



Local Government Standards Panel

Complaint Number	SP 2 of 2018 [DLGSC 20180213]
Legislation	<i>Local Government Act 1995</i>
Complainant	Mr Gary Evershed
Respondent	Councillor Michael Smart
Local Government	Shire of Augusta Margaret River
Regulation	Regulations 7(1)(a), 8(b), 9(1) and 10(1)(a) of the <i>Local Government (Rules of Conduct)</i> <i>Regulations 2007</i>
Panel Members	Ms M Strauss (Presiding Member) Mr M Beecroft (Member) Ms R Aubrey (Member)
Heard	30 April 2018 Determined on the documents
Outcome	Breaches of regulations 7(1)(a), 8(b) and 9(1) No breach of regulation 10(1)(a)

FINDING AND REASONS FOR FINDING

Published **25 May 2018**

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Summary of the Panel's decision

1. This complaint (the Complaint) concerns potential works on the Flinders Bay boat ramp in the Shire of Augusta Margaret River (the Shire). The Panel found that Councillor Michael Smart, a Shire Councillor, committed three minor breaches under the *Local Government Act 1995 (WA)* (the Act) and regulations 7(1)(a), 8(b) and 9(1) of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) in November 2017 and December 2017 when dealing with information about the potential works. Cr Smart did not breach regulation 10(1) when communicating with the Shire administration about a company interested in performing the works.

2. Cr Smart breached regulation 7(1)(a) by improperly sending sensitive information to a person who was interested in bidding for work on the boat ramp, which information had been provided to Councillors by the administration to assist Councillors in making decisions about works on the boat ramp. Cr Smart breached regulation 8(b) by using the Shire's email system to send the sensitive information to the person and to communicate with him about an estimated price for works on the boat ramp. Cr Smart breached regulation 9(1) by communicating with the person about the price for works on the boat ramp, which amounted to performing a task that contributed to the Shire's administration.

Jurisdiction and procedural fairness

3. The Act and Regulations provide for the circumstances in which a council member commits a minor breach.¹

4. On 9 January 2018 the Panel received a Complaint of Minor Breach Form dated 28 December 2017 signed by the Shire's Chief Executive Officer, Mr Gary Evershed (the CEO) alleging Cr Smart committed four minor breaches under regulations 7, 8, 9 and 10.

5. The CEO provided a statement in his Complaint Form, copies of 19 emails dating between 8 November 2017 and 21 December 2017 and copies of several photographs. In response to a request from the Department of Local Government, Sport and Cultural Industries (the Department) for clarification of which emails supported which allegations the CEO sent what he referred to as his "reformatted information" in the form of a table (the Table) to the Department on 24 January 2018.

6. The Panel convened on 30 April 2018 to consider the Complaint. The Panel:

- accepted the Department's advice that, based on information published on the Western Australian Electoral Commission's website, Cr Smart was a Shire Councillor at the time of the alleged breaches and when the Panel met to consider the Complaint;
- was satisfied the Complaint was made within two years after the alleged breaches occurred² and that the Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of a minor breach³;

¹ Sections 5.105(1) and 5.104(1) of the Act.

² Section 5.107(4) of the Act

³ Sections 5.107 and 5.109 of the Act.



- noted that on 2 February 2018 the Department sent Cr Smart copies of the Complaint Form, the Table and the emails provided with the Complaint Form, inviting Cr Smart to respond to the Complaint;
- noted that on 11 February 2018 the Department received Cr Smart's response by way of an Elected Members Response Form, with attachments, and comments inserted in the Table (the Response);
- noted that on his own initiative Cr Smart supplemented his Response in an email to the Department dated 7 April 2018, which the Panel treated as part of his Response;
- was satisfied the Department had provided procedural fairness to Cr Smart; and
- found it had jurisdiction to consider the Complaint.

Panel's role

7. The Panel is not an investigative body.⁴ It makes decisions about complaints of minor breaches solely upon the evidence presented to it and, when relevant, information published on the local government's website, such as minutes of council meetings, codes of conduct, standing orders and policies. For the Panel to find that a councillor committed a minor breach it must be satisfied on the evidence before it that it is more likely than not that the alleged breach occurred.⁵ This is commonly referred to as "the required standard" or "the required standard of proof".

8. The Panel cannot rely on an alleged fact unless it is satisfied that it is more likely than not that the alleged fact is true.⁶ The Panel cannot merely choose between two or more conflicting but equally possible versions of events.⁷ To accept one of the competing versions of events it must be satisfied that one is more likely to be the correct version.

9. For a finding that a councillor has breached a particular regulation the Panel must be satisfied to the required standard that every element of that regulation has been established.

10. Where the complainant submits the Panel should come to a particular conclusion, such as that the evidence establishes an element of the regulation, the Panel must be satisfied, after weighing up all the evidence and applying the relevant legal principles, that its conclusion is the one best supported by the evidence.⁸

The Complaint generally

11. The emails provided with the Complaint Form mention two shire projects, one relating to the Ellis Street Finger Jetty or the Ellis Street Floating Jetty (the ES Project), the other to the Flinders Bay boat ramp or the Flinders access ramp (the FB Project). It is important to note that at the time of the alleged breaches the Shire had not commenced any work on the Flinders Bay boat ramp/access ramp. Accordingly, the FB Project concerns only potential works.

⁴ *Re v Local Government Standards Panel* [2015] WASC 51, paragraph 24.

⁵ Section 5.106 of the Act.

⁶ The effect of section 5.106 of the Act.

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

⁸ The effect of section 5.106 of the Act.



12. The parties should note that even though the CEO reformatted the Complaint Form as the Table, the Panel spent an unreasonable amount of time unravelling the material both parties put before the Panel to identify the relevant subregulations; whether both the ES Project and FB Project were relevant to the alleged breaches; the particulars of each allegation and response; and the evidentiary material relevant to each allegation and response.

Allegation 1 - breach of regulation 7

13. Regulation 7 provides:

“7. Securing personal advantage or disadvantaging others

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

(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.”

14. None of the alleged conduct is conduct to which regulation 7(2) applies. The CEO has not stated whether he alleges a breach of regulation 7(1)(a), 7(1)(b) or both. Based on the material provided by the CEO, the Panel treated Allegation 1 as an alleged breach of regulation 7(1)(a).

15. Allegation 1 arises out of information given to all Councillors in an email from the Shire’s Director Infrastructure Services (Mr MB), on 22 November 2017 concerning the FB Project.

16. This Allegation is that Cr Smart breached regulation 7(1)(a) on 24 November 2017 when he sent an email and sensitive information taken from Mr MB’s 22 November 2017 email to Mr LB, a Project Manager with SMC Marine Pty Ltd (SMC), thereby giving SMC an advantage over other contractors who may wish to perform the works.

17. The CEO provides a number of emails to support this Allegation. Email 1F referred to below is the communication alleged to have given Mr LB an advantage.

18. The following series of emails concerns the ES Project. The CEO claims these emails demonstrate Cr Smart had a relationship with Mr LB before Cr Smart and Mr LB communicated about the FB Project.

Email 1A - from Mr LB to the Shire’s Mr DN on 8 November 2017 headed “SMC Marine’s capabilities”. Mr LB expresses concern that SMC had not been given the opportunity to quote for the ES Project. He attaches information about previous SMC projects to demonstrate its previous work and asks Mr DN to keep SMC in mind for any future works.

Email 1B - from Mr LB to Cr Smart, undated, headed “SMC Marine’s capabilities”, forwarding Cr Smart a copy of Email 1A.



Email 1C - from Cr Smart to Mr MB, the CEO and other Councillors on 10 November 2017 headed "SMC Marine recent WA projects" forwarding a copy of Emails 1A and 1B and an attachment demonstrating SMC's work on other projects. Cr Smart says Mr LB had been assured that SMC would be given the opportunity to quote for the ES Project.

19. The following series of emails concerns the FB Project:

Email 1D – from Mr MB to all Councillors and the CEO on 22 November 2017 headed "Advice request from LGIS". The Panel understands that LGIS refers to the Local Government Insurance Scheme (LGIS). Mr MB discusses a number of issues affecting the FB Project arising out of his recent discussion with a representative of LGIS, including risks associated with potential works. Mr MB reported they had discussed a number of aspects, including the possible installation of a handrail, gradient options and disability access.

In the last five paragraphs of Email 1D Mr MB discusses the feasibility of a new structure, mentions a number of options for creating safe and attractive access to the beach and attaches a design and photographs by way of "an impression for (Councillors') perusal and discussion".

Email 1E – from Cr Smart to himself at his "amrshire" email address on 24 November 2017 at 8.09am. This comprises three of the last five paragraphs of Email 1D (Mr MB's Information).

Email 1F -- from Cr Smart to Mr LB on 24 November 2017 at 8.44am headed "Flinders Access Ramp" saying (*italics added by the Panel*):

- "*The information below gives you some idea as to what may be suitable*" (Statement 1)
- Cr Smart envisaged the railing being similar to the one in Busselton, of which he would send a photo; it is not Council's intention to make the ramp disability compliant; and there is matching rock that was removed from the swimming area.
- "*This is just to keep you informed, if council goes down this path I'm sure your company will be invited to tender*" (Statement 2).

20. In support of Allegation 1 the CEO submits:

- Emails 1B and 1C show Cr Smart had an "ongoing relationship" with Mr LB.
- Cr Smart was not entitled to send Mr MB's Information to Mr LB or SMC because Mr MB's Information was for Councillors only, to assist them in their decision-making, and SMC was a potential supplier for a future Council project (the FB Project).
- In Email 1F Cr Smart was lobbying on behalf of Mr LB before the FB Project was put out for quotation or tender.
- Cr Smart had no authority to tell Mr LB in Statement 2 (in Email 1F) that he was sure Mr LB would be invited to tender.



Response to Allegation 1

21. Cr Smart denies he breached regulation 7(1)(a), submitting:

- He did not have an ongoing relationship with Mr LB; he had only communicated with him in two telephone calls and two emails in the “previous couple of weeks”; and he had not met or spoken to Mr LB before that.
- He sent Mr LB information about the FB Project to get “a rough indication of what infrastructure was envisaged to be provided to enable assisted access to the water at the Flinders Bay Boat Ramp”.
- He was attempting to establish whether works could be achieved within the budget allocated for the FB Project.
- Nothing he sent to Mr LB was financially sensitive.
- He was not aware Mr LB intended to get a quote for the manufacture of the ramp from a third party.
- Any person can learn about future City projects by following Council minutes, agendas and budgets.
- In relation to Statement 2, this was a “casual comment” to imply that Mr LB’s company would be likely to be given the opportunity to quote for the FB Project, considering SMC had been overlooked for the ES Project despite having been assured it would have the opportunity to quote for the ES Project.
- The Shire had started an investigation into why SMC was not invited to quote for the ES Project.

22. The Panel is satisfied to the required standard that:

- “*The information below*” in Email 1F refers to Mr MB’s Information. The effect of this is that Cr Smart sent Mr MB’s Information to Mr LB with Email 1F.

First element – whether Cr Smart was a councillor at the time of the alleged breach

23. Cr Smart was clearly a councillor at the time of the alleged breach. This element is established.

Second element - whether Cr Smart used his office as a councillor when he sent Email 1F and MB’s Information to Mr LB

24. Cr Smart received and sent Emails 1D, 1E and 1F using his “amrshire” email address. The Panel finds it is more likely than not that Cr Smart also used his Shire email address to forward Mr MB’s Information to Mr LB.

25. The Panel finds that Cr Smart received and sent Emails 1D, 1E and 1F, and forwarded Mr MB’s Information to Mr LB in his capacity as a Councillor. Therefore Cr Smart used his office as a Councillor when sending and receiving these Emails and Mr MB’s information.



Third element - whether Cr Smart used his office improperly when sending Email 1F and Mr MB's information to Mr LB

26. The minutes of the ordinary council meeting on 22 November 2017, 2 days before Cr Smart sent Email 1F, include an officer's report for item 11.2.3 Flinders Bay Protection and Management Plan.⁹ The officer's report is wide ranging and only briefly refers to potential works on the Flinders Bay boat ramp, including a handrail.

27. The Panel has not been given any evidence that could establish that when Cr Smart sent Email 1F all the contents of Email 1F and all of Mr MB's Information were available to the public.

28. The Panel is satisfied to the required standard that:

- Mr MB's Information or at least part of it was not available to the public when Cr Smart sent it to Mr LB.
- Mr MB had sent Email 1D to Councillors in confidence to assist them to identify and consider the issues in advance of any formal debate, or further formal debate, about how to proceed with the FB Project and what specific work should be undertaken.

29. The dictionary definition of "improper" is "not in accordance with propriety of behaviour, manners, etc.; unsuitable or inappropriate for the purpose or occasion; abnormal or irregular."¹⁰

30. Whether there is impropriety is to be assessed objectively: would a reasonable person with knowledge of the duties, powers and authority of a councillor, and all the circumstances of the particular case, form the view that the councillor had breached the standards of conduct expected of a councillor?¹¹ "For behaviour to be improper it must be such that a right-thinking person would regard the conduct as so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty."¹² Councillors have a duty to be faithful to the proper workings of the local government and their council.¹³

31. Under the Act Panel members must have regard to the general interests of local government in Western Australia.¹⁴ It is in the interests of local government that councillors are, and are seen to be, professional and to act consistently with authorised decisions of Council and the administration. Councillors must also respect, and be seen to respect, the local government's processes and the roles of its officers and their lawful decisions.

32. Regulation 3 of the Regulations sets out general principles to guide councillors' behaviour, although contravention of any of any of these does not amount to a minor

⁹ Item 11.2.3 business is recorded on pages 56 to 62 of those minutes.

¹⁰ Macquarie Dictionary, Revised Third Edition.

¹¹ *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 27, referring to *R v Byrnes* (1995) 183 CLR 501.

¹² *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 9, referring to *Robbins v Harness Racing Board* [1984] VR 641.

¹³ *Yates and Local Government Standards Panel* [2012] WASAT 59 paragraph 64(5), *Treby and Local Government Standards Panel* [2009] WASAT 224 paragraph 19.

¹⁴ Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).



breach.¹⁵ Regulation 3 provides, among other things, that councillors should: act with reasonable care and diligence; act lawfully; avoid damage to the local government's reputation; and base decisions on relevant and factually correct information.

33. The meaning of "improper" must be considered in the context of relevant legislation, such as the Act and the Regulations, other rules and standards that apply to a councillor's role and conduct, such as the local government's Code of Conduct, and the circumstances and context of the case.¹⁶

34. A councillor's use of his or her office can be improper even though the councillor is intending to benefit the local government, the council or the ratepayers and residents.¹⁷ Conduct can be improper even though the councillor's judgment is that it isn't improper

35. Having considered all the circumstances outlined above and applying the tests for impropriety the Panel is satisfied to the required standard that Cr Smart used his office improperly when saying in Email 1F, "*The information below gives you some idea as to what may be suitable ... It's not Council's intention to make the ramp Disability compliant*" to Mr LB. The Panel is also satisfied to the required standard that Cr Smart used his office improperly when sending Mr MB's Information with Email 1F.

36. The Panel make these findings because:

- Cr Smart knew SMC was interested in bidding for future Shire work (based on Emails 1A and 1B), thus was a potential contractor.
- Councillors have a duty to diligently assess the sensitivity of information; exercise good judgment when dealing with information, particularly when it is not in the public domain; and treat their Council's and the administration's processes with respect and integrity.
- Any reasonable person who reads Email 1D, knowing that Council hadn't yet decided how to proceed with the FB Project, and in the absence of any evidence that its contents were already in the public domain, would conclude that at that stage the contents of Email 1D were sensitive and for Councillors and staff only.
- Cr Smart knew or should have known that he was not at liberty at that time to tell a potential contractor what work "may be suitable" or comment on Council's view about access for disabled people.
- Cr Smart knew or should have known that he was not at liberty at that time to forward Mr MB's Information to a potential contractor or tell the potential contractor that Council was not intending to make the boat ramp disability compliant.
- Cr Smart gave the Panel material indicating that the Shire was looking into ES Project processes. He thought Mr LB and SMC had been treated badly in relation to the ES Project, but this does not justify giving Mr LB advance notice of what Councillors would be considering when deciding how to proceed with the FB Project.

¹⁵ Regulation 13.

¹⁶ *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 10, referring to *Treby and Local Government Standards Panel* [2010] WASAT 81 (*Treby* 2010).

¹⁷ *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64(4), referring to *Treby* 2010.



- A reasonable person would consider Cr Smart to have breached the standards of conduct expected of a councillor by sending Mr MB's Information and the contents of Email 1F, thereby giving Mr LB advance notice of issues, features and specifications Councillors would be considering, or may consider, before deciding on any works to be undertaken.
- A reasonable person would consider Cr Smart to have breached the standards of conduct expected of a councillor by sending Mr MB's Information and the contents of Email 1F before any formal quotation or tender processes had been commenced.

37. Cr Smart improperly used his office when sending Email 1F and Mr MB's Information to Mr LB on 24 November 2017. This element is established.

Fourth element – whether Cr Smart used his office improperly to gain directly or indirectly an advantage for himself or any other person.

38. The CEO does not allege Cr Smart sought to gain an advantage for himself. SMC is a "person".¹⁸

39. "Advantage" is defined as "favouring a circumstance; something which gives one a better position ... benefit; increased well-being or convenience ... pecuniary profit ..."¹⁹; "any state, circumstance, opportunity or means specifically favourable to success, interest or any desired end ... benefit gain, profit"²⁰.

40. "To" in "to gain directly or indirectly an advantage" indicates that for this element to be established Cr Smart must have intended to gain an advantage. He must be found to have taken action for the purpose of, or with a view to, gaining an advantage for Mr LB or SMC.

41. For this element to be established, it is not necessary to find that Cr Smart's actions did, or reasonably could have, delivered an advantage to Mr LB or SMC.²¹

42. The Panel rejects Cr Smart's submission that Statement 2 is merely a "casual comment". Even if Cr Smart had little previous contact with Mr LB, Cr Smart knew when he sent Email 1F and Mr MB's Information that SMC was interested in bidding for Shire work. There is no evidence the Shire had, or was going to, give Mr MB's Information to any other potential contractor.

43. Considering the nature of Mr MB's Information, together with Statements 1 and 2 in Email 1F, the only reasonable conclusion is that Cr Smart wanted to give Mr LB and SMC advance notice of issues, features and specifications being considered by the administration and Council to assist them to prepare for any future formal quote or tender process.

44. The Panel is satisfied to the required standard that Cr Smart sent Email 1F and Mr MB's Information to Mr LB with the intention of directly or indirectly giving Mr LB and SMC an advantage over other potential contractors.

45. This element is established.

¹⁸ *Interpretation Act 1994 (WA)*, section 5.

¹⁹ Shorter Oxford English Dictionary, Sixth Edition.

²⁰ Macquarie Dictionary, Revised Third Edition.

²¹ *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraphs 71, 72.



46. The Panel finds that Cr Smart breached regulation 7(1)(a).

Allegation 2 – breach of regulation 8

47. Regulation 8 provides:

“8. Misuse of local government resources

A person who is a council member must not either directly or indirectly use the resources of a local government —

(a) for the purpose of persuading electors to vote in a particular way at an election, referendum or other poll held under the Act, the Electoral Act 1907 or the Commonwealth Electoral Act 1918; or

(b) for any other purpose,

unless authorised under the Act, or authorised by the council or the CEO, to use the resources for that purpose.”

48. The CEO alleges Cr Smart breached regulation 8(b) because he did not have authority to use the Shire’s email service to send Email 1F or Mr MB’s Information to Mr LB, or to obtain a quote or estimate for work on the FB Project.

49. The following emails are also relevant:

Email 2A – from Mr LB to Cr Smart on 19 December 2017 headed “Flinders Bay Access Ramp”, quoting for the manufacture and installation of a ramp and handrail.

Email 2B – from Cr Smart to Mr MB and all Councillors on 20 December 2017 headed “Flinders Access Ramp”. Cr Smart referred Mr MB to other work SMC had done; mentioned SMC had been overlooked for the ES Project; and forwarded Mr LB’s quote. Cr Smart said he had asked Mr LB for a rough estimate “for (his) own interest, not to have any input into what is (Mr MB’s) role” but to “demonstrate that (the amount) provided in the budget may come close to covering the cost of the proposed work”.

Response to Allegation 2

50. Cr Smart submits the CEO has made an “incorrect and misleading cross reference to the (ES Project)” in his Table because no contract for the FB Project was being negotiated when Emails 1D, 1F and 2A were sent.

51. It is true that these three Emails preceded any contract negotiations for the FB Project, which is why Cr Smart acted improperly when sending Email 1F. All the Allegations in the Complaint relate to the FB Project. The Panel finds that the CEO’s reference in the Table to “when the contract was being negotiated” was not intended to refer to the ES Project but to current discussions about future works on the Flinders Bay boat ramp.

52. Cr Smart submits he had authority to use the Shire’s email service because he was merely seeking to inform himself about whether building the handrail at the Flinders Bay boat ramp was affordable under the Shire’s budget, which was legitimate Shire business. Cr Smart says the administration frequently reminds Councillors to use the Shire’s email service for Shire business.



First element - whether Cr Smart was a councillor at the time of the alleged breach

53. Clearly Cr Smart was a councillor at the time of the alleged breach. This element is established.

Second element - whether Cr Smart used a Shire “resource”

54. “Resource” is defined as “a source of supply, support, or aid ... money, or any property which can be converted into money, assets ...”²² The Shire’s email service is a “resource”.

55. Cr Smart used his Shire email address containing “amrshire” to send Email 1F and Mr MB’s Information, and to receive the estimate (Email 2A).

56. This element is established.

Third element - whether Cr Smart was authorised by the Act, the Council or the CEO to use the Shire’s email service

57. Cr Smart breached regulation 7(1)(a) when he used the Shire’s email service. The Act could not possibly authorise Cr Smart to use the email service for such improper behaviour. In fact the Act prohibits such behaviour through the Regulations.

58. By making this Allegation the CEO is asserting that neither he nor Council authorised Cr Smart to use the Shire’s email service to communicate with Mr LB in Emails 1F and 2A and to send Mr MB’s Information to Mr LB. As there is no evidence that Council or the CEO did so, the Panel accepts the CEO’s assertion.

Cr Smart breached regulation 8(b)

59. The Panel finds that Cr Smart breached regulation 8(b) by using a Shire resource, namely its email system, to communicate with Mr LB in Emails about possible future works at the Flinders Bay boat ramp when he was not authorised to do so.

Allegation 3 - regulation 9

60. Regulation 9 provides:

“9. *Prohibition against involvement in administration*

- (1) *A person who is a council member must not undertake a task that contributes to the administration of the local government unless authorised by the council or by the CEO to undertake that task.*
- (2) *Subregulation (1) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.”*

61. Regulation 9(2) does not rule out the application of regulation 9(1) because the Complaint does not concern conduct at a council or committee meeting.

²² Macquarie Dictionary, Revised Third Edition.



Whether Cr Smart was a councillor at the time of the alleged breach

62. There can be no doubt that Cr Smart was a councillor at the time of the alleged breach. This element is established.

Whether Cr Smart undertook a task that contributed to the administration of the Shire

63. The CEO asserts that obtaining quotes and estimates is a task, to be carried out by the administration in accordance with the Shire's Procurement Policy. He alleges Cr Smart performed this task by asking Mr LB for an indicative cost for work on the Flinders Bay boat ramp.

Cr Smart's response

64. Cr Smart admits he verbally asked Mr LB for a "rough estimate" of the cost of providing a handrail and non-slip surface but denies he invited Mr LB or SMC to "tender or quote". He says he asked Mr LB for the estimate because SMC had been overlooked for the ES Project works; and he was unaware Mr LB intended to seek a "more substantial quote from another source".

Panel's consideration

65. The scheme of the Act distinguishes between the roles of council and the staff employed by the local government, or the "administration". Local governments are bodies corporate²³ of which the council is the governing body²⁴. The role of council includes making local laws, overseeing the allocation of the local government's finances and resources and determining its policies.²⁵ The role of councillors is to represent the interests of electors, ratepayers and residents of the district.²⁶ The administration advises councillors to assist in their decision-making and implements policies determined by council and council's other decisions.

66. Regulation 9 reinforces the distinction between the role of councillors and the administrative staff.

67. The Shorter Oxford English dictionary²⁷ defines "task" as "a piece of work imposed on or undertaken by a person; a fixed quantity of labour to be performed by a person". The Macquarie Dictionary²⁸ defines "task" as "a definite piece of work assigned or falling to the person; duty; any piece of work".

68. The Panel is satisfied to the required standard that it is the administration's role to obtain estimates, indicative prices, quotes or tenders from potential contractors. It is immaterial that Cr Smart may have only sought a "rough estimate".

69. Intent is not an element of regulation 9. It is not relevant that Cr Smart wanted to help a person or company he considered to have been disadvantaged, or that he thought he was assisting the Shire by finding out what could be achieved within the budget. It is irrelevant that Cr Smart did not expect Mr LB to involve another company.

²³ Section 2.5(2) of the Act.

²⁴ Section 2.6(1) of the Act.

²⁵ Sections 3.51 and 2.7(2) of the Act.

²⁶ Section 2.10(a) of the Act.

²⁷ Sixth Edition.

²⁸ Revised Third Edition.



70. The Panel finds that Cr Smart breached regulation 9(1) by asking Mr LB for the estimate.

Allegation 4 - breach of regulation 10

71. Regulation 10 provides:

“10. Relations with local government employees

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

(a) direct or attempt to direct a person who is a local government employee to do or not to do anything in the person’s capacity as a local government employee; or

(b) attempt to influence, by means of a threat or the promise of a reward, the conduct of a person who is a local government employee in the person’s capacity as a local government employee.

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

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

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

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

(4) Subregulation (3)(a) does not apply to conduct that is unlawful under The Criminal Code Chapter XXXV.”

72. The CEO does not specify whether he alleges Cr Smart breached regulation 10(1)(a) or 10(1)(b). The CEO does not allege any threat or promise so the Panel treated this as an alleged breach of regulation 10(1)(a).

73. The material provided by Cr Smart in support of the Allegation indicates that regulations 10(2), (3) and (4) are not relevant.

Email 3

74. The CEO relies on an email from Mr MB to the CEO and another Shire employee sent on 21 December 2017 (Email 3). In Email 3 Mr MB lists several concerns and assertions about Cr Smart’s conduct, which are mostly the assertions that gave rise to Allegations 1, 2 and 3 and which have been discussed above. After listing these concerns Mr MB says:



“Given the ongoing nature of this matter, and heavy involvement of (Cr Smart) there is also a feeling of authoritarian pressure being placed on staff to deliver a certain outcome, i.e. one that aligns with the individual requirements of the Councillor rather than officers’ technical and legal advice.”

First element - whether Cr Smart was a councillor at the time of the alleged breach

75. Clearly Cr Smart was a councillor at the time of the alleged breach. This element is established.

Second element – whether Cr Smart directed or attempted to direct an employee to do something

76. The dictionary definition of “direct” is to “give authoritative instructions to; order (a person) to do (a thing) to be done; order the performance of; give instructions; command ...”²⁹

77. Mr MB asserts in Email 3 that by sending Mr LB sensitive and inaccurate information and telling staff about SMC’s capabilities in advance of a formal quotation/tender process, Cr Smart put pressure on staff to deliver a certain outcome. This does not amount to giving staff a direction.

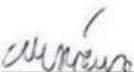
78. Neither Email 3 nor any of the other material submitted by the CEO contains a direction.

79. The Panel finds that this Allegation is without substance. The CEO has not presented any evidence that could possibly support a finding that Cr Smart directed any employee to do anything. As this Allegation cannot possibly be made out the Panel does not need to consider it further.

80. Cr Smart did not breach regulation 10(1)(a).

Panel’s decision

81. The Panel finds that Cr Smart breached regulations 7(1)(a), 8(b) and 9(1), thereby committing three minor breaches. Cr Smart did not breach regulation 10(1)(a).


Merranie Strauss (Member)


Mark Beecroft (Deputy Member)


Rebecca Aubrey (Deputy Member)

Date of Reasons for Decision – 25 May 2018

²⁹ Shorter Oxford English Dictionary, Sixth Edition.