismissed and furthermore:

### **SP58 of 2018**

- The Finding is defective as the information was in the public domain and was not information that he acquired at a closed meeting; and

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<sup>1</sup> Section 5.110(5) of the Act.



- The breach is “*minor, trivial and inconsequential*” and any penalty imposed by the Panel may “*expose the Standards Panel process to ridicule*”.

#### SP2018-099

- The Complaint was defective because it was an “*omnibus complaint*” and each grievance should be the subject of a single complaint that can be fairly argued and judged on its own merits.
- There is a lack of natural justice and procedural fairness in putting aside his objections and hearing all the complaints together, as each could have “*infected*” and prejudiced the fair hearing of another.
- The Findings include “*general comments*” regarding his Response. This suggests he may not have been given a fair hearing.
- He does not believe that an ordinary, reasonable person would consider that he did not meet the standards of conduct expected of a councillor. On the contrary, he would expect an ordinary resident or ratepayer to be grateful that a councillor was prepared to be honest and forthright and help bring matters of considerable public interest to light.
- As he has already faced penalties for other breaches and has not repeated the behaviours complained of since those findings, he submits there is no beneficial purpose to be served by imposing an additional penalty in this case.

#### **Panel’s consideration**

10. The Panels found on both occasions that Cr Southwell committed a breach of regulation 6(2)(b) in respect of his conduct when he made comments on a Facebook post relating to the Council Meeting thereby passing on confidential information obtained at a closed meeting.
11. When responding to the Findings, Cr Southwell uses the opportunity to reassert his position that he did not commit a breach, but states that regardless, the breach is “*minor, trivial and inconsequential*” and his conduct was justified. Cr Southwell also threatens the Panel and criticises its processes.
12. The comments made by Cr Southwell on Facebook disclosed information that he acquired as a Councillor from a closed meeting, and is a very serious matter. Therefore, the Panel does not consider that dismissal of the Complaint is appropriate because this would indicate that the breach is so minor that no penalty is warranted.
13. Nor does the Panel consider that ordering Cr Southwell to undergo further training is an adequate sanction or is appropriate because Cr Southwell does not show any willingness to reflect constructively on his conduct or take on board the comments made by the Panel.
14. The options left for the Panel to consider are to order the publication of a Notice of Public Censure or to order Cr Southwell to make a Public Apology (or both).



15. Cr Southwell disclosed the information from the closed meeting publicly on social media and it specifically related to the Shire's President and the Shire's former CEO; a public apology to these parties who were directly impacted by Cr Southwell's conduct is appropriate.
16. Furthermore, the sanction imposed by the Panel must send a message to councillors, local government employees, ratepayers, residents and the wider public that councillors must maintain appropriate standards of conduct. Cr Southwell used his position as a council member to publicly disclose confidential information from a closed meeting and it was simply unacceptable.
17. While the Panel notes that when an order that a Notice of Public Censure be published, that Notice is published by the local government's CEO, at the expense of the local government, and such expense is significant where the Notice is to be published in a newspaper or newspapers, the Panel also finds that it is appropriate that Cr Southwell be publicly censured for the breach of regulation 6(2)(b).
18. A censure is a public statement of disapprobation of a councillor's conduct and the Panel considers this to be the appropriate penalty as it will send a message to the community and other councillors that Cr Southwell's conduct was unacceptable and deserving of a serious penalty.
19. The penalties of a public apology and a public censure are commensurate with the seriousness of the breach concerned.

### **Panel's decision**

1. The Panel orders that in relation to the breach of regulation 6(2)(b) and in terms of the attached order, that:
  - i. under section 5.110(6)(b)(i) of the Act, Cr Southwell be publicly censured (PART A); and
  - ii. under section 5.110(6)(b)(ii) of the Act, Cr Southwell publicly apologise to the Shire President and the Shire's former CEO (PART B).

Sarah Rizk (Presiding Deputy Member)

Elanor Rowe (Deputy Member)

Rebecca Aubrey (Deputy Member)



## Attachment

Complaint Number	SP 58 of 3018 and SP 2018-099
Legislation	<i>Local Government Act 1995 (WA)</i>
<b>Complainants</b>	<b>Councillor Brian Hearne</b> <b>Councillor Jennifer Scott</b>
<b>Respondent</b>	<b>Councillor Michael Southwell</b>
Local Government	<b>Shire of Capel</b>
Regulation	Regulation 6(2)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i>
Panel Members	Ms S Rizk (Presiding Member) Ms E Rowe (Deputy Member) Ms R Aubrey (Deputy Member)
Heard	23 May 2019 Determined on the documents
Outcome	Public censure Public apology

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## ORDER

Published: 3 July 2019

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## THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

### PART A - ORDER FOR PUBLIC CENSURE

1. Councillor Michael Southwell, a Councillor for the Shire of Capel (“the Shire”), be censured as specified in paragraphs 2 and 3 below.
2. Within the period of 29 days to 43 days from the day following the date of service of this Order on Councillor Southwell, the Chief Executive Officer of the Shire arrange for the following Notice of Public Censure to be published, in no less than 10 point print:
  - (a) as a one-column or a two-column display advertisement in the first 15 pages of “The West Australian” newspaper; and
  - (b) as a one-column or a two-column display advertisement in the first 15 pages of the “Bunbury Mail” newspaper.
3. The Notice of Public Censure is to be published on a date other than the Notice of Public Censure ordered in Complaint Number SP2018-101.



Government of Western Australia  
Local Government Standards Panel

**NOTICE OF PUBLIC CENSURE**

The Local Government Standards Panel has found that Councillor Michael Southwell, a Councillor of the Shire of Capel, breached:

- (a) regulation 6(2)(b) of the *Local Government (Rules of Conduct) Regulations 2007 (WA)* when he made comments on a Facebook post relating to the Council Meeting on 27 June 2018 thereby passing on confidential information obtained at a closed meeting.

In engaging in this conduct, Councillor Southwell made improper use of his office as a council member.

The Panel censures Councillor Southwell for a breach of regulation 6(2)(b) of the *Local Government (Rules of Conduct) Regulations 2007 (WA)*.

**LOCAL GOVERNMENT  
STANDARDS PANEL**



## PART B - ORDER FOR PUBLIC APOLOGY

4. Councillor Michael Southwell, a Councillor for the Shire of Capel ("the Shire"), publicly apologise to the Shire's President and the Shire's former CEO.
5. At the Shire's first ordinary council meeting Cr Southwell attends after the expiration of 28 days from the date of service of this Order on him Cr Southwell shall:
  - (a) ask the presiding person for his or her permission to address the meeting to make a public apology to the Council and the Shire;
  - (b) make the apology immediately after Public Question Time or during the Announcements part of the meeting or at any other time when the meeting is open to the public, as the presiding person thinks fit;
  - (c) address the Council as follows, without saying any introductory words before the address, and without making any comments or statement after the address:

"I advise this meeting that:

- i. A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened regulation 6(2)(b) of the Local Government (Rules of Conduct) Regulations 2007 when I made comments on a Facebook post relating to the Council Meeting on 27 June 2018 thereby passing on confidential information obtained at a closed meeting.
- ii. The Panel found that by behaving in this manner I disclosed confidential information about the Shire's President and the Shire's former CEO that I obtained at a closed meeting thereby committing one breach of regulation 6(2)(b) of the Local Government (Rules of Conduct) Regulation 2007.
- iii. I accept that I should not have acted in such a manner towards the Shire's President and the Shire's former CEO and I apologise to the parties concerned for having done so."

6. If Cr Southwell fails or is unable to comply with the requirements of paragraph 5 above he shall cause the following notice of public apology to be published in no less than 10 point print, as a one-column or two-column display advertisement in the first 10 pages of the Bunbury Mail newspaper.

### **PUBLIC APOLOGY BY CR MICHAEL SOUTHWELL**

A formal complaint was made to the Local Government Standards Panel alleging that I contravened a provision of the *Local Government (Rules of Conduct) Regulations 2007* when I made comments on a Facebook post relating to the Council Meeting on 27



June 2018 thereby passing on confidential information obtained at a closed meeting.

The Panel found:

(1) I committed one breach of regulation of 6(2)(b) of the Rules of Conduct Regulations when I made comments on a Facebook post relating to the Council Meeting on 27 June 2018 thereby passing on confidential information regarding the Shire's President and the Shire's former CEO that I obtained at a closed meeting.

(2) By behaving in this way to the Shire's President and the Shire's former CEO, I failed to meet the standards of conduct expected of a councillor

I apologise to the parties concerned for acting in such a manner.

Sarah Rizk (Presiding Deputy Member)

Elanor Rowe (Deputy Member)

Rebecca Aubrey (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."*

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**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**ACT** : LOCAL GOVERNMENT ACT 1995 (WA)

**CITATION** : SOUTHWELL and LOCAL GOVERNMENT  
STANDARDS PANEL [2020] WASAT 6

**MEMBER** : MS D QUINLAN, MEMBER

**HEARD** : 25 OCTOBER 2019

**DELIVERED** : 8 JANUARY 2020

**FILE NO/S** : CC 1069 of 2019

**BETWEEN** : MICHAEL SOUTHWELL  
Applicant

AND

LOCAL GOVERNMENT STANDARDS PANEL  
Respondent

ATTORNEY GENERAL OF WESTERN  
AUSTRALIA  
Intervener

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*Catchwords:*

Local government - Review of decision of Local Government Standards Panel for minor breach - Facebook post made before council minutes available - Whether councillor disclosed information acquired at closed meeting - Whether information in public domain

*Legislation:*

*Local Government (Rules of Conduct) Regulations 2007* (WA), reg 4, reg 6, reg 6(2)(b), reg 7, reg 7(1)(b)

*Local Government Act 1995* (WA), s 2.10(c), s 5.23(2), s 5.23(2)(a), s 5.23(2)(b), s 5.103, s 5.104(1), s 5.105(1)(a), s 5.106, s 5.107, s 5.110, s 5.110(2)(a), s 5.110(6), s 5.110(6)(b)(i), s 5.110(6)(b)(ii), s 5.125, Pt 5, Div 9  
*State Administrative Act 2004* (WA), s 24, s 27, s 29(1), S 29(3)(a), 29(3)(c)(i), s 37(1), s 60(2), Pt 3, Div 3

*Result:*

Decisions as to breach affirmed  
Sanction decision set aside and substituted with Tribunal's sanction

*Category:* B

**Representation:**

*Solicitors:*

Applicant :  
Respondent : State Solicitor's Office  
Intervener : State Solicitor's Office

**Case(s) referred to in decision(s):**

Corr and Local Government Standards Panel [2012] WASAT 14  
Kepert and Local Government Standards Panel [2019] WASAT 78  
Mazza and Local Government Standards Panel [2009] WASAT 165  
Ord Irrigation Cooperative Ltd v Department of Water [2018] WASCA 83  
R v Australian Broadcasting Tribunal; (1980) 144 CLR 13  
Treby and Local Government Standards Panel [2010] WASAT 81;  
(2010) 73 SR (WA) 66

**REASONS FOR DECISION OF THE TRIBUNAL:**

***Introduction***

1           These proceedings arise in the Tribunal pursuant to an application made on 22 July 2019 under s 5.125 of the *Local Government Act 1995* (WA) (LG Act). The applicant, Councillor Michael Southwell (Cr Southwell), a council member of the Shire of Capel (Shire), seeks a review in the Tribunal of findings on 15 February 2019 and 4 April 2019 of minor breaches in relation to two complaints and orders as to a joint sanction made on 3 July 2019 by the Local Government Standards Panel (Panel).

2           The respondent in these proceedings is the Panel. The role in these proceedings of the Panel was limited to the production of a bundle of documents provided pursuant to s 24 of the *State Administrative Act 2004* (WA) (SAT Act): see ***R v Australian Broadcasting Tribunal***; (1980) 144 CLR 13 and ***Treby and Local Government Standards Panel*** [2010] WASAT 81; (2010) 73 SR (WA) 66 at [16].

3           The Attorney General of Western Australia (Intervener) exercised his right to intervene in these proceedings under s 37(1) of the SAT Act to assist the Tribunal in its determination of these proceedings and, where necessary, by acting as a contradictor to the case presented by Cr Southwell.

4           On 10 October 2019 the Tribunal ordered that the review of the Panel's decisions as to two minor breaches and sanction are to be determined entirely on the documents pursuant to s 60(2) of the SAT Act.

5           Part 3 Div 3 of the SAT Act sets out the scope of the Tribunal's review jurisdiction. Section 29(1) of the SAT Act provides the Tribunal with the corresponding jurisdiction, functions and discretions as those of the Panel under the LG Act.

6           Pursuant to s 27 of the SAT Act, the purpose of the review by the Tribunal is to produce the correct and preferable decision at the time of the review. Section 27 of the SAT Act also provides that the Tribunal:

- (a) is not limited to the reasons given by the Panel or the grounds for review set out in the application;

- (b) considers the decision afresh at the time of the review; and
- (c) may take into account any additional or new information which was not provided at the time the original decision was made.

***Documents before the Tribunal***

7 The parties have provided the following documents and submissions to the Tribunal for the determination of these proceedings:

- (a) application for review with attachments lodged on 22 July 2019;
- (b) Intervener's statement of issues, facts and contentions dated 12 September 2019;
- (c) Panel's bundle of documents dated 12 September 2019;
- (d) Cr Southwell's response dated 4 October 2019;
- (e) Cr Southwell's statement dated 28 October 2019; and
- (f) Intervener's written submissions dated 25 October 2019.

***The two complaints - SP 58 of 2018 and SP 2018-099***

8 On 18 July and 16 October 2018, the Panel received two separate complaints forwarded by the complaints officer at the Shire both complaining of the same conduct of Cr Southwell on 28 June 2018 and each alleging a minor breach under s 5.107 of the LG Act.

9 The two complaints were made as follows:

- (a) a complaint of minor breach made by Cr Brian Hearne dated 15 July 2018 (SP 58 of 2018): see pages 72 - 91 of the respondent's bundle (RB); and
- (b) a complaint of minor breach made by Cr Jennifer Scott dated 8 October 2018 (SP 2018-099): see pages 92 - 99 RB.

10           Whilst both complaints related to the same alleged conduct, SP 58 of 2018 alleged Cr Southwell had breached reg 6 and reg 7 of the *Local Government (Rules of Conduct) Regulations 2007 (WA)* (Rules of Conduct Regulations). Whereas, SP 2018-099 alleged Cr Southwell had breached reg 4, reg 6 and reg 7 of the Rules of Conduct Regulations.

11           The Panel found that Cr Southwell had not breached reg 4 and reg 7 of the Rules of Conduct Regulations. Those allegations were not pressed by the Intervener in these review proceedings. The Tribunal concurs with the Panel and the Intervener that consideration of whether reg 4 and reg 7 of the Rules of Conduct Regulations have been breached does not arise for determination from the facts in these proceedings.

12           Relevant to the issues for determination in these review proceedings, it is alleged that Cr Southwell breached reg 6(2)(b) of the Rules of Conduct Regulations which provides that a council member must not disclose information that the council member acquired at a closed meeting other than information derived from a non-confidential document.

### ***Legislative framework***

13           Part 5 Div 9 of the LG Act legislates the conduct of officials operating in local government including local government councillors and provides for sanctions when it is found that councillors have committed either minor or major breaches of the LG Act. These proceedings relate to allegations of minor breaches of the LG Act.

14           Section 5.103 of the LG Act provides as follows:

#### **5.103. Codes of conduct**

(1) Every local government is to prepare or adopt a code of conduct to be observed by council members, committee members and employees.

[(2) deleted]

(3) Regulations may prescribe codes of conduct or the content of, and matters in relation to, codes of conduct and any code of conduct or provision of a code of conduct applying to a local government under subsection (1) is of effect only to the extent to which it is not inconsistent with regulations.

15 Section 5.104(1) of the LG Act enables regulations to be made prescribing rules of conduct for council members that council members are required to observe. Section 5.105(1)(a) of the LG Act provides a council member commits a minor breach if he or she contravenes - a rule of conduct made under s 5.104(1) of the LG Act.

16 Regulation 6 of the Rules of Conduct Regulations provides:

**Use of information**

(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) Subregulation (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.

17 Section 5.106 of the LG Act outlines that the standard of proof required for finding that a breach has occurred is that it is to be based on evidence from which it may be concluded that it is more likely than not that the breach occurred.

18 In the decision of the Court of Appeal in *Ord Irrigation Cooperative Ltd v Department of Water* [2018] WASCA 83 at [124] - [125] the Court of Appeal found, subject of course to the enabling legislation, that no party bears an onus, legal or practical, in review proceedings in the Tribunal. The Court of Appeal at [115] considered that the incorrect placement of an 'onus' on a party in review proceedings can distract the Tribunal from critical focus on the terms of the legislation which define and delimit the Tribunal's powers and the circumstances in which those powers may be exercised.

19 Section 5.110 of the LG Act provides that the Panel (and in these proceedings, the Tribunal) may deal with a minor breach in the following manner:

**Dealing with complaint of minor breach**

(1) The member of the primary standards panel who receives a complaint from a complaints officer under section 5.107(3)(c), 5.108(2)(c) or 5.109(1)(c) is to -

- (a) allocate that complaint to a standards panel; and
- (b) send the complaint and anything received from the complaints officer to the member of that standards panel who is appointed under Schedule 5.1 clause 2(a).

(2) After receiving a complaint allocated to it under subsection (1), a standards panel is required to -

- (a) make a finding as to whether the breach alleged in the complaint occurred; or
- (b) send the complaint to the Departmental CEO under section 5.111.

...

(6) The breach is to be dealt with 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)[.]

20 The Tribunal has previously considered reg 6(2)(b) in *Mazza and Local Government Standards Panel* [2009] WASAT 165 per Pritchard DCJ (as she then was) (*Mazza and LGSP*). In *Mazza and LGSP* at [82] and [85], the Tribunal accepted the submission of the Intervener that 'public domain' in reg 6(3)(c) should be given its ordinary and natural meaning as follows:

... the ordinary and natural meaning of that expression is set out in the Oxford Dictionary Online which defines 'public domain' as meaning '[t]he state or condition of belonging or being generally available to all, esp. through not being subject to copyright. Chiefly in *the public domain*'.

21 The Tribunal has also previously considered reg 6(2)(a) in *Corr and Local Government Standards Panel* [2012] WASAT 14 per Sharp DCJ (*Corr and LGSP*). In *Corr and LGSP* at [50], the Tribunal found that 'information' in reg 6(2) should also be given its ordinary and natural meaning as follows:

The word 'information' is not defined in the Rules of Conduct Regulations and there is no reason to give it anything other than its ordinary meaning, which is knowledge or facts communicated about a particular subject, event etc; *Shorter Oxford English Dictionary* (6<sup>th</sup> ed., 2009). It is not limited to 'advice', legal, strategic or otherwise.

***Background facts***

22 The background facts are not in dispute between Cr Southwell and the Intervener. Where Cr Southwell and the Intervener differ is the application of those facts to reg 6(2)(b) of the Rules of Conduct Regulations which will be considered by the Tribunal later in these reasons in determining each of the identified issues to be determined.

23 Cr Southwell was elected a councillor of the Shire in October 2017, and has remained an elected councillor of the Shire since that date: see page 59 RB.

24 On Friday 22 June 2018, the Shire posted the agenda for the upcoming ordinary council meeting scheduled for 27 June 2018 (agenda) on its webpage: see pages 45 - 51 RB.

25 On Wednesday 27 June 2018, an ordinary council meeting of the Shire was held (council meeting). The minutes of the council meeting were not posted on the Shire's webpage until Monday 2 July 2018 (minutes): see pages 52 - 58 RB.

26 The following matters, which comprised new business of an urgent nature, were discussed at the council meeting (urgent business):

- (a) a matter affecting an employee or employees; and
- (b) legal advice obtained, or which may be obtained, by the local government and which relates to a matter to be discussed at the meeting.

(see page 56 RB)

27 In order to discuss the urgent business, council considered closing the meeting to members of the public, as provided for under s 5.23(2)(a) and (b) of the LG Act. Before a procedural motion closing the meeting was moved and voted on, the minutes record that at 7.18 pm the following persons left the council meeting: the Shire President (President), Shire staff members, the incoming Chief Executive Officer (CEO), Mr McCabe and Ms Ace, a journalist with the *South Western Times*. Procedural motion OC0624 closing the meeting to members of the public in order to discuss the urgent business behind closed doors, was moved and carried eight votes to nil (closed meeting): see page 56 RB.

28 The minutes record that the motion considered in the closed meeting, was:

**ITEMS FOR CONSIDERATION BEHIND CLOSED DOORS**

Cr McCleery declared an Impartiality interest in Item 21.1 Legal Action - Defamation Statements. The extent and nature of his interest is that his neighbour is one of the publishers mentioned in the item.

Mr Paul Sheedy and Cr Murray Scott declared a Financial interest in Item 21.1 Legal Action - Defamation Statements. The extent and nature of their interest is that they are parties requesting Council to meet legal costs.

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**OCO624 (21.1) Legal Action – Defamation Statements**

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Location:	Shire of Capel
Applicant:	Civic Legal
File Reference:	LI.AD.2/ILM471
Disclosure of Interest:	I wish to disclose a financial interest in this matter being one of the parties the subject of the legal advice.
Date:	25.06.18
Author:	Chief Executive Officer, PF Sheedy
Senior Officer:	Chief Executive Officer, PF Sheedy
Attachments:	Civic Legal - Legal Advice (CONFIDENTIAL)

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**IN BRIEF**

The legal advice provided by Civic Legal indicates that, in their view, potential defamatory statements have been made on Facebook posts, against the Shire President and Chief Executive Officer by alleged defamers, that Council Policy 1.5 allows the Council to agree to meet the legal costs involved in issuing 'concerns notices', with Council being requested to formally resolve to support the action.

(see page 57 RB)

29 The Tribunal notes that the minutes quoted above record that after the council meeting was closed, the President and the CEO, Mr Paul Sheedy, both declared a financial interest in the motion (declarations): see page 57 RB. However, the minutes had already recorded as noted above that the President had left the council meeting. The minutes do not record that the CEO, Mr Sheedy had left the council meeting. The minutes are not clear as to whether the declarations made by the President and the CEO were done before or after the meeting was closed. The Tribunal finds that it cannot make factual findings in this regard and that, in any event, this lack of clarity is not material to the determination of the issues in these proceedings.

30 A motion relating to the urgent business was voted upon by the council (the motion), with seven councillors voting in favour of the motion and one councillor, Cr Southwell, voting against the motion (council decision). The council decision was recorded in the minutes as follows:

Moved Cr Bell, Seconded Cr J Scott

That Council resolves to:

1. Support the Shire President and the CEO in obtaining advice and representation, from Civic Legal, to issue concerns notices on their behalf with a view to obtaining a public apology and other amends to a maximum combined cost of \$6,000 (i.e. a maximum of \$3,000 to support the Shire President and a maximum of \$3,000 to support the CEO); and
2. Endorse the deeds between the Shire and Shire President and Chief Executive Officer (as tabled at the meeting) and authorise the President and Chief Executive Officer to affix the Common Seal to the deeds.

Carried 7/1

Cr Southwell requested that his vote against the Motion be recorded.

(see page 57 RB)

31 Once the motion passed, a procedural motion was moved and passed to re-open the closed meeting to the public. The minutes record that, at 7.50 pm the President, Shire staff and Mr McCabe re-entered the council meeting. The minutes record that at 7.51 pm, the President resumed the Chair and the Presiding Member read out the council decision in relation to the motion: see page 58 RB.

32 Prior to the publication of the minutes on 2 July 2018, at approximately 15:55 pm on 28 June 2018, the Gelorup Gazette – Greater Bunbury Region, posted the following post on its Facebook page (Gelorup Gazette Post):

**\*\*Capel Shire Rate Increase Update\*\***

I would like to let everyone know that at the Council Meeting on Wednesday a late motion was carried to allocate \$3000 each to the CEO, & Shire President for pursuing a defamation case against myself and the Sunday Times.

(see pages 80 and 97 RB)

33 Also prior to the publication of the minutes on 2 July 2018, on 28 June 2018 at approximately 17:07 pm, Cr Southwell shared the Gelorup Gazette Post as well as posting the following comment on another Facebook page (Facebook Post):

This was a late Motion so wasn't in the Agenda. The President left the room because he had an obvious financial conflict of interest, the outgoing CEO declared a financial interest, but remained in the room. I questioned this and was told he did not have to leave the room.

I spoke against and voted against this Motion.

It was passed with the following councillors voting in favour:

Jennifer Scott

Barry Bell

Douglas Kitchen

Brian Hearne

Debra Radisich

Sebastian Shiano

Peter McCleery

I can't comment on this decision, except to say I opposed it in the debate.

The Council policy which says we will not fund defamation actions is easy to find on the website under Council/Policies.

(see pages 80 and 97 RB)

**Panel's decisions**

34 Prior to the Panel publishing its findings and reasons for findings in SP 58 of 2018 and SP 2018-099, Cr Southwell provided submissions in response to the complaints the subject of the decisions: see pages 100 - 102 RB.

35 On 15 February 2019 the Panel in SP 58 of 2018 published its findings and reasons for finding that Cr Southwell had breached reg 6(2)(b) of the Rules of Conduct Regulations: see pages 5 - 19 RB. In relation to the first allegation, the Panel in SP 58 of 2018 found as follows:

**Panel's consideration**

First Allegation: Regulation 6(2)(b)

49. Based on the evidence before it, the Panel finds that the following series of events occurred:

- i. The Council Meeting was held on 27 June 2018:
  - the part of the Council Meeting relating to the Motion was closed to the public; and
  - the Council Meeting was re-opened subsequent to the Motion being heard and the Council Decision was then read out;

ii. On 28 June 2018 Cr Southwell published the Facebook Post in which he made the following comments ("Comments"):

*"The President left the room because he had an obvious financial conflict of interest, the outgoing CEO declared a financial interest, but remained in the room. I questioned this and was told he did not have to leave the room.*

.....

*I spoke against and voted against this Motion...I can't comment on this decision, except to say I opposed it in the debate".*

iii. On 2 July 2018 the Minutes including the Council Decision were published on the Shire's website.

50. Regulation 6(2)(b) forbids the *disclosure of information* by a council member that they *acquired at a closed meeting*. The Panel finds it more likely than not, that the essential elements which need to be satisfied in order for a contravention of regulation 6(2)(b) to have occurred, have been established.
51. Cr Southwell published the Comments (referred to in paragraph 49(ii) above) publicly on Facebook. The Comments contained the following information that Cr Southwell acquired at the closed part of the meeting and was not information derived from a non-confidential document:
- a. The President left the room;
  - b. The outgoing CEO remained in the room;
  - c. Cr Southwell questioned why the CEO was allowed to remain in the room; and
  - d. Cr Southwell spoke against the Motion.
52. The information in a closed council meeting that by virtue of regulation 6 a Councillor is not permitted to disclose publicly includes any word that is said during the closed meeting (except what is generally available to all persons at the time of the Councillor's disclosure).
53. While some of the information that Cr Southwell acquired at the Closed Meeting and which he disclosed in the Facebook Post, was in the public domain at the time the Facebook Post was published, the information specifically outlined in paragraph 51(a-d) above was not.

**Findings**

54. Accordingly for the above reasons, the Panel finds that Cr Southwell did breach regulation 6(2)(b).

(see pages 16 - 17 RB)

36 As to the second allegation of a breach of reg 7(1)(b), the Panel in SP 58 of 2018 found as follows:

Second Allegation: Regulation 7(1)(b)

*First, second and third elements satisfied*

55. The Panel finds that Cr Southwell engaged in the conduct which is the subject of the Second Allegation; and that he was a councillor and was acting as a councillor at all relevant times.

56. The first, second and third elements of regulation 7(1)(b) are established for the Second Allegation.

*Whether Cr Southwell acted improperly (fourth element)*

57. The Complainant states that Cr Southwell only "possibly" committed a breach of regulation 7(1)(b). It is not for the Panel to make a determination where the allegation against a councillor is uncertain. However, the Complainant's allegation of a breach of regulation 7 is clearly indicated on the Complaint Form and the Panel is satisfied that the allegation is sufficiently made out.
58. The Panel is satisfied that the fourth element has been established in relation to the Second Allegation and finds that Cr Southwell did act improperly. The Panel makes this finding because it is satisfied to the required standard of proof that a reasonable person would consider that Cr Southwell did not meet the standards of conduct expected of a councillor when adding the Facebook Post:
- a. Cr Southwell shared and commented on the Gelorup Gazette's post from earlier the same day. In doing so, he inappropriately disclosed information from the Closed Meeting and thereby failed to comply with the procedural requirements for closed meetings.
  - b. Furthermore, other parties present at the Closed Meeting would have been placed at a disadvantage as they would not have been able to comment on the matters raised at the meeting and in Cr Southwell's Facebook Post without also potentially breaching the regulations.
  - c. With regard to Cr Southwell's comment that Council "will not fund defamation actions", the Panel refers to clause 2.2(c) of the Shire's *Legal Representation Costs & Indemnification Councillors and Employees Policy*, a copy of which is attached to the Complaint, that states:  
  
*The Shire will not approve, unless under exceptional circumstances, the payment of legal representation costs for a defamation action, or a negligence action, instituted by a Councillor or employee.*
  - d. There are clearly circumstances under which the Shire will approve the payment of legal representation costs for defamation actions, albeit only "exceptionally". By providing information to the community Cr Southwell was under a duty to take reasonable care

and accurately advise what Council policy is, which he did not do.

- e. Finally, with regard to Cr Southwell's comment "*Sounds like you are as gobsmacked as I was*", the Panel finds this was a short and limited response to a comment by another Facebook user. While Cr Southwell was under a duty to accept the Council Decision graciously, the Panel does not find this comment to be improper in the circumstances.

Whether Cr Southwell intended to cause detriment to the local government or any other person (fifth element)

59. The Panel is not satisfied to the required standard of proof that Cr Southwell intended to cause detriment to the Shire by publishing the Facebook Post as alleged. The Panel refers to Cr Southwell's explanation in relation to his intention in publishing the Facebook Post:

- a. Cr Southwell maintains in his response to the Complaint that he did not intend to disclose "confidential" information when referring to what occurred at the Council Meeting in the Facebook Post:

*"Cr Hearne says there was no-one in the public gallery, and that the minutes were not published until four days later. This does not turn matters which were revealed and apparent to the open part of a Council meeting into confidential matters which cannot be discussed publicly."*

- b. Cr Southwell states that he was fulfilling his duty as a councillor to facilitate communication between the council and the community by publishing the Facebook Post. While the Panel has already noted that it finds parts of the Facebook Post to be improper, it is plausible that Cr Southwell's intention was to provide a brief summary of what occurred at the Council Meeting.
- c. Cr Southwell further contends that he was surprised at the Council Decision and hence his comment "*sounds like you were as gobsmacked as I was*". The Panel again finds it plausible that this comment (that was made shortly after the Council Decision) was indicative of his reaction to the Council Decision and that he did not intend to cause detriment to the Shire by making it.

60. Based on the evidence before it, the Panel does not find it more likely than not that Cr Southwell intended to cause a detriment to the Shire by publishing the Facebook Post.

**Findings**

61. The Panel finds Cr Southwell did not breach regulation 7(1)(b) in relation to the Second Allegation.

(see pages 17 - 18 RB)

37 On 4 April 2019, the Panel in SP 2018-099 published its findings and reasons for finding that Cr Southwell had breached reg 6(2)(b) of the Rules of Conduct Regulations: see pages 20 - 34 RB. In relation to that allegation, the Panel in SP 58 of 2018 found as follows:

**Regulation 6 – Allegation 3**

62. To make a finding of a minor breach in respect to regulation 6 the Panel must be satisfied that:
- a. Cr Southwell 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 Southwell disclosed information to someone who at the time was not also a Councillor of the same local government;
    - ii. the disclosed information was acquired by Cr Southwell either:
      - 1. from a confidential document; or
      - 2. 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;
    - iii. if the information was acquired at a closed council or committee meeting, Cr Southwell 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).

Cr Southwell was an elected member at the relevant times

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

Cr Southwell disclosed information to someone who at the time was not also a Councillor.

64. Allegation 3 alleges that Cr Southwell disclosed certain confidential information to the writers or administrators of the Gelorup Gazette, and that this was the source of the information contained in the Gelorup Post.
65. However there is no evidence provided which would allow the Panel to come to the conclusion that it was more likely than not this occurred.
66. The Complainant has made an assumption and is merely speculating as to where the confidential information was sourced. This is not enough for the Panel to make a finding to the required standard that Cr Southwell disclosed the information.
67. This element is not met.

The disclosed information was information Cr Southwell acquired 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

68. The Complaint alleges that Cr Southwell disclosed confidential issues that were discussed in the closed portion of the OCM.
69. However, as the above element is not met and, further, there is no evidence provided that the relevant information was provided by Cr Southwell, the Panel has not further considered this element at this stage.

Cr Southwell did not derive the disclosed information from a non-confidential document, or the disclosure did not occur in any of the ways identified in regulation 6(3)

70. As the above elements are not met, it is not necessary to consider this element.

#### Conclusion

71. Given the above, the elements required to find a breach of regulation 6 of the Regulations in respect to Allegation 3 have not been met.

(see pages 30 - 31 RB)

38 The Panel in SP 2018-099 found that Cr Southwell had not breached reg 7(1)(b) of the Rules of Conduct Regulations on the same basis as the Panel's decision in SP 58 of 2018: see pages 31 -33 RB. The Panel in SP 2018-099 found that Cr Southwell had not breached reg 4 of the Rules of Conduct Regulations as Cr Southwell had not contravened a provision of a local law as to conduct.

39 On 3 July 2019 the Panel published its joint sanction decision and reasons for decision in SP 58 of 2018 and SP 2018-099 (joint sanction decision): see pages 35 - 44 RB. The Panel's joint sanction decision found as follows:

**Panel's consideration**

10. The Panels found on both occasions that Cr Southwell committed a breach of regulation 6(2)(b) in respect of his conduct when he made comments on a Facebook post relating to the Council Meeting thereby passing on confidential information obtained at a closed meeting.
11. When responding to the Findings, Cr Southwell uses the opportunity to reassert his position that he did not commit a breach, but states that regardless, the breach is "*minor, trivial and inconsequential*" and his conduct was justified. Cr Southwell also threatens the Panel and criticises its processes.
12. The comments made by Cr Southwell on Facebook disclosed information that he acquired as a Councillor from a closed meeting, and is a very serious matter. Therefore, the Panel does not consider that dismissal of the Complaint is appropriate because this would indicate that the breach is so minor that no penalty is warranted.
13. Nor does the Panel consider that ordering Cr Southwell to undergo further training is an adequate sanction or is appropriate because of Cr Southwell does not show any willingness to reflect constructively on his conduct or take on board the comments made by the Panel.
14. The options left for the Panel to consider are to order the publication of a Notice of Public Censure or to order Cr Southwell to make a Public Apology (or both).
15. Cr Southwell disclosed the information from the closed meeting publicly on social media and it specifically related to the Shire's President and the Shire's former CEO; a public apology to these parties who were directly impacted by Cr Southwell's conduct is appropriate.

16. Furthermore, the sanction imposed by the Panel must send a message to councillors, local government employees, ratepayers, residents and the wider public that councillors must maintain appropriate standards of conduct. Cr Southwell used his position as a council member to publicly disclose confidential information from a closed meeting and it was simply unacceptable.
17. While the Panel notes that when an order that a Notice of Public Censure be published, that Notice is published by the local government's CEO, at the expense of the local government, and such expense is significant where the Notice is to be published in a newspaper or newspapers, the panel also finds that it is appropriate that Cr Southwell be publicly censured for the breach of regulation 6(2)(b).
18. A censure is a public statement of disapprobation of a councillor's conduct and the Panel considers this to be the appropriate penalty as it will send a message to the community and other councillors that Cr Southwell's conduct was unacceptable and deserving of a serious penalty.
19. The penalties of a public apology and a public censure are commensurate with the seriousness of the breach concerned.

(see pages 38-39 RB)

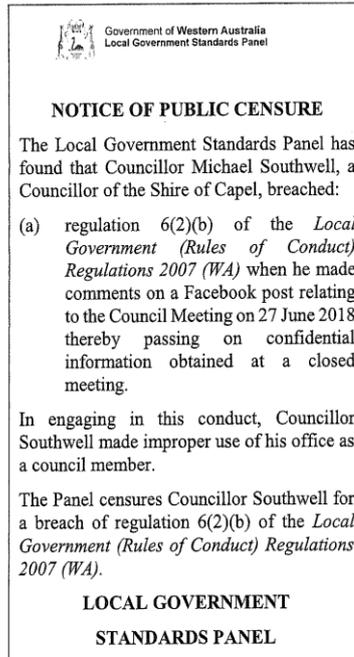
- 40 The Panel ordered that Cr Southwell be publicly censured under s 5.110(6)(b)(i) of the LG Act and publicly apologise to the Shire President and the Shire's former CEO under s 5.110(6)(b)(ii) of the LG Act. The Panel's orders were as follows:

**THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:**

**PART A – ORDER FOR PUBLIC CENSURE**

1. Councillor Michael Southwell, a Councillor for the Shire of Capel ("the Shire"), be censured as specified in paragraphs 2 and 3 below.
2. Within the period of 29 days to 43 days from the day following the date of service of this Order on Councillor Southwell, the Chief Executive Officer of the Shire arrange for the following Notice of Public Censure to be published, in no less than 10 point print:
  - (a) as a one-column or a two-column display advertisement in the first 15 pages of "The West Australian" newspaper; and

- (b) as a one-column or a two-column display advertisement in the first 15 pages of the "Bunbury Mail" newspaper.
3. The Notice of Public Censure is to be published on a date other than the Notice of Public Censure ordered in Complaint Number SP2018-101.



#### PART B – ORDER FOR PUBLIC APOLOGY

4. Councillor Michael Southwell, a Councillor for the Shire of Capel ("the Shire"), publicly apologise to the Shire's President and the Shire's former CEO.
5. At the Shire's first ordinary council meeting Cr Southwell attends after the expiration of 28 days from the date of service of this Order on him Cr Southwell shall:
- (a) ask the presiding person for his or her permission to address the meeting to make a public apology to the Council and the Shire.
- (b) make the apology immediately after Public Question Time or during the Announcements part of the meeting or at any other time when the meeting is open to the public, as the presiding person thinks fit;
- (c) address the Council as follows, without saying any introductory words before the address, and without making any comments or statement after the address:

"I advise this meeting that:

- i A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened regulation 6(2)(b) of the Local Government (Rules of Conduct) Regulations 2007 when I made comments on a Facebook post relating to the Council Meeting on 27 June 2018 thereby passing on confidential information obtained at a closed meeting.
- ii. The Panel found that by behaving in this manner I disclosed confidential information about the Shire's President and the Shire's former CEO that I obtained at a closed meeting thereby committing one breach of regulation 6(2)(b) of the Local Government (Rules of Conduct) Regulation 2007.
- iii. I accept that I should not have acted in such a manner towards the Shire's President and the Shire's former CEO and I apologise to the parties concerned for having done so."

6. If Cr Southwell fails or is unable to comply with the requirements of paragraph 5 above he shall cause the following notice of public apology to be published in no less than 10 point print, as a one-column or two-column display advertisement in the first 10 pages of the Bunbury Mail newspaper.

**PUBLIC APOLOGY BY CR MICHAEL SOUTHWELL**

A former complaint was made to the Local Government Standards Panel alleging that I contravened a provision of the *Local Government (Rules of Conduct) Regulations 2007* when I made comments on a Facebook post relating to the Council Meeting on 27 June 2018 thereby passing on confidential information obtained at a closed meeting.

The Panel found:

- (1) I committed one breach of regulation of 6(2)(b) of the Rules of Conduct Regulations when I made comments on a Facebook post relating to the Council Meeting on 27 June 2018 thereby passing on confidential information regarding the Shire's President and the Shire's former CEO that I obtained at a closed meeting.
- (2) By behaving in this way to the Shire's President and the Shire's former CEO, I failed to meet the standards of conduct expected of a councillor.

I apologise to the parties concerned for acting in such a manner.

(see pages 41-43 RB)

*Issues for determination*

41 The principal issue for the Tribunal to determine in these proceedings is whether Cr Southwell has committed the alleged two minor breaches (SP 58 of 2018 and SP 2018-099) and, if so, to exercise its discretion to impose the appropriate sanction.

42 In determining the principal issue, the Tribunal must also progressively determine the following sub-issues identified by the Intervener (and as amended by the Tribunal) as follows:

Issue 1: Whether Cr Southwell was a councillor of the Shire on 27 and 28 June 2018.

Issue 2: If Issue 1 is found by the Tribunal to be 'yes', whether on 28 June 2018 Cr Southwell shared the Gelorup Gazette Post as well as posting the Facebook Post which disclosed the following information (Disclosed Information):

- (a) the President left the room (matter (a));
- (b) the outgoing CEO remained in the room (matter (b));
- (c) Cr Southwell questioned why the CEO was allowed to remain in the room and was told he did not have to leave the room (matter (c)); and
- (d) Cr Southwell opposed the motion in the debate, meaning that he spoke against the motion (matter (d)).

Issue 3: If Issue 2 is found by the Tribunal to be 'yes', whether Cr Southwell acquired the Disclosed Information at a council meeting or a part of a council meeting that was closed to members of the public under s 5.23(2) of the LG Act.

Issue 4: If Issue 3 is found by the Tribunal to be wholly or partly 'yes', whether the Disclosed Information was derived from a non-confidential document as defined in reg 6(1) of the Rules of Conduct Regulations.

Issue 5: If Issue 4 is found by the Tribunal to be 'no', whether the Disclosed Information was already in the public domain for the purposes of reg 6(3)(c) of the Rules of Conduct Regulations at the time it was disclosed by Cr Southwell.

Issue 6: If Issue 5 is found by the Tribunal to be 'no', what is the appropriate sanction to impose under s 5.110(6) of the LG Act for Cr Southwell's breach of reg 6(2)(b) of the Rules of Conduct Regulations.

43 The Intervener proposed the above six issues for determination by the Tribunal and those issues were agreed by Cr Southwell. Cr Southwell also proposed a further issue for determination which has two components. Firstly, whether the relevant complaints were properly and validly made so as to be able to be judged against the Rules of Conduct Regulations. Secondly, whether it was proper that the two complaints were dealt with together to produce the Panel's joint sanction decision on 3 July 2019.

44 Firstly, the Tribunal does not agree with the suggestion by Cr Southwell that the validity of the two complaints arises as an issue of merit for determination in these review proceedings. Secondly, the Tribunal will consider whether the two alleged breaches can be jointly sanctioned if the Tribunal finds against Cr Southwell in relation to Issues 1 to 5 and needs to determine Issue 6.

### ***Cr Southwell's submissions***

45 Cr Southwell contends that the Panel's findings of minor breach and joint sanction decision should be set aside and submitted in support of that contention as follows:

- (a) The minutes indicate that the persons identified left the meeting, but the minutes fail to record that another member of the public:
  - a. was in the gallery and left the meeting when it was closed to the public;
  - b. remained in the ante-room outside until the meeting was re-opened to the public; and

- c. then remained in the meeting until its conclusion.
- (b) He did not disclose the Disclosed Information with a 'post' on his Facebook page. He shared and commented on another Facebook page.
- (c) The information in matters (a), (b), (c) and (d) was not information relating to the motion or discussion during deliberation, but was peripheral 'machinery' matters unrelated to the matters covered by reg 6(2)(b) of the Rules of Conduct Regulations and outside the clear intent of that regulation.
- (d) Whether the President left the meeting before or after the closure of the meeting, was information which was freely available public knowledge both at the time and later and, nevertheless, not information which was subject to the confidentiality imposed by the closure of the meeting. The fact that the CEO remained in the room was freely available public knowledge at the time the meeting was closed because he did not leave the room by the one available exit, along with the others who left the room at the time. The CEO made his declaration of conflict before the meeting was closed, not after. In any event his remaining in the room is not information subject to the confidentiality imposed by the closure of the meeting.
- (e) The Intervener's statement contains an incorrect assertion that he questioned why the CEO remained in the room. The Facebook comment does not characterise the nature of any question he asked, simply that he 'questioned'. The comment; 'was told he did not have to leave the room', does not divulge any information which was subject to the confidentiality imposed by the closure of this part of the meeting.
- (f) It is far-fetched to claim that disclosing he spoke in relation to the motion falls within information derived from a closed meeting. He derived this information from a personal memory of speaking. The fact that a councillor, spoke during a debate on an item before

council is totally unremarkable. The fact that a person spoke is not information which needs to be protected by regulation. No information was conveyed regarding what was said. The information that he spoke against the motion could also be easily surmised from the publicly available information that he voted against the motion and asked for his vote against to be recorded.

- (g) It is open for the Tribunal to conclude that while the facts in matters (b), (c) and (d) may have become apparent during the closed meeting, they were either already in the public domain, or would have been obvious and unremarkable to the ordinary reader of the Facebook comment, or not fall within the definition of 'information' which should not be disclosed, should it be acquired at a closed meeting. The material complained of does not fit the definition of confidential matters from a closed meeting. After the vote was taken, the result and decision was announced during the re-opened council meeting. It was a matter of public knowledge and later public record in the council minutes how councillors voted on the motion.
- (h) The information in the public domain in this case, was not simply known to one or two other people, it was available to anyone who may have attended the council meeting. At least six people were there.
- (i) The Intervener contends a breach of standards occurred, which may have lasted only three days, prior to being eliminated with the publishing of the minutes. Facts which have begun to exist and are not subject to confidentiality do not lie fallow, in some sort of twilight, subject to implicit, temporary confidentiality, until they are brought to light and into the public domain sooner or later, subject to the vagaries of publication of minutes. Section 2.10(c) of the LG Act says it is the role of a councillor to facilitate communication between the community and the council. There is no provision for this to be set aside during observance of a 'twilight zone' between a council meeting and the publication of minutes.

- (j) He agrees with the Intervener that there is no reason for an apology to the Shire President.

***Intervener's submissions***

46

The Intervener submitted in summary as follows:

- (a) It can be inferred that Cr Southwell shared the Disclosed Information that was included in the Gelorup Gazette Post and made the Facebook Post. Accordingly, the Intervener contends that it is open for the Tribunal to be satisfied that Cr Southwell disclosed the information on Facebook as set out in Issue 2 as matters (a) to (d). It is immaterial whether that disclosure was via a post on Cr Southwell's Facebook page, or by sharing and commenting on another Facebook page.
- (b) Matters (a) to (d) constituted information for the purposes of the reg 6(2)(b) of the Rules of Conduct Regulations, notwithstanding that they related to the conduct or a procedure of the council meeting.
- (c) The word 'information' is not defined in the LG Act or the Rules of Conduct Regulations. In *Corr and LGSP* at [50] the Tribunal found that there is no reason to give the word 'information' anything other than its ordinary meaning, citing the *Shorter Oxford English Dictionary* (6th ed., 2009), 'which is knowledge or facts communicated about a particular subject, event etc'.
- (d) It is clear that 'information' includes knowledge or facts communicated about a particular subject. Communication incorporates both verbal and non-verbal acts: see *Macquarie Dictionary Online*.
- (e) The verb 'acquired' is also not defined in the LG Act or Rules of Conduct Regulations. The *Macquarie Dictionary Online* defines the verb as meaning, amongst other definitions, as: '1. to come into possession of; get as one's own: ... 2. to gain for oneself through one's actions or efforts'.

- (f) The information in matters (a) to (d) was knowledge or facts relating to the motion which the Intervener contends constitutes 'information' for the purposes of reg 6(2)(b) of the Rules of Conduct Regulations.
- (g) It is open for the Tribunal to conclude that it was more likely than not that the information in matters (b), (c) and (d) was information which Cr Southwell acquired at the closed meeting for the following reasons:
- a. With respect to matter (a), as the minutes (which were not before the Panel) indicate that the President left the room before the meeting was closed, it is open for the Tribunal to conclude that the information contained in matter (a) was information that Cr Southwell did not acquire at the closed meeting.
  - b. With respect to matter (b), an inference can be drawn that the CEO remained in the room after the meeting was closed, because it was only after this point (as recorded in the minutes) that the CEO made his declaration. Accordingly, the fact that the CEO remained in the room is information that was acquired by Cr Southwell at the closed meeting.
  - c. With respect to matter (c), as noted above the inference can be drawn that the CEO made his declaration after the meeting was closed. It follows that it is open to the Tribunal to also conclude that Cr Southwell's question as to why the CEO remained in the room, was raised during the closed meeting. Accordingly, matter (c) was information that was acquired by Cr Southwell at the closed meeting.
  - d. With respect to matter (d), the minutes indicate that after the meeting was closed, the motion was tabled and a vote taken. It can be inferred that the point at which Cr Southwell spoke in relation to the motion was before the vote was taken. Accordingly, the Intervener contends

that the fact that Cr Southwell spoke against the motion was information which was acquired by him at the closed meeting.

- (h) Cr Southwell submits, because at least six people were in attendance at the meeting, that this means the information he acquired during the closed part of the meeting was already in the public domain when it was published. The Intervener relies on its submissions in respect of the interpretation of the verb 'acquired' and the phrase 'public domain' as it appears in reg 6(3)(c) of the Rules of Conduct Regulations, as discussed by Pritchard J (as she was then) in *Mazza and LGSP* at [82] and [85]. Accordingly, it is open to the Tribunal to conclude that it was more likely than not that the information as defined as matters (b), (c) and (d), was information which Cr Southwell acquired during the closed part of the meeting and was not information which was already in the public domain.
- (i) In relation to matters (b), (c) and (d) the Intervener agrees with the reasons given by the Panel at paragraphs 10 to 19 of the joint sanction decision: see pages 38-39 RB.
- (j) It is open for the Tribunal to determine that matter (a) was information which occurred before the meeting was closed. Accordingly, an order that Cr Southwell publicly apologise to the Shire President may not now be necessary. In all other respects, the Panel's order as to sanction should be affirmed by the Tribunal.

***Issue 1 – whether Cr Southwell was a councillor on 27 and 28 June 2018***

47 Cr Southwell agrees that he was a councillor of the Shire at all material times as the issue was framed by the Intervener. The Tribunal so finds that Cr Southwell was a councillor on 27 and 28 June 2018.

***Issue 2 – whether Cr Southwell posted the Disclosed Information***

48 Issue 2 requires the Tribunal to determine whether Cr Southwell posted the Disclosed Information on Facebook. More particularly, on 28 June 2018 whether Cr Southwell shared the Gelorup Gazette Post

as well as posting the Facebook Post both of which disclosed the following Disclosed Information:

- (a) the President left the room (matter (a));
- (b) the outgoing CEO remained in the room (matter (b));
- (c) Cr Southwell questioned why the CEO was allowed to remain in the room and was told he did not have to leave the room (matter (c)); and
- (d) Cr Southwell opposed the motion in the debate, meaning that he spoke against the motion (matter (d)).

49 Cr Southwell has clarified that the Facebook Post was not made on his own Facebook page but made on another Facebook page. This is not disputed by the Intervener and is accepted by the Tribunal as correct. However, this factual clarification is not material to the issues to be determined by the Tribunal.

50 Cr Southwell admits that he wrote the Facebook Post which contains the information defined in these reasons as the Disclosed Information. The Tribunal also finds that the Disclosed Information is information in the context of reg 6(2) of the Rules of Conduct Regulations as found in *Corr and LGSP* at [50].

***Issue 3 – whether Cr Southwell acquired the Disclosed Information at a meeting closed to the public***

51 Issue 3 requires the Tribunal to determine whether Cr Southwell acquired the Disclosed Information at a council meeting or a part of a council meeting that was closed to members of the public under s 5.23(2) of the LG Act.

52 The Tribunal concurs with the Intervener and Cr Southwell that matter (a), the information that the President left the room, was not information acquired at a closed meeting as the President had left the meeting before it was closed.

53 The Tribunal accepts the ordinary and natural meaning of 'acquired' as submitted by the Intervener from the *Macquarie Dictionary Online* which defines the verb as meaning, amongst other definitions, as: '1. to come into possession of; get as one's own: ... 2. to gain for oneself through one's actions or efforts'.

54 The Tribunal finds in relation to matter (b), the fact that the CEO remained in the closed meeting, was information acquired at the closed meeting by those present at the closed meeting, including Cr Southwell.

55 The Tribunal finds in relation to matter (c), the fact that Cr Southwell questioned why the CEO was allowed to remain in the room and was told he did not have to leave the room, was information acquired at the closed meeting by those present at the closed meeting, including Cr Southwell.

56 As to matter (d), the Tribunal does not accept Cr Southwell's submission that because the council decision with his dissent noted was later stated in the open meeting this meant the information that Cr Southwell had spoken against the motion was freely known to those who had not been present at the closed meeting but were present at the council meeting. For those outside of the closed meeting to know that Cr Southwell opposed the motion in the debate, in that he spoke against the motion, they would have to make an inference on the basis of the vote count that was later stated in the council meeting. However, another equally plausible inference could be that, whilst Cr Southwell voted against the motion, he did not speak opposing the motion in the debate. The Facebook Post stated that 'I can't comment on this decision, except to say I opposed it in the debate'. This overtly suggests that Cr Southwell participated in the debate and argued against the motion. In any event, reg 6(2)(b) of the Rules of Conduct Regulations refers to information *acquired* at a closed meeting, not information known to others who witnessed, who physically went into or came out of the closed meeting or inferences made by others who later hear the decision made at the closed meeting.

57 The Tribunal finds that the information in matter (d) could only have been acquired by those present at the closed meeting. Therefore, the Tribunal finds in relation to matter (d), the fact that Cr Southwell opposed the motion in the debate meaning that he spoke against the motion, was information acquired at the closed meeting by those present at the closed meeting, including Cr Southwell.

58 Therefore, the Tribunal finds, that Cr Southwell acquired the Disclosed Information in matters (b), (c) and (d) at a closed meeting.

***Issue 4 – whether the Disclosed Information was from a non-confidential document***

59 Issue 4 requires the Tribunal to determine whether the Disclosed Information was derived from a non-confidential document as defined in reg 6(1) of the Rules of Conduct Regulations.

60 Issue 4 is not in dispute between the Intervener and Cr Southwell. Therefore, the Tribunal finds that the Disclosed Information was not derived from a non-confidential document.

***Issue 5 – whether the Disclosed Information was already in the public domain***

61 Issue 5 requires the Tribunal to determine whether the Disclosed Information was already in the public domain for the purposes of reg 6(3)(c) of the Rules of Conduct Regulations at the time it was disclosed by Cr Southwell on 28 June 2018.

62 Reg 6(3)(c) of the Rules of Conduct of Regulations provides that the prohibition on a council member not to disclose information that they acquired at a closed meeting does not prevent a council member from disclosing information that is in the public domain.

63 Cr Southwell submitted that the Disclosed Information was in the public domain. The Disclosed Information was freely known to anyone who may have attended the council meeting and he knows of at least six people who attended.

64 The Tribunal finds it is more likely than not that the six people could have made a reasonable inference that as the CEO did not depart the room as the President did before the closed meeting occurred, that the CEO had remained in the room. However, the Tribunal does not accept that the six attendees making this observation and inference on 27 June 2018 as to the Disclosed Information matter (b), constitutes that information being in the 'public domain' as that phrase is intended to mean in the context of reg 6(3)(c) of the Rules of Conduct Regulations and as found in *Mazza and LGSP* at [82] and [85].

65 As to Disclosed Information in matters (c) and (d), the Tribunal finds that the Disclosed Information was only known by those who acquired such information at the closed meeting and was clearly not already in the public domain when the Facebook Post was made. Moreover, contrary to Cr Southwell's submissions, even when the minutes were provided on 2 July 2018 the Disclosed Information

in matters (c) and (d) would still not be in the public domain but for the Facebook Post made by Cr Southwell.

***Conclusion - Issues 1 to 5***

66 The Tribunal is satisfied that its findings on the evidence and Issues 1 to 5 supports a conclusion it is more likely than not that on 28 June 2018 Cr Southwell in making his Facebook Post breached reg 6(2)(b) of the Rules of Conduct Regulations by disclosing the Disclosed Information in matters (b), (c) and (d), that being information he had acquired at a closed meeting.

67 Therefore, under s 29(3)(a) of the SAT Act, the Tribunal will affirm the decisions of the Panel on 15 February 2019 (SP 58 of 2019) and 4 April 2019 (SP 2018-099), in that Cr Southwell had committed a minor breach under s 5.110(2)(a) of the LG Act by contravening reg 6(2)(b) of the Rules of Conduct Regulations.

***Issue 6 – sanction***

68 The final issue for the Tribunal to determine is the appropriate sanction to impose under s 5.110(6) of the LG Act for Cr Southwell's breach of reg 6(2)(b) of the Rules of Conduct Regulations.

69 The Panel determined that, as its findings in complaint matters SP 58 of 2019 and SP 2018-099 had each concluded that a minor breach of the LG Act had occurred in relation to identical facts and circumstances of the Facebook post, a joint sanction was appropriate.

70 The facts and circumstances of the breach committed by Cr Southwell can be distinguished with that of ***Keperit and Local Government Standards Panel*** [2019] WASAT 78 at [86] - [88]. In the present case, the factual findings which support a finding of a minor breach in both complaint matters SP 58 of 2019 and SP 2018-099 are identical. It is important that Cr Southwell is not sanctioned twice for the exact same behaviour.

71 Whilst the Tribunal has made a finding under s 5.110(2)(a) of the LG Act in both complaint matters SP 58 of 2019 and SP 2018-099 that a breach has occurred, the facts that support that finding of a minor breach are identical. However, the Tribunal finds that it agrees with the Panel that only one sanction is appropriate. Section 5.110(6) of the LG Act provides that the Tribunal is to deal with *the breach* by dismissing the complaint or ordering one or more of the following in that the person is to be publically censured or publically apologise or

undertake training as specified in the order. Therefore, the Tribunal has taken the view that it cannot issue a joint or global sanction. The Tribunal must make an order in relation to the breach found in both complaint matters SP 58 of 2019 and SP 2018-099.

72 Section 5.110(2)(a) and (6) allow for the Tribunal to determine that, whilst a breach has occurred it is nonetheless appropriate to dismiss a complaint. Therefore, in accordance with the reasons expressed above that Cr Southwell should not be sanctioned twice for the exact same behaviour, the Tribunal considers that it is not open to issue a joint sanction and that one complaint should be dismissed. As the findings of breach are identical in each of complaint matters SP 58 of 2019 and SP 2018-099, it does not matter which one is dismissed. The Tribunal will dismiss the later complaint matter SP 2018-099.

73 Therefore, under s 29(3)(c)(i) of the SAT Act, the Tribunal considers it is appropriate to set aside the Panel's joint sanction decision and substitute its own decision as to the appropriate sanction.

74 Accordingly, in the exercise of the Tribunal's discretion as to the appropriate sanction for the minor breach, the Tribunal finds it agrees with the Panel that a public censure and a public apology is appropriate.

75 The Tribunal finds that Cr Southwell has failed to meet the standards expected of a local government councillor. The Tribunal has also considered whether to order Cr Southwell to undertake further training as to his obligations as a local government councillor. Cr Southwell displays a fundamental misunderstanding of reg 6 of the Rules of Conduct Regulations, not only by his initial conduct found by the Tribunal to constitute a minor breach, but also by his submissions in these proceedings as to what constitutes information acquired at a closed meeting. However, the Tribunal has ultimately concluded that these published reasons as well as the public censure and apology should suffice to educate Cr Southwell in this regard.

76 As to the terms of the public censure and apology, the Tribunal has made a number of alterations to the Panel's orders to accord with these reasons. The terms of the orders specifying the public censure and apology are attached to these reasons and marked 'Annexure A' and will also be attached to the orders provided to the parties. In particular the Tribunal has determined it is appropriate to amend the Panel's orders as follows:

- (a) To delete Part A – paragraph 3 of the public censure. No information was provided to the Tribunal regarding any other proceedings that may affect the sanction in these proceedings.
- (b) In the Notice of Public Censure, delete the reference to Cr Southwell engaging in conduct that is an improper use of his office as a council member. No findings in relation to a breach of reg 7 of the Rules of Conduct Regulations have been made.
- (c) To delete any reference to an apology by Cr Southwell directly to the President in accordance with the finding above as to matter (a).
- (d) To make clear the commencement time for the date calculations required for the public censure and apology from the date of the Tribunal's orders rather than service of those orders on Cr Southwell.
- (e) To make clear that the disclosure of information acquired at the closed meeting was not only in relation to the former CEO.
- (f) To not allow Cr Southwell the option of publishing his apology in the *Bunbury Mail* newspaper. The Tribunal has also publically censured Cr Southwell in two newspapers. The Tribunal considers it appropriate that Cr Southwell take responsibility for his minor breach of the LG Act by orally apologising in person at an ordinary council meeting for his Facebook post disclosing information he acquired at a closed meeting.

### **Orders**

77

In accordance with these reasons, the Tribunal orders as follows:

1. The Tribunal affirms the decision of the Local Government Standards Panel on 15 February 2019 (SP 58 of 2019), made under s 5.110(2)(a) of the *Local Government Act 1995* (WA), that Cr Michael Southwell had committed a minor breach by contravening reg 6(2)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA).

2. The Tribunal affirms the decision of the Local Government Standards Panel on 4 April 2019 (SP 2018-099), made under s 5.110(2)(a) of the *Local Government Act 1995* (WA), that Cr Michael Southwell had committed a minor breach by contravening reg 6(2)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA).
3. The orders of the Local Government Standards Panel on 3 July 2019 as to the appropriate joint sanction for a minor breach in both SP 58 of 2019 and SP 2018-099 are set aside and substituted with the Tribunal's order as attached and marked 'Annexure A'.

### **Annexure A**

#### **THE TRIBUNAL ORDERS THAT:**

##### **PART A – ORDER FOR PUBLIC CENSURE**

1. Councillor Michael Southwell, a Councillor for the Shire of Capel ("the Shire"), be censured as specified in paragraph 2 below.
2. After 28 days and before 42 days from the date of this Order, the Chief Executive Officer of the Shire arrange for the following Notice of Public Censure to be published, in no less than 10 point print, in the following two newspapers:
  - (a) as a one-column or a two-column display advertisement in the first 15 pages of *The West Australian* newspaper; and
  - (b) as a one-column or a two-column display advertisement in the first 15 pages of the *Bunbury Mail* newspaper.

**NOTICE OF PUBLIC CENSURE**

The State Administrative Tribunal has found that Councillor Michael Southwell, a Councillor of the Shire of Capel, breached:

- (a) regulation 6(2)(b) of the *Local Government (Rules of Conduct) Regulations 2007 (WA)* when he made comments on a Facebook post relating to the Council Meeting on 27 June 2018 thereby passing on confidential information obtained at a closed meeting.

The Tribunal censures Councillor Southwell for a breach of regulation 6(2)(b) of the *Local Government (Rules of Conduct) Regulations 2007 (WA)*.

**LOCAL GOVERNMENT**

**STANDARDS PANEL**

**PART B – ORDER FOR PUBLIC APOLOGY**

- 4. Councillor Southwell publicly apologise to the Council and the Shire's former CEO.
- 5. At the Shire's first ordinary council meeting Cr Southwell attends after the expiration of 28 days from the date of this Order Cr Southwell shall:
  - (a) ask the presiding person for his or her permission to address the meeting to make a public apology to the Council and the Shire.
  - (b) make the apology immediately after Public Question Time or during the Announcements part of the meeting or at any other time when the meeting is open to the public, as the presiding person thinks fit;
  - (c) address the Council as follows, without saying any introductory words before the address, and without making any comments or statement after the address:

"I advise this meeting that:

- i Two complaints were made to the Local Government Standards Panel, in which it was alleged that I contravened regulation 6(2)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) when I made comments on a Facebook post relating to the Council Meeting on 27 June 2018 thereby passing on confidential information obtained at that closed meeting.
- ii. On review in the State Administrative Tribunal, the Tribunal has found that by behaving in this manner I disclosed confidential information that I obtained at a closed meeting, which included confidential information about the Shire's former CEO, thereby committing a breach of regulation 6(2)(b) of the *Local Government (Rules of Conduct) Regulation 2007*.
- iii. I accept that I should not have acted in such a manner and I apologise to the parties concerned for having done so."

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MS D QUINLAN, MEMBER

8 JANUARY 2020