

Decision-maker's Title: LOCAL GOVERNMENT STANDARDS PANEL
Jurisdiction: Complaints of minor breach by local government council members
Act: *Local Government Act 1995*
File No/s: SP 10 of 2008 (DLGRD 20080054)
Heard: Determined on the documents
Considered: 23 April 2008, 12 June 2008, 18 July 2008 and 14 August 2008
Coram: Mr Q. Harrington (Presiding Member)
Councillor C. Robartson (Member)
Mr J. Lyon (Member)

SP 10 of 2008

Complainant: Jonathan THROSSELL

Council member complained about: Councillor Kevin Alan BLACK

Finding

The Panel finds that, for the following reasons, Councillor Black has committed a breach of standing order 2.1.10(1) of the Shire's standing orders, and has thus committed a minor breach by virtue of regulation 4(2).

Reasons for finding

1. In these Reasons, unless otherwise indicated, a reference to a section is a reference to the corresponding section in the *Local Government Act 1995* ("the Act"), and a reference to a regulation is a reference to the corresponding regulation or sub-regulation in the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations").
2. The complainant, Mr Throssell, is the complaints officer and Chief Executive Officer ("CEO") of the Shire of Mundaring and complains about Councillor Black's conduct during a part of the Shire's Ordinary Council Meeting on 22 January 2008 ("the OCM") when it was closed to members of the public.
3. The written material that Mr Throssell provided with the complaint, when he sent it to the Panel, comprised copies of: the unconfirmed minutes of the OCM; the Shire's standing orders in effect at the time of the OCM; and his Officer Report dated 18 January 2008 ("Mr Throssell's Report") in relation to Item 12.2.1 at the OCM, at the end of which appears the Minute Secretary's notes taken during the meeting immediately preceding Council debate on that item at the OCM ("the Minute Secretary's notes").

4. By the complaint form itself:

- (a) Mr Throssell alleges in essence that at the OCM Councillor Black's conduct was as follows:

"Councillor Black stated that Mr Throssell had "deliberately withheld information from Council" and "deliberately" submitted an item/report on an application for financial assistance for the provision of legal services from Cr Black as a late item in order to prevent him from seeking the approval of the Minister to participate in discussions on the item in accordance with s 5.69 of the Act."

- (b) Mr Throssell alleges that by this conduct Councillor Black has committed a breach of standing order 2.1.10 of the Shire's standing orders and a breach of regulation 10; and

- (c) Mr Throssell also states that *"Despite being ruled out of order for the comments, Councillor Black refused to apologise when requested by the Presiding Person (Cr Dullard)."*

5. Regulation 4(2) provides that contravention of a local law as to conduct is a minor breach for the purposes of section 5.105(1)(b). Standing Order 2.1.10 provides in relevant part that a member present at a meeting shall not reflect adversely upon the action of another member or employee.

6. At the Panel's meeting on 23 April 2008 the Panel considered the complaint and, inter alia, noted that:

- (a) while the Minute Secretary's notes in substance include Councillor Black's comments that Mr Throssell complains about in the complaint, they are not a verbatim record;

- (b) regulation 10(3)(a) has no relevance to this matter, nor does regulation 10(3)(b) as they do not apply to conduct during a Council meeting or a part of the meeting that is closed to members of the public; and

- (c) in relation to Mr Throssell's statement repeated in 4(c) above:

- (i) in the Panel's view, Mr Throssell's statement is a reference to Councillor Black's conduct being in breach of standing order 2.4.11(1) of the Shire's standing orders, which reads:

"Any member who uses an expression which, in the opinion of the person presiding, is offensive to any member or employee of the Council is, when required by the person presiding, to unreservedly withdraw the expression and make a satisfactory apology."

- (ii) amongst the meanings of the word "expression" in the Macquarie Dictionary is "a particular word, phrase, or form of words";
- (iii) in the Panel's view, standing order 2.4.11(1) appears to be aimed at the use of abusive language;
- (iv) in the Panel's view, Councillor Black did not use any "expression" in this matter; and

- (v) therefore, in the Panel's view, there was no cause for the person presiding to apply standing order 2.4.11(1), and Councillor Black did not breach that standing order; and
- (d) the breach alleged in the complaint was a breach of standing order 2.1.10(1) of the Shire's standing orders, a local law relating to conduct of people at council or committee meetings.

7. On 6 May 2008 a Notice of the Complaint, a copy of the complaint, a copy of a typed version of the Minute Secretary's notes, a form of Notice of Admission and a form of Notice of Denial were sent by the Panel Administration to Councillor Black. The Notice of the Complaint stated, inter alia, that:

"... the Panel's provisional view is that section 2.1.10(1) of the Standing Orders applies at any time during a meeting. Accordingly, there is one allegation under the complaint that remains to be dealt with by the Panel. This allegation is:

"That immediately prior to Council considering your application for financial assistance for legal services at the Ordinary Council Meeting of the Council of the Shire of Mundaring on 22 January 2008 you contravened section 2.1.10(1) of the Standing Orders by both or either: (a) reflecting adversely upon the character or action of Mr Jonathan Throssell, a Shire employee; and/or (b) imputing an improper motive to Mr Throssell; by making the statements or comments attributed to you under the Shire's Minute Secretary's notes taken at the meeting."

8. The Notice of the Complaint also invited Councillor Black's response to the allegation, within 21 days. Councillor Black's response of 22 pages (including 20-pages of his submissions) was received on 28 May 2008.

9. At the Panel's meeting on 12 June 2008, inter alia:

- (1) The Panel discussed Councillor Black's response of 28 May 2008 – noting that his response to the allegation is, in essence, that:
 - (a) he disputes the accuracy of the Minute Secretary's notes;
 - (b) he says that at no time did he say the word "deliberately" – in particular, he did not say that Mr Throssell had "deliberately" made item a late item;
 - (c) rather, he says that he did say: *"I don't know what the hold up was but that meant quite predictably (sic) that I didn't have the opportunity ..."*
 - (d) in relation to Mr Throssell's Report, according to Councillor Black's notes on what was actually said at the OCM in relation to this matter (these notes being reproduced in pages 12-15 of Cr Black's submissions), he says he said:

“So I’m asking before the debate starts on the particular item for me to be afforded the opportunity and council can agree to that to allow me to partake in the debate.

If that doesn’t happen then the next point I would ask for the matter to be deferred. The reason is because the report is quite factually incorrect. There is critical information that hasn’t been included.

The CEO or whoever wrote the report simply hasn’t included pertinent information and that pertinent information must be included in the report which is a part of ...”

- (2) The Panel agreed that they were not prepared to proceed to make a finding in this matter until endeavours have been made to obtain further information on what was actually said by Councillor Black at the OCM in relation to this matter.
- (3) The Panel requested the Panel Administration to provide to the Shire’s complaints officer a copy of pages 12-15 of Councillor Black’s response, and to request the complaints officer to:
 - (a) provide copies of those pages to each Councillor (other than Councillor Black) and each employee present at the OCM at the relevant time; and
 - (b) obtain a signed and dated written account from such of those Councillors and employees who are willing to provide their recollection (in their own words) as to what was said by Councillor Black at the relevant time – in particular whether Councillor Black used the word “deliberately” or “predictably”.

10. The Panel Administration performed the tasks so requested. The Shire’s complaints officer responded on 9 July 2008 with 7 witness accounts and a copy of Mr Throssell’s file note dated 12 February 2008. The information in this material is to the effect that Councillor Black:

- (a) used both of the words “predictably” and “deliberately” in reflecting on Mr Throssell’s actions in relation to the timing of the item as a late item; and
- (b) used the word “deliberately” in reflecting on Mr Throssell’s alleged actions in relation to the alleged withholding of information.

11. At the Panel’s meeting on 18 July 2008, inter alia:

- (1) The Panel discussed the 7 witness accounts and Mr Throssell’s file note dated 12 February 2008. On the issue of procedural fairness to Councillor Black, the Panel decided that:
 - (a) relevant extracts of the witness accounts that address Councillor Black’s actual words spoken, be provided to Councillor Black;

- (b) Councillor Black be given a 10-day opportunity to respond to those extracts; and
- (c) the Panel would reconsider this matter after that 10-day period has expired.

(2) The Panel requested the Panel Administration attend to (1)(a) and (b).

12. The Panel Administration performed the tasks so requested by way of a letter to Councillor Black, dated 24 July 2008. Councillor Black responded on 12 August 2008, with a 25-page facsimile copy of written material and submissions. In making its finding in this matter the Panel has carefully considered and taken into account everything contained in the two sets of submissions from Councillor Black.

13. The Panel notes that:

- (a) in item 16 on page 2 of Councillor Black's response of 12 August 2008, he identifies "the salient point [as] did I say "deliberately' in the context that I said the CEO Throssell deliberately made the item a late item and left out material or did I say predictably"; and
- (b) notwithstanding that identification, Councillor Black has not denied that he used the words "deliberately withheld information from Council" in reflecting on Mr Throssell's actions in relation to Mr Throssell's Report.

14. On the basis of the material and information referred to above, it is the Panel's view that there is sufficient evidence from which it may be concluded, and from which the Panel so concludes, that it is more likely than not that at the OCM Councillor Black:

- (a) used both of the words "predictably" and "deliberately" in reflecting on Mr Throssell's actions in relation to the timing of the item as a late item; and
- (b) used the words "deliberately withheld information from Council" in reflecting on Mr Throssell's actions in relation to Mr Throssell's Report.

15. In the Panel's view, a reasonable person would perceive Councillor Black's reflections on Mr Throssell's actions in this matter as adverse to Mr Throssell in that they constitute at least an implication ("Councillor Black's implication") that Mr Throssell's actions had improperly interfered with or hindered, or were improperly interfering with or hindering, Councillor Black's entitlements and his due performance of his functions and responsibilities as a Council member.

16. The Panel notes that:

- (1) Section 5.69(1) reads:
"If a member has disclosed, under section 5.65, an interest in a matter, the council or the CEO may apply to the Minister to allow the disclosing member to participate in the part of the meeting, and any subsequent meeting, relating to the matter."

(2) Accordingly, Councillor Black did not have the capacity to make an application under section 5.69(1).

(3) Mr Throssell's Report includes legal advice (in relation to Councillor Black's application) sought and obtained in the 14-day period after Councillor Black had made his application, and that Mr Throssell's Report was completed on the last day of that period.

17. In the Panel's view:

- (a) standing order 2.1.10(1) applies at any time during a Council meeting;
- (b) standing order 2.1.10(1) is contravened if a Council member is present at a Council meeting and reflects adversely upon the action of another member or employee; and
- (c) an adverse reflection is a reflection that would be perceived by a reasonable person as tending to lower a person in the estimation of his or her fellow persons by making them think less of him or her.

18. In the Panel's view, at the OCM Councillor Black reflected adversely on the actions of Mr Throssell when he:

- (a) used the word "deliberately" in reflecting on Mr Throssell's actions in relation to the timing of the item as a late item; and
- (b) used the words "deliberately withheld information from Council" in reflecting on Mr Throssell's actions in relation to Mr Throssell's Report.

19. Accordingly, the Panel finds that Councillor Black has committed a breach of standing order 2.1.10 of the Shire's standing orders, and has thus committed a minor breach by virtue of regulation 4(2).

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Quentin Harrington (Presiding Member)

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Clive Robartson (Member)

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John Lyon (Member)

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SP 10 of 2008

Complainant: Mr Jonathan THROSSELL

Council member complained about: Councillor Kevin Alan BLACK

Local Government: Shire of Mundaring

Decision:

The Panel has made a finding ("the finding") that Councillor Black committed a breach of standing order 2.1.10(1) of the Shire of Mundaring's standing orders, and has thus committed a minor breach by virtue of regulation 4(2) of the *Local Government (Rules of Conduct) Regulations 2007* ("the breach").

The Panel's decision on how the breach is dealt with under section 5.110(6) of the *Local Government Act 1995* ("the Act"), is that for the following reasons pursuant to paragraph (c) of section 5.110(6) of the Act it orders two of the sanctions described in paragraph (b) of section 5.110(6) of the Act, as set out in the attached Minute of Order.

REASONS FOR DECISION

1. The finding was made on the basis, inter alia, of the Panel's view that during a part of the Shire's Ordinary Council Meeting on 22 January 2008 when it was closed to members of the public Councillor Black reflected adversely on the actions of Mr Throssell when he:
 - (a) used the word "deliberately" in reflecting on Mr Throssell's actions in relation to the timing of Item 12.2.1 as a late item; and
 - (b) used the words "deliberately withheld information from Council" in reflecting on Mr Throssell's actions in relation to Mr Throssell's Officer Report dated 18 January 2008 in relation to Item 12.2.1.

2. The Panel notes that:

(1) On 18 August 2008 the Panel Administration, on behalf of the Panel, sent to Councillor Black a letter under which he was given:

(a) notice of the finding;

(b) a copy of the Panel's written *Reasons for Finding* in regard to the finding; and

(c) an opportunity for him to make submissions (within 21 days of the date of the notice) about how the breach should be dealt with under s 5.110(6) of the Act.

(2) On 5 September 2008 the Panel Administration received a fax, on Councillor Black's letterhead, from an unidentified person who advised:

"To whom it may concern,

Cr. Black has current commitments and is not available until the 30 October 2008.

Responses will be made within 14 days from that date."

(3) The Panel Administration understood that advice to be in reference to this matter and another matter (SP 21 of 2008) in relation to which:

(a) Councillor Black is the person complained about; and

(b) the Panel Administration had sent him material for his response.

(4) On 22 September 2008 the Panel Administration sent a letter by Express Post to Councillor Black, referring to this matter, such other matter and the fax mentioned in (a) and stating, inter alia, that:

"Your facsimile provides no reasons for the Panel to consider why it should not proceed with hearing each of the complaints on the evidence currently before it. In the absence of written evidence of special circumstances to support the Panel deferring these matters they will continue to be listed for consideration by the Panel on the 2 October 2008.

I draw your urgent attention to providing, as soon as possible, evidence of your unavailability for consideration by the Panel."

(5) On 26 September 2008 the Panel Administration received a fax, on Councillor Black's letterhead, from an unidentified person who advised:

“Further to my fax dated 5th September 2008 to the Local Government Standards Panel.

With regard to the express post letter recently received. I confirm that this letter remains unopened as Mr. Black is not in Perth, has no access to phones, faxes, emails or other communication and is not available until the 30 October 2008.

Responses will be made within 14 days from that date.”

3. In the Panel’s view:
 - (a) Councillor Black has had sufficient notice of the finding; and
 - (b) Councillor Black has had sufficient opportunity to make submissions on how the Panel should deal with the breach under section 5.110(6) of the Act.
4. Councillor Black has not previously been found under Part 5 Division 9 of the Act to have committed any minor breach.
5. Having regard to the said *Reasons for Finding*, the above matters, the significance of the role of a local government’s Chief Executive Officer, and the general interests of local government in Western Australia, the Panel’s decision in this matter is that pursuant to paragraph (c) of section 5.110(6) of the Act it orders two of the sanctions described in paragraph (b) of section 5.110(6) of the Act, as set out in the attached Minute of Order.

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Quentin Harrington

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Clive Robartson

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