

## LOCAL GOVERNMENT STANDARDS PANEL

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

Complaint Number	SP 3 of 2017 [DLGSC 2017005]
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Mr Jason Whiteaker</b>
<b>Subject of complaint</b>	<b>Councillor Ulo Rumjantsev</b>
Local Government	<b>Shire of Northam</b>
Regulation	Regulation 11(2) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Ms M Strauss (Presiding Member) Ms S Siekierka (Deputy Member) Councillor P Kelly (Member)
Heard	23 June 2017 Determined on the documents
Outcome	Two breaches of regulation 11(2)

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### FINDING AND REASONS FOR FINDING

Published 14 July 2017

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## Summary of the Panel's decision

1. The Panel found that Councillor Ulo Rumjantsev (Cr Rumjanstev) a councillor for the Shire of Northam (the Shire), committed two minor breaches under the *Local Government Act 1995* (WA) (the Act) and regulation 11(2) of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) when failing to disclose impartiality interests at a meeting of the Bushfire Advisory Committee on 31 May 2016 and at an ordinary council meeting on 15 June 2016.

## Jurisdiction

2. The Act provides for the circumstances in which a council member commits a minor breach.<sup>1</sup>
3. On 23 January 2017 the Panel received a Complaint Form dated 6 January 2017 completed by Mr Jason Whiteaker, the Shire's Chief Executive Officer, alleging that Cr Rumjanstev, a member of the Bakers Hill Volunteer Bush Fire Brigade, breached regulation 11(2) by failing to declare impartiality interests at a meeting of the Bush Fire Advisory Committee (the Committee) on 31 May 2016 and at an ordinary council meeting on 15 June 2016 (the Complaint).
4. Prior to 1 July 2017 the Government department assisting the relevant Minister to administer the Act was the Department of Local Government and Communities (the former Department). On 1 July 2017 the Department of Local Government, Sport and Cultural Industries became the Department responsible for administering the Act.
5. On 10 April 2017 the former Department sent a letter to Cr Rumjanstev dated 7 April 2017 with a copy of the Complaint Form and associated material, inviting him to respond to the Complaint. Cr Rumjanstev responded in a letter to the former Department dated 20 April 2017 (the Response).
6. Under the Act the Panel is required to consider a complaint of a minor breach and make a finding as to whether the alleged breach occurred.<sup>2</sup> On 23 June 2017 the Panel convened to consider the Complaint.
7. The Panel accepted the former Department's advice, based on information from the Western Australian Electoral Commission, that Cr Rumjanstev was a councillor at the time of the alleged breaches and when the Panel met on 23 June 2017.
8. The Panel was satisfied the Complaint had been made within two years after the alleged breaches are said to have occurred<sup>3</sup>, that the Complaint had been dealt with in accordance with the administrative requirements in the Act for dealing with complaints of minor breaches<sup>4</sup> and that the former Department had provided procedural fairness to Cr Rumjantsev.

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

<sup>2</sup> Section 5.110(2)(a) of the Act.

<sup>3</sup> Section 5.107(4) of the Act

<sup>4</sup> Sections 5.107, 5.108, 5.109 of the Act.

9. If a councillor has previously committed two or more minor breaches, the Panel may send the Complaint to the Chief Executive Officer of the department assisting the relevant Minister at the time instead of considering the Complaint itself.<sup>5</sup> As Cr Rumjantsev had not previously committed a minor breach the Panel did not consider sending the Complaint to the Chief Executive Officer of the former Department.
10. Based on the information referred to in paragraphs 2 to 9 above the Panel found it had jurisdiction to determine whether Cr Rumjanstev had committed the two alleged minor breaches of regulation 11(2).

### **Panel's role**

11. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.
12. Any finding that a councillor has committed a minor breach must be based on evidence from which it may be concluded that it is more likely that the breach occurred than that it did not occur (the required standard of proof).<sup>6</sup>
13. Where direct proof of an alleged fact, proposition or conduct is not available, in order to find the allegation, proposition or conduct has been established, the Panel must be satisfied on the evidence that it is more probable than not that the alleged fact, proposition or conduct occurred. The Panel cannot make a finding that the alleged fact, proposition or conduct occurred if the evidence merely supports two or more conflicting but equally possible inferences.<sup>7</sup>
14. For a finding that a councillor has breached a particular regulation the Panel must be satisfied that every element of the particular regulation has been established to the required standard of proof.

### **Regulation 11**

15. A councillor commits a minor breach if he or she breaches regulation 11(2). Regulation 11 provides:

*"11. Disclosure of interest*

*(1) In this regulation —*

*interest means an interest that could, or could reasonably be perceived to, adversely affect the impartiality of the person having the interest and includes an interest arising from kinship, friendship or membership of an association.*

*(2) A person who is a council member and who has an interest in any matter to be discussed at a council or committee meeting attended by the member must disclose the nature of the interest —*

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<sup>5</sup> Sections 5.110(2)(b), 5.111(1) of the Act.

<sup>6</sup> Section 5.106 of the Act.

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

- (a) *in a written notice given to the CEO before the meeting; or*
  - (b) *at the meeting immediately before the matter is discussed.*
- (3) *Subregulation (2) does not apply to an interest referred to in section 5.60 of the Act.*
- (4) *Subregulation (2) does not apply if —*
- (a) *a person who is a council member fails to disclose an interest because the person did not know he or she had an interest in the matter; or*
  - (b) *a person who is a council member fails to disclose an interest because the person did not know the matter in which he or she had an interest would be discussed at the meeting and the person disclosed the interest as soon as possible after the discussion began.”*

## **Complaint**

16. In the Complaint Form Mr Whiteaker makes two allegations:

Allegation 1 is that Cr Rumjantsev breached regulation 11(2) by failing to disclose an impartiality interest at a Committee meeting on 31 May 2016 when the Committee considered nominations for his appointment as a Fire Control Officer (FCO).

Allegation 2 is that Cr Rumjantsev breached regulation 11(2) by failing to disclose an impartiality interest at an ordinary council meeting on 15 June 2016 when Council appointed a number of FCOs, including Cr Rumjantsev.

## **Response**

17. Cr Rumjanstev responded to both allegations by saying:

*“I was thinking that because I am an Office Bearer of a not for profit organisation that 5.5.63 (f) would apply, not thinking that only applied to a Financial Interest. I honestly did not consider an Impartiality Interest was applicable.*

*It would appear that I did have an error in judgement, and for this I apologise.”*

18. The Panel infers that Cr Rumjanstev believed section 5.63(1)(f) of the Act applied.

## **Legislative background – bush fire control officers and bush fire advisory committees**

19. Under the *Bush Fires Act 1954 (WA)* (the BF Act) local governments can establish and maintain volunteer bush fire brigades<sup>8</sup> to carry out a range of activities, including preventing and fighting bush fires.<sup>9</sup> A local government must keep a register of bush fire brigades and their members.<sup>10</sup> Members are “volunteer fire

<sup>8</sup> BF Act section 41.

<sup>9</sup> BF Act section 35A.

<sup>10</sup> BF Act section 41(2).

fighters”<sup>11</sup> and may or may not be “bush fire control officers” appointed under the BF Act.

20. A local government may from time to time appoint as many people as it thinks necessary to be its bush fire control officers.<sup>12</sup> Bush fire control officers carry out “normal brigade activities”, such as preventing and fighting fires, and other functions specified in the Act, such as issuing permits to burn bush during restricted burning periods.<sup>13</sup>
21. The council of a local government governs the local government’s affairs and is responsible for the performance of the local government’s functions.<sup>14</sup>
22. Under the Act a council of a local government may establish committees of three or more persons to assist the council.<sup>15</sup> These committees may include people other than councillors and local government employees.<sup>16</sup> These committees are committees of the council.<sup>17</sup>
23. Under the BF Act a local government may appoint people to a bush fire advisory committee to advise it on a wide range of matters including preventing and controlling fires, planning fire-breaks, forming bush fire brigades and any other matter relating to bush fire control.<sup>18</sup> The committee must include at least one councillor nominated by the council. The advisory committee is answerable to the local government.<sup>19</sup>
24. Based on the provisions of the Act and the BF Act discussed above, the Panel finds that a bush fire advisory committee established under the BF Act is a committee of the relevant council.

### **The Shire’s Bush Fire Advisory Committee**

25. The Committee operating at the time of the alleged breaches was established by the Shire Council at its ordinary council meeting on 21 October 2015. Council appointed two Councillors to the Committee, including Cr Rumjanstev, and representatives from nine bush fire brigades.

### **Bush Fire Advisory Committee meeting 31 May 2016**

26. The minutes record that Cr Rumjanstev attended this meeting in his capacity as a councillor member of the Committee.

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<sup>11</sup> BF Act section 35.

<sup>12</sup> BF Act section 38(1).

<sup>13</sup> BF Act section 38(4).

<sup>14</sup> The Act, section 2.71.

<sup>15</sup> The Act, section 5.8.

<sup>16</sup> The Act, section 5.8.

<sup>17</sup> The Act, section 5.1.

<sup>18</sup> BF Act section 67(1).

<sup>19</sup> BF Act section 67(4).

27. Item 6.8 is titled “Nominations for Bush Fire Control Officers 2016/2017” but the minutes for this item refer to “fire control officers”, “FCOs” and “Bushfire Control Officer”. Considering the title and content of the minutes for this item as a whole, the Panel concludes that all these terms mean a “bushfire control officer” appointed under the BF Act.
28. The minutes record that no Committee members disclosed any interest in any agenda item either at the start of the meeting, immediately before agenda item 6.8 was to be considered or at any other time during the meeting. There is no reference to any councillor having declared an interest in item 6.8 at any time before the meeting.
29. For item 6.8, under “Background”, the minutes record that at its ordinary council meeting on 15 July 2015 Council resolved to (underlining added by the Panel):
- “Endorse that the minimum standard to be appointed a FCO include the recommendation to complete the following (Department of Fire and Emergency Services) training modules prior to 1 November 2015 and become a requirement in order to qualify to the position of Bushfire Control Officer for the 2016 and future fire seasons.
- Introduction to Fire Fighting
  - Bush Fire Fighting
  - Structural A
  - Crew Leader/Advanced Firefighter and/or Sector Commander
  - FCO course or a refresher within the last 5 years.”
30. The minutes also include under “Background”:
- “The issue that both Council and the Committee need to deal with is (the) fact that a number of nominated FCOs do not meet the above criteria at the current time”
31. The minutes record that Cr Rumjanstev and several others had nominated for appointment as FCOs.
32. In line with the Shire officer’s recommendation to the Committee, the Committee passed a motion (the main motion) that the Committee recommend to Council that it:
- appoint the listed nominees, including Cr Rumjanstev, as FCOs, subject to each person having complied with adopted minimum training and experience standards;
  - modify the requirements to be a fully operational “Active FCO” to add a requirement that each person complete four specified training modules; and
  - endorse the requirement that a permit issuing FCO is to have undertaken the specified training modules.
33. For item 6.8 Cr Rumjanstev seconded two motions that a particular individual be added to the list of those recommended for appointment.
34. The main motion was carried unanimously by the Committee.

## Ordinary council meeting on 15 June 2016

35. The minutes record that Cr Rumjanstev and eight other Councillors attended the meeting.
36. The Panel has no reason to doubt the accuracy of the minutes. At the start of the meeting two Councillors declared interests in the agenda item relating to the Wundowie Men's Shed, one an impartiality interest, the other a financial interest. The minutes record that both Councillors described the nature of their interest. There is no reference to Cr Rumjanstev declaring any interest at the start of the meeting.
37. Item 11.5 is titled "Adoption of the Recommendations of the Bush Fire Advisory Committee Meeting". Council discussed a number of Committee recommendations, including those arising out of Committee meeting agenda item 6.8 referred to above.
38. The minutes do not record any disclosures of interest just before item 11.5 was discussed or at any time during debate. There is no reference to any councillor having disclosed an interest in item 11.5 at any time before the meeting.
39. In line with the Committee's recommendations Council voted unanimously to appoint the recommended people, including Cr Rumjanstev, as bush fire control officers for the 2016/17 season "subject to the individual complying with the adopted minimum training and experience standards prior to the commencement of the 2016/17 fire season". Council resolved that to be a fully operational bush fire control officer a person had to have a stipulated minimum period of fire fighting experience and to have undergone the specified training courses.

### What type of interest must be disclosed?

40. Regulation 11(2) applies to an interest "that could, or could reasonably be perceived to, adversely affect the impartiality of the councillor called upon to debate and/or vote on a matter.<sup>20</sup> This is commonly referred to as an "impartiality interest". The interest to be disclosed does not have to be a financial interest.
41. A councillor does not need to abstain from voting just because they have an impartiality interest in a matter to be considered by council but they have a duty to declare their interest before debating and voting on the matter.
42. It is not necessary to show that the councillor would benefit or stand to lose anything from any vote on the issue. It is a question of whether another person could reasonably perceive that the councillor may not be impartial when dealing with the matter when it is before the council.

### Elements of regulation 11(2)

43. In order to find that Cr Rumjanstev committed a breach of regulation 11(2) the Panel must be satisfied to the required standard of proof that:
  - Cr Rumjanstev was a council member at the time of the alleged breach (first element);

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<sup>20</sup> The definition in 11(1).

- he was attending a council meeting or “committee meeting” at the time of the alleged breach (second element);
  - he had an “interest” as defined in regulation 11(1) (an impartiality interest) in the matter being debated (third element);
  - he failed to disclose the nature of his interest before or at the council or committee meeting (fourth element); and
  - regulation 11(4) does not excuse the non-disclosure.
44. For regulation 11(4) to apply, if Cr Rumjanstev did fail to disclose, the Panel must be satisfied that Cr Rumjanstev:
- did not know he had an impartiality interest in the matter [11(4)(a)]; or
  - did not know the matter would be discussed at the meeting, provided he disclosed the interest as soon as possible after the discussion about the item began [11(4)(b)].

#### **Allegation 1 – breach at Committee meeting 31 May 2016**

45. First element: Cr Rumjanstev was a council member at the time of the alleged breach so this element of regulation 11(2) is established.

Second element - was Cr Rumjanstev attending a council meeting or “committee meeting” at the time of the alleged breach?

46. Allegation 1 is that Cr Rumjanstev breached regulation 11(2) at the Committee meeting on 31 May 2016. Words and expressions used in the Regulations have the same meaning as those words and expressions used in the Act.<sup>21</sup> “Committee” in the Act means a committee of a Council.<sup>22</sup> Therefore “committee” in regulation 11(2) also means a committee of the Council.
47. The Panel has already decided that the Committee is a committee of the Council so this element is established.

Third element - did Cr Rumjanstev have an impartiality interest in the matters to be considered in item 6.8?

48. Cr Rumjanstev had been nominated for appointment as a bush fire control officer. The minutes of the Committee meeting do not indicate whether he nominated himself or someone else nominated him. Cr Rumjanstev does not say in his Response that he was not aware he was a nominee or that he did not want to be appointed. Cr Rumjanstev seconded two motions that a person be added to the list of nominees. The only reasonable inferences are that Cr Rumjanstev knew he had been nominated, accepted the nomination and was seeking to be appointed.
49. Cr Rumjanstev was due to vote on whether he and others should be recommended for appointment and whether he should be required to meet the proposed new minimum training standards before being appointed.

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<sup>21</sup> *Interpretation Act 1984* (WA)

<sup>22</sup> The Act, section 5.1.

50. The Panel is satisfied to the required standard of proof that it would be a reasonable perception that Cr Rumjanstev may not be impartial when deciding whether to recommend himself to Council and whether to recommend that he and other prospective bush fire control officers face new pre-conditions for appointment.
51. The Panel finds that Cr Rumjanstev had an impartiality interest in agenda item 6.8. This element is established.

Fourth element - did Cr Rumjanstev fail to disclose the nature of his interest before or at the Committee meeting?

52. The Panel has no reason to doubt that the minutes are correct. Cr Rumjanstev did not dispute the allegation that he failed to disclose an interest at the meeting before item 6.8 was debated and did not submit that he disclosed any interest to the CEO before the meeting.
53. This element is established.

Does regulation 11(4) excuse the non-disclosure?

54. Regulation 11(4)(b) does not excuse Cr Rumjanstev. This is because he did not disclose the interest even after the Committee started to consider the matter.
55. In relation to 11(4)(a) Cr Rumjanstev says he thought section 5.63(1)(f) of the Act excused him from having to disclose any interest and “honestly did not consider an impartiality interest was applicable”. Section 5.63(1)(f) provides that a councillor does not have to disclose a financial interest or a proximity interest (as defined in sections 5.60 to 5.61 of the Act) if the interest arises only through their membership of a not-for-profit organisation. The Panel infers that Cr Rumjanstev is referring to his membership of a volunteer bush fire brigade at the time of the alleged breach.
56. For the Panel to excuse the non-disclosure under regulation 11(4)(a) it must be satisfied that it is more likely than not that Cr Rumjanstev did not know he had an impartiality interest.
57. Cr Rumjanstev’s Response indicates that he knew he had an interest of some sort and turned his mind to whether he needed to do anything about it. Even if he thought 5.63 of the Act excused him, the Panel finds it is more likely than not that Cr Rumjanstev actually knew he had a connection with agenda item 6.8 that may be problematic for him, in terms of perceptions about his wish to be appointed as a bush fire control officer.
58. Even if Cr Rumjanstev did not in his own mind recognise his impartiality interest, he can be found to have known that he had an interest within the meaning of “know” in regulation 11(4)(a) because the test is objective, as decided in *Corr and Local Government Standards Panel [2014] WASAT 86 (Corr)*.
59. In *Corr* Senior Member McNab said:

“24. However, in my view, the standard required in conflict of interest matters is generally an objective standard - one that can be satisfied without the need for proof that Councillor Corr had any direct, conscious or actual knowledge of the relevant conflict. The conflict arises from objective or constructive circumstances, not from the subjective knowledge of the particular Councillor.

25. This is not to say, however, that such matters are irrelevant to the question of any sanction to be imposed should a breach occur.

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27. Regulation 11(4) of the Regulations provides, in my view, no defences, as Councillor Corr had Council material in his possession that it was his duty to read or to be appraised of and which, had he discharged that duty, he would have - or should have - noticed a potential conflict of interest."

60. The Panel is not satisfied to the required standard of proof that Cr Rumjanstev did not know, within the meaning of "know" in regulation 11(4)(b), he had an impartiality interest in agenda item 6.8 which could reasonably cause others to think that he might not be impartial when considering the item.
61. The Panel finds that regulation 11(4)(a) does not excuse Cr Rumjanstev from his duty to disclose his impartiality interest.

### **Allegation 2 – breach at ordinary council meeting 15 June 2016**

62. First and second elements: Cr Rumjanstev was a council member attending a council meeting at the time of the alleged breach so these elements of regulation 11(2) are established.

Third element - did Cr Rumjanstev have an impartiality interest in the matters to be considered in item 11.5?

63. For agenda item 11.5, as with proceedings at the Committee meeting, Cr Rumjanstev's role was to debate the issues and decide whether to vote for his own appointment and conditions of appointment that would affect him. The Panel is satisfied to the required standard of proof that it would be a reasonable perception that Cr Rumjanstev may not be impartial when voting on whether he be appointed and whether he and other prospective bush fire control officers would face new pre-conditions for appointment.
64. The Panel finds that Cr Rumjanstev had an impartiality interest in agenda item 11.5. This element is established.

Fourth element - did Cr Rumjanstev fail to disclose the nature of his interest before or at the Council meeting?

65. The Panel had no reason to doubt that the minutes are correct. Cr Rumjanstev did not dispute that he had failed to disclose an interest at the meeting before item 11.5 was debated and did not submit that he disclosed any interest to the CEO before the meeting.
66. This element is established.

Does regulation 11(4) excuse the non-disclosure?

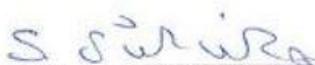
67. Regulation 11(4)(b) does not excuse Cr Rumjanstev. This is because he did not disclose the interest even after Council started to consider the matter.
68. In relation to 11(4)(a) Cr Rumjanstev's Response is the same as for Allegation 1. For the same reasons given in relation to Allegation 1 the Panel finds that Regulation 11(4)(a) does not excuse Cr Rumjanstev from his duty to disclose his impartiality interest.

## Panel's finding

69. The Panel finds that Cr Rumjanstev breached regulation 11(2) at a Bush Fire Advisory Committee meeting on 31 May 2016 and at an ordinary council meeting on 15 June 2016 by failing to disclose an impartiality interest to the CEO before the meetings or before items 6.8 and 11.5 respectively were considered. Accordingly, Cr Rumjanstev committed two minor breaches.

  
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Merranie Strauss (Member)

  
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Paul Kelly (Member)

  
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Sheryl Siekierka (Deputy Member)

Date of Reasons – 13 July 2017