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## Local Government Standards Panel

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Complaint Number	SP 43 of 2018
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Mr Robert Jeans</b>
<b>Respondent</b>	<b>Councillor Lee Downham</b>
Local Government	<b>City of Rockingham</b>
Regulation	Regulation 7 of the <i>Local Government (Rules of Conduct)</i> <i>Regulations 2007</i>
Panel Members	Ms Sheryl Siekierka (Presiding Member) Ms Elanor Rowe (Deputy Member) Ms Rebecca Aubrey (Deputy Member)
Heard	21 November 2018 Determined on the documents
Outcome	One breach of regulation 7(1)(b)

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### FINDING AND REASONS FOR FINDING

Delivered 13 December 2018

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#### DEFAMATION CAUTION

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## Summary of the Panel's decision

1. The Panel found that Councillor Lee Downham ("Cr Downham"), a councillor for the City of Rockingham ("the City"), committed one minor breach under the *Local Government Act 1995* (WA) ("the Act") and regulation 7 of the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations") when he added a post to Facebook following a Council Meeting on 22 May 2018 regarding a flyer that had been left in councillors' pigeonholes in the councillors' lounge around the same time of the meeting.

## Jurisdiction and procedural fairness

2. The Act makes provision for the circumstances in which a council member commits a minor breach.<sup>1</sup>
3. On 14 June 2018, the Panel received a Complaint of Minor Breach Form ("Complaint"), containing one allegation of a breach of the Regulations, signed by the City's Acting CEO, Mr Robert Jeans ("the Complainant"), in relation to Cr Downham's behaviour when he added a post to Facebook following a Council Meeting on 22 May 2018 regarding a flyer that had been left in councillors' pigeonholes in the councillors' lounge around the same time of the meeting
4. On 18 June 2018, the Department advised Cr Downham of the Complaint and invited him to respond. The Department sent Cr Downham a copy of the original Complaint and all the supporting documents provided by the Complainant.
5. 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 21 November 2018 the Panel convened to consider the Complaint.
6. The Panel:
  - (i) accepted the Department's advice, based on information from the Western Australian Electoral Commission, that Cr Downham was a councillor at the time of the alleged breaches, having been elected on 17 October 2015, and was still a Councillor when the Panel met on 21 November 2018;
  - (ii) was satisfied the Complaint had been made within two years after the alleged breaches are said to have occurred<sup>3</sup>;
  - (iii) was satisfied 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
  - (iv) was satisfied that the Department had provided procedural fairness to Cr Downham.

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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.



7. 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 Downham had not previously committed a minor breach the Panel did not consider sending the Complaint to the Chief Executive Officer of the Department.
8. Based on the information referred to in paragraphs 2 to 7 above the Panel found it had jurisdiction to determine whether Cr Downham had breached regulation 7 in connection with the Complaint.

### Panel's role

9. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.
10. 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 than not that the breach occurred than that it did not occur (the required standard of proof).<sup>6</sup>
11. 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 from the evidence that it is more probable than not that it has 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>
12. 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 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.”*

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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.



14. The Panel decided that the alleged conduct is not conduct that contravenes section 5.93 of the Act or section 83 of *The Criminal Code*.

### **Substance of the Complaint**

15. The Council Meeting on 22 May 2018 (“Council Meeting”) was attended by, amongst others, the Complainant, Cr Elliott, Cr Whitfield and Cr Downham and concluded around 8:00pm. The Council Meeting was followed by a dinner in a reception room adjacent to the Council Chambers. Such a dinner generally follows each Council meeting and all councillors have a standing invitation to attend.
16. The dinner was attended by the Complainant and several other people. Neither Cr Whitfield nor Cr Downham attended, although Cr Whitfield did briefly enter the reception room shortly after the conclusion of the Council Meeting. Cr Whitfield did not speak with the Complainant, or ask to speak with him.
17. The Complainant departed for home around 8:45pm and remained contactable by email and telephone. Cr Downham has the Complainant’s email address and very occasionally uses it to contact the Complainant.
18. The following morning, on 23 May 2018, the Complainant received an email from Cr Whitfield who complained that an anonymous flyer (“Flyer”) had been placed in councillors’ pigeonholes that are situated in the councillors’ lounge in the City’s Administration building.
19. The Flyer sets out an article with the title ‘*Anger over Rockingham Chief Executive Officer Andrew Hammond’s \$7k council send-off*’ referring to a civic function held on 3 May 2018 to acknowledge the contributions of the retiring CEO, amongst other things.
20. The article includes the following statements:

*Cr Matthew Whitfield, who revealed details of the event on social media, said he strongly disagreed with the mayor’s decision to approve what he said was a waste of taxpayers’ money.*

*“Households who have just been stung with utility price increases and rate rises are soon to follow, and households are doing it hard,” he said.*

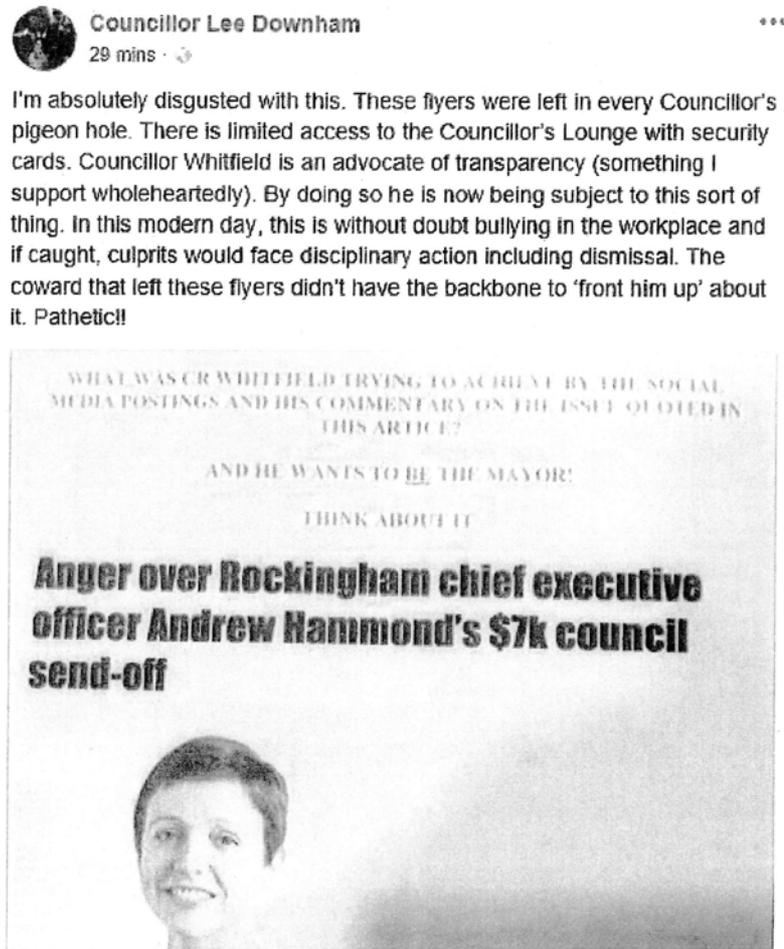
*“The outgoing CEO may have done a good job, but to spend \$7400 on a farewell party using taxpayers’ money does not pass any common-sense test.*

*Retiring depot managers with 20 years experience or cleaners with 30 years do not get a party so why should very well paid CEOs?”*

21. The Flyer highlighted the statements set out in paragraph 20 above in red and also included the following words, also in red, which did not appear in the article when it was published:

***“WHAT WAS CR WHITFIELD TRYING TO ACHIEVE BY THE SOCIAL MEDIA  
POSTINGS AND HIS COMMENTARY ON THE ISSUE QUOTED IN THIS ARTICLE  
(sic)?  
AND HE WANTS TO BE THE MAYOR!  
THINK ABOUT IT”***

22. As a result of inquiries the Complainant made after the receipt of Cr Whitfield's email regarding the Flyer, the Complainant determined by 10:30am on the same day that the Flyer had been placed in the councillors' pigeonholes by Councillor Chris Elliott ("Cr Elliott") and not by an employee of the City.
23. The Complainant does not know the exact time that Cr Downham learned of the existence of the Flyer, but Cr Downham referred to it in a post added by him on his Facebook page at 9:33pm on 22 May 2018 ("Facebook Post"). A copy of the Facebook Post is below:



24. In the Facebook Post Cr Downham notes "*there is limited access to the Councillors' Lounge with security cards*". By referring to it as the "Councillors Lounge" Cr Downham inferred it was possible that the Flyer was placed in councillors' pigeonholes by a fellow councillor.
25. Furthermore, by stating that "*there is limited access to the Councillor's Lounge with security cards*", Cr Downham inferred that the Flyer may have been placed there by an employee of the City because a reasonable person would believe that some or all of the City's employees would have a security card that would give them access to the Councillors' Lounge.



26. The inference that it could be an employee who was responsible for leaving the Flyers was reinforced by Cr Downham's assertion that *"this is without a doubt bullying in the workplace and, if caught, culprits would face disciplinary action including dismissal"* because a councillor cannot be "dismissed" as they are not employees of the City.
27. On 25 May 2018 the Complainant sent an email and letter to Cr Downham expressing his disappointment with the Facebook Post and the way Cr Downham handled it insofar as it related to the Flyer. The Complainant did not receive a response to his letter but it appears that the Facebook Post was subsequently removed from Cr Downham's page.
28. The Complainant states:
- "I submit that the publication of the Facebook Post, without first affording the City an opportunity to investigate who published the Flyer, involved breaches of regulation 7(1)(a) and (b) of the Regulations, in that it involved an improper use by Cr Downham of his office as a council member:*
- (a) to cause detriment to the City, its employees and its councillors (save for himself and Cr Whitfield); and*
- (b) to gain directly or indirectly an advantage for himself".*
29. The detriment to the City arises in the following manner:
- (a) Cr Downham published the Facebook Post without first endeavouring to ascertain who had placed the Flyers in councillors' pigeonholes;
- (b) contending that the Flyers must have been placed in councillors' pigeonholes by employees of the City or by a councillor cast aspersions upon the integrity of the City's other councillors (except Cr Whitfield), the City's employees and the City generally;
- (c) contending that the person who deposited the Flyer was a "coward" that did not confront Cr Whitfield and who had acted in retaliation for Cr Whitfield's opposition to the City's funding of the Civic Function, presented the City and its employees in a very negative light; and
- (d) Cr Downham's further contention that he 'wholeheartedly' supported Cr Whitfield as an "advocate of transparency" implied that some or all of the other councillors (except Cr Whitfield) and some or all of the City's employees were opposed to transparency.
30. That detriment was likely to be caused, is supported by posts of a negative nature relating to the Flyers added to the "Baldivis Chat" Facebook page, a copy of which (as at June 2018) is attached to the Complaint.
31. The advantage to Cr Downham is that he promoted himself as someone who "wholeheartedly" supported Cr Whitfield as an "advocate of transparency" and that transparency was something otherwise lacking within the City and that he should be seen as one of its champions, which might ultimately assist in his re-election to Council.



## Councillor Downham's Response

32. Cr Downham denies that he breached the regulations as detailed in the Complaint. The alleged breach is based on the opinion of the Complainant alone and his incorrect interpretations and grossly exaggerated view and is a clear indication of the Complainant's mission to victimise Cr Downham and Cr Whitfield by submitting complaints of breaches for anything possible.

33. It is also a clear indication that the Complainant is tracking every article that Cr Downham and Cr Whitfield publish, including on wider chat pages within the Baldivis Ward. The Complaint has clearly been written (or assisted) by the City's legal counsel who also previously submitted a complaint against Cr Downham. In response to particular aspects of the allegation, Cr Downham responds as follows:

*Cr Downham inferred that the Flyer may have been placed in Councillors' pigeonholes by an employee of the City*

34. This is farcical. No reasonable person would ever know that 'city employees' would have access to the Councillor's lounge. Most people would not even know there was a Councillors' lounge. Cr Downham absolutely refutes the claim.

*Cr Downham's assertion that stating "the culprits would face disciplinary action" further implies an employee may have placed the Flyer in the pigeonholes*

35. This is a biased view of the Complainant in his attempts to justify the Complaint. Cr Downham's comment was in the context of general workplace rules, regulations and policies. If this were to happen in the workplace it would be without doubt bullying. There is no way Cr Downham ever inferred with this statement, or otherwise, that it was a city officer who was responsible for the Flyers. The Complainant is stretching his imagination.

*The Facebook post was a breach of regulation 7 as it did not afford the City an opportunity to investigate who published the Flyer*

36. Firstly, Cr Downham's page does not cause a detriment to the City and / or councillors. It is a statement of dissatisfaction with a Flyer. It does not infer City employees were to blame.

37. Secondly there is absolutely no advantage to be gained (directly or indirectly); the Facebook Post was purely a statement of dissatisfaction.

*Contending that the Flyer must have been placed in pigeonholes by employees or by a councillor cast aspersions on the integrity of the City's other councillors (except Cr Whitfield), the City's employees and the City generally*

38. This statement is "beyond credulity". The Complainant is 'suggesting' and 'inferring' lots of things based on his biased and fictitious opinion and the statement is far-fetched.

*That detriment is likely to result (as shown by the follow up posts on Baldivis Now)*



39. Suggesting that a conversation on Facebook that started as a result of the Facebook Post, somehow supports the Complainant's allegations, is again testing the boundaries of credulity.

*Cr Downham promoted himself as someone who 'wholeheartedly' supported Cr Whitfield as an 'advocate of transparency', that transparency is something that was otherwise lacking in the city and that he should be seen as one of its champions, which might ultimately assist in his re-election.*

40. Being an advocate of transparency in no-way suggests that this is something otherwise lacking in the City. The Complainant is simply looking for reasons which support the Complaint. The final part of the sentence can only be seen as "laughable"; the Complainant is wrongly assuming Cr Downham is going for re-election and is scraping the barrel to suggest Cr Downham's Facebook post might assist in this.

### **Mitigating Factors**

41. Cr Downham further states:

- The City does not have a social media policy and has provided no training whatsoever regarding social media;
- The Complainant suggests that Cr Downham cast aspersions upon the integrity of the City's other councillors (except Cr Whitfield) the City's employees and the City generally. If this were true, why has Cr Elliott not been subject to the same complaint as the same principle must also apply. By placing an unnamed Flyer in the Councillors' lounge, Cr Elliott must have cast aspersions upon the integrity of the city's other councillors, the city's employees and the City generally if that is the Complainant's argument. However, as the Complainant has adjudged that Cr Elliott's actions do not warrant a breach, then the precedent was set prior to Cr Downham's alleged breach being submitted. This is another clear indication to Cr Downham that he has been singled out;
- The Complainant's reasoning is without substance; and
- It is clear it is only Cr Downham and Cr Whitfield who are being targeted as no other Councillor (Cr Elliott in particular) has been referred to the Panel. The Complainant has not mentioned the anguish caused to the victim and recipient of the Flyer, nor has he, to date, spoken with the victim / recipient about the Flyer.

### **Summary**

42. The pettiness of the breach must raise questions as to what the Acting CEO is doing and why. The bizarre and extreme statements by the Complainant must suggest a "witch hunt". There has been no communication between Cr Downham and the Complainant; the Complainant has chosen to complain rather than approach Cr Downham with professionalism. The allegations and reasoning by the Complainant would undoubtedly make any / every Elected Member redundant of their role. The Complaint should be dismissed as petty, vindictive and without credulity.



## Panel's consideration

### First Allegation: Regulation 7

#### Elements of regulation 7(1)

43. In order to find that Cr Downham breached regulation 7 the Panel must be satisfied to the required standard of proof that:

- (a) the person, the subject of the Complaint, engaged in the alleged conduct (first element);
- (b) the person, the subject of the Complaint, was a council member both at the time of the conduct and the time when the Panel makes its determination (second element);
- (c) by engaging in the conduct, the person, the subject of the complaint, made use of his or her office as a council member (in the sense that he or she acted in their capacity as a councillor, rather than in some other capacity (third element);
- (d) that when viewed objectively, such use was an improper use of the person's office as a council member in that it:
  - (i) involved a breach of the standards of conduct that would be expected of a person in the position of a councillor by reasonable persons with knowledge of the duties, power and authority of the councillor and the circumstances of the case; and
  - (ii) was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty;(fourth element)
- (e) the person engaged in the conduct in the belief that:
  - (i) [in the case of regulation 7(1)(a)] an advantage would be gained either directly or indirectly for the person or any other person; or
  - (ii) [in the case of regulation 7(1)(b)] detriment would be suffered by the local government or any other person.(fifth element).

#### First, second and third elements satisfied

44. The Panel finds that Cr Downham engaged in the conduct which is the subject of the Complaint; and that he was a councillor and was acting as a councillor at all relevant times.

45. The first, second and third elements of regulation 7(1) are established.



#### Fourth element - meaning of “to make improper use of office”

46. The Macquarie 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.”<sup>8</sup> The Shorter Oxford dictionary definition is “irregular, wrong; unsuitable, inappropriate; unbecoming, unseemly.”<sup>9</sup>
47. 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?<sup>10</sup> “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.”<sup>11</sup>
48. Under the Act Panel members must have regard to the general interests of local government in Western Australia.<sup>12</sup> It is in the interests of local government that councillors are, and are seen to be, professional and respectful in their dealings with fellow councillors, local government employees and members of the public.
49. 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 breach.<sup>13</sup> Regulation 3 provides, among other things, that councillors should act with reasonable care, diligence and integrity and treat others with respect and fairness. The meaning of “improper” must be considered in the context of relevant legislation, such as the Act and the Regulations, and 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.<sup>14</sup> All these provisions form part of the backdrop to the Regulations and give context to a complaint but the alleged conduct must also be judged in the particular circumstances.
50. Conduct can be improper even though the councillor’s judgment is that it isn’t improper. 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.<sup>15</sup>

#### Fifth element - meaning of “to gain directly or indirectly an advantage for the person or any other person” and “to cause detriment to the local government or any other person”

##### Advantage

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<sup>8</sup> Macquarie Dictionary, Seventh Edition.

<sup>9</sup> Shorter Oxford English Dictionary, Sixth Edition.

<sup>10</sup> *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 27, referring to *R v Byrnes* (1995) 183 CLR 501.

<sup>11</sup> *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 9, referring to *Robbins v Harness Racing Board* [1984] VR 641.

<sup>12</sup> Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).

<sup>13</sup> Regulation 3.

<sup>14</sup> *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 10.

<sup>15</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64, referring to *Treby and Local Government Standards Panel* [2010] WASAT 81 (*Treby 2010*).



51. "Advantage" is defined as "favouring a circumstance; something which gives one a better position benefit; increased well-being or convenience pecuniary profit ..."<sup>16</sup>
52. "To" in "to gain directly or indirectly an advantage" indicates that for this element to be established, a councillor must have intended to gain an advantage for themselves or another person.
53. For this element to be established, it is not necessary to find that the councillor's actions did, or reasonably could have, delivered the result sought.<sup>17</sup>

### Detriment

54. "Detriment" means loss, damage or injury.<sup>18</sup> It includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage. A person can suffer detriment through others thinking less favourably of them.<sup>19</sup>
55. For regulation 7(1)(b) to be satisfied it is not necessary to show that the local government or the person concerned actually suffered detriment.<sup>20</sup> However it is not enough to show that the local government or the person concerned suffered detriment, or could have suffered detriment. The Panel must find that it is more likely than not that the councillor believed that his or her actions would cause detriment and intended to cause detriment.<sup>21</sup>
56. "To cause detriment" has been interpreted as meaning "in order to" or "for the purpose of" causing detriment, or "with the will to" cause detriment.<sup>22</sup> There can be a finding of intent if, after considering all the evidence, the only reasonable inference is that the councillor intended to cause detriment.<sup>23</sup>

## **Panel's Findings**

### Whether Cr Downham acted improperly (fourth element)

57. The Panel is satisfied that the fourth element has been established and that Cr Downham 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 Downham did not meet the standards of conduct expected of a councillor when publishing the Facebook Post regarding the Flyers following the Council Meeting:
  - a. Cr Downham submits the anonymous placing of the Flyers in councillors' pigeonholes was a serious matter, involving bullying of a fellow councillor. However, on the evidence, it appears that Cr Downham did not contact the Complainant (the Acting CEO) or Mayor Sammels and inform them about the Flyers once he had become aware of them;

<sup>16</sup> Shorter Oxford English Dictionary, Sixth Edition

<sup>17</sup> Yates and Local Government Standards Panel [2012] WASAT 59, paragraphs 71,72

<sup>18</sup> Macquarie Dictionary Revised Third Edition, 2001.

<sup>19</sup> *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraphs 31, 32.

<sup>20</sup> *Treby* 2010, paragraph 96, referring to *Chew v The Queen* 1992 CLR 626 (*Chew* 2010).

<sup>21</sup> *Re and Local Government Standards Panel* [2014] WASAT 111, paragraph 51, referring to *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd* [2013] FCA 1342.

<sup>22</sup> *Chew* 2010.

<sup>23</sup> *Treby* 2010.



- b. Cr Downham then published the Facebook Post (publicly) shortly after finding out about the Flyers, still without having conferred with the Complainant or Mayor Sammels. By doing so, members of the public would likely have become aware of the Flyers before the City did, and before the City had had a reasonable chance to investigate and establish who was responsible;
- c. Cr Downham was aware of who had access to the councillors' lounge and that the Flyers had most likely been placed in the pigeonholes by either an employee of the City or another councillor; either way, the proper internal procedures for dealing with such matters should have been followed so the City could take the correct action;
- d. The City was precluded from being given the opportunity to investigate the Flyer situation and establish the facts before Cr Downham published the Facebook Post.

58. The Panel is satisfied that the fourth element has been established and that Cr Downham did act improperly by publishing the Facebook Post.

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

59. The Complainant alleges that by publishing the Facebook Post, Cr Downham intended to both gain an advantage for himself and to cause a detriment to all councillors (except Cr Whitfield), the City's employees and the City generally.

60. The Panel does not consider the allegation in respect of regulation 7(1)(a) (that Cr Downham acted with the intention of gaining an advantage), is supported by the evidence.

61. In relation to the allegation that Cr Downham breached regulation 7(1)(b), the Panel is satisfied to the required standard that Cr Downham, when publishing the Facebook Post, intended to cause detriment to the local government and that the fifth element has been established. The Panel finds it is more likely than it is not that:

- (a) after becoming aware of the Flyers, Cr Downham published the Facebook Post without first confirming whether the City also knew about them and that an employee of the City or a councillor may have been involved;
- (b) the Facebook Post was published online during the evening (following the Council Meeting), thereby Cr Downham would have been aware that the information would reach several people in the community possibly before the City; and
- (c) the City was not given the opportunity to investigate the matter before Cr Downham published the Facebook Post that referred to bullying occurring in local government; this potentially placed the City at a disadvantage in dealing with and responding to the matter.

62. The Panel is satisfied that the fifth element has been established.



### Panel's Finding

63. The Panel finds that Cr Downham committed one breach of regulation 7(1)(b) in relation to the Complaint.

A handwritten signature in blue ink that reads "S. Siekierka".

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Sheryl Siekierka (Presiding Member)

A handwritten signature in black ink that reads "Elanor".

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Elanor Rowe (Deputy Member)

A handwritten signature in black ink that reads "Rebecca".

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Rebecca Aubrey (Deputy Member)