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## Local Government Standards Panel

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Complaint Number	SP 2020-059
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Mr Michael Foley</b>
<b>Respondent</b>	<b>Councillor Ian Johnson</b>
Local Government	<b>City of Swan</b>
Regulation	Regulation 4 Regulation 7 of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mrs Emma Power (Presiding Member) Cr Peter Rogers (Member) Mr Gordon MacMile (Member)
Heard	12 August 2020 Determined on the documents
Finding	One (1) breach of Regulation 7(1)(b)

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### FINDING AND REASONS FOR FINDING

Delivered 28 August 2020

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#### DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents.



## Summary of the Panel's decision

1. On 12 August 2020, the Panel found that Councillor Ian Johnson, a councillor of the City of Swan (**"the City"**):
  - a. did not commit a minor breach pursuant to the *Local Government Act 1995 (WA)* (**"the Act"**) regulation 4 of the *Local Government (Rules of Conduct) Regulations 2007* (**"the Regulations"**); and
  - b. did commit a minor breach of the Act and regulation 7 of the Regulations, when at the 24 June 2020 Agenda Forum of the City, he disagreed with and repeatedly interrupted the presiding member and therefore allegedly caused embarrassment to the Council and members of the public who were present as set out in paragraph 15 below.

## The Panel's Role

2. Under section 5.110(2) of the Act the Panel is required to consider a minor breach complaint and make a finding as to whether the alleged minor breach occurred.
3. The Act provides for the circumstances in which a council member commits a minor breach.<sup>1</sup>
4. The Panel may make a finding that a councillor has committed a minor breach of the Act and Regulations based on evidence from which it may be concluded that it is more likely that the alleged breach occurred than it did not occur.<sup>2</sup>
5. In order to find a breach, it must be established that each element of the relevant Regulation is more likely than not to have been breached or met.
6. In considering whether a minor breach is established the Panel must consider:
  - a. all evidence provided and, where there are conflicting circumstances, inferences or evidence, must come to a reasonable conclusion that any circumstance, inference or evidence relied upon is more likely than not to have occurred or be accurate<sup>3</sup>; and
  - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding<sup>4</sup>.
7. The Panel does not possess investigative or supervisory powers.<sup>5</sup> The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials published by the relevant local authority's website.
8. It is the responsibility of both complainants and respondents to provide the Panel with all information they wish the Panel to consider when making its determination.

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

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

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

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

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



9. The Panel also must have regard to the general interests of local government in Western Australia<sup>6</sup>.
10. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

### **Jurisdiction and Procedural Fairness**

11. On 26 June 2020 the Panel received a complaint from Mr Michael Foley acting as complaints officer of the City ("**the Complaints Officer**"). The same enclosed a Complaint of Minor Breach Form dated 26 June 2020.
12. In the complaint form, the Complainant alleges that, at the 24 June 2020 Agenda Briefing ("**the Briefing Session**"), Cr Johnson breached:
  - a. **Allegation 1** - regulation 4 when he breached the City of Swan Meeting Procedures Local Law 2019 by disagreeing with the presiding member regarding the conduct of the meeting; and
  - b. **Allegation 2** - regulation 7 of the Regulations when his conduct in disagreeing with, and repeatedly interrupting, the presiding member allegedly caused embarrassment to the Council and members of the public who were present,as set out in paragraph 15 below (together "**the Complaint**").
13. The Panel convened on 12 August 2020 to consider the Complaint.
14. The Panel:
  - a. accepted the advice of the Department that, based on information published on the Western Australian Electoral Commission's website, Cr Johnson was:
    - i. at the time the Panel met, the elected to the Council of the City in October 2019 for a term expiring in October 2023;
    - ii. a Councillor at the time of the alleged breach; and
    - iii. a Councillor when the Panel met on 12 August 2020;
  - b. was satisfied the Complaint was made within six months after the alleged breach occurred<sup>7</sup>;
  - c. was satisfied that the City's Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of a minor breach<sup>8</sup>;
  - d. was satisfied the Department had provided procedural fairness to Cr Johnson; and
  - e. found it had jurisdiction to consider the Complaint.

### **The Specifics of the Complaint**

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

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

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



15. The Complainant provided the following arguments and comments in respect to the Complaint:
- a. Prior to each monthly Council Meeting an agenda forum is held. The agenda forum is an opportunity for the public and Councillors to ask questions on matters on the agenda and also for the public to present deputations.
  - b. Due to the COVID-19 pandemic and pursuant to the *Local Government Amendment (COVID-19 Response) Act 2020*, the Council unanimously resolved to suspend the following clauses of its Meeting Procedures Local Law and that these matters be determined at the discretion of the Presiding Member, including sections 2.1(3), 2.2, 2.4, 2.5(1)(b), 2.6, 4.1, 4.4, 4.5 and 7.4.
  - c. On Phase 3 easing of restrictions coming into effect, the City decided that only 13 “in person” deputations could be accommodated and still allow the agenda forum meetings to be completed within a 2 hour timeframe. One measure implemented to permit this was to limit the time allocation for deputations.
  - d. Both Councillors and the community have been informed of these changes.
  - e. At the Agenda Forum of the 24 June 2020 (“**the Agenda Forum**”), there was a disagreement between Cr Johnson and Cr Bailey regarding the management of deputations. Specifically, the ability of Councillors to ask those making deputations multiple questions following their deputations.
  - f. The Presiding Member explained to Cr Johnson, that in order to get through the business on the agenda, that each deputation would be limited to five minutes (including questions). The total time allotted to deputations was 40 minutes.
  - g. Cr Johnson disagreed with this ruling and sought a vote from other Councillors to allow Councillors to ask questions following each deputation.
  - h. This motion was lost 6/8.
  - i. Deputations continued, but the issue arose again following another deputation, when the Presiding Member ruled that there was no further time for questions.
  - j. Cr Johnson repeatedly interrupted the Presiding Member, stating that it was not in the Presiding Member's power to determine how deputations would be managed, that the Presiding Member was disrupting the meeting, and insisted asking his question.
  - k. In doing so, Cr Johnson has breached the following clauses of the *City of Swan Meeting Procedures Local Law 2019* (“**the Local Law**”):
    - i. 4.8 - No interruption - Cr Johnson did not raise a point of order, or request to make a personal explanation, and repeatedly interrupted the Presiding Member.
    - ii. 4.10 - No re-opening of discussion - Cr Johnson sought to re-litigate the decision to not allow more than 5 minutes per deputation, even after the Council had voted on the matter.
    - iii. 5.1 - Preservation of Order - Cr Johnson initially failed to comply with a direction from the Presiding Member to not interrupt.





- c. The CEO appears to have mis-used City resources to create this complaint. Cr Johnson does not believe he drafted it himself.
- d. The CEO has breached section 5.123 of the Act Confidentiality by disclosing the Complaint to others.
- e. The CEO has also misled the Panel by failing to include the City of Swan Agenda Forum Guidelines and the recent legal advice from McLeods. This is misleading in a material particular under section 5.107(1) and (2) of the Act.
- f. The information is incorrect as, despite being asked, the City has not provided public health advice regarding the CEO's and Mayor's desire to limit meetings to 2 hours. No other Council has limited meetings to 2 hours.
- g. In Cr Johnson's opinion, the 2 hour limit does not have a medical or scientific justification and is not a reason to curtail meetings and deputations. Given the small number of deputations in person, a few questions from Councillors could easily be accommodated.
- h. The Mayor does not have any power to change the format of the agenda forum. An email sent out from the minutes clerk, is not sufficient to change the local law for meeting procedures.
- i. It is correct that the City has suspended deputations, however, the Agenda Forum went ahead. The only limitation on meetings under the Stage Governments COVID-19 restrictions at that date was a 1.5 metre distance between all participants and no more than 1 person per 2 square metres. The State Government has not made an emergency declaration limiting meetings to 2 hours.
- j. The meeting ran for just over 2 hours, and in Cr Johnson's view a few minutes extra to ask some important questions would not do any harm.
- k. Had Cr Bailey not been so disruptive the meeting might have finished earlier.
- l. The CEO in his complaint suggests that Cr Johnson should have called a "*point of order*" before asking questions. This is not correct, prior to this agenda forum no Councillor had ever has to raise a point of order in an agenda forum, they are usually informal.
- m. The Panel should watch the whole video to get the facts.
- n. Cr Johnson does not agree that he committed the conduct. All he was doing was trying to ask questions in line with the City's normal practise at an agenda forum.
- o. The Mayor disrupted the meeting, which is a breach of the Local Law, when Cr Johnson tried to ask questions of deputees. It is the purpose of an agenda forum to hear deputations and for Councillors to ask questions. Mayor Bailey's interruptions were contrary to the Local Law and our Agenda Forum Guidelines.
- p. In Cr Johnson's view the applicant was denied procedural fairness in not having the opportunity to answer questions. In the end Cr Johnson left the meeting to ask the applicant questions as he felt that Cr Bailey's behaviour to the applicant was unfair and without foundation in law.
- q. In Cr Johnson's view, by restricting deputations without a decision of Council to that effect and then disrupting the meeting, the Mayor breached regulation 7 of



- the Regulations by creating a detriment to the applicant and others and the whole Council.
- r. Sending out an email by a third party one day prior to the agenda forum insisting on a limit of 5 minutes per depute for both speech and questions inclusive from Councillors is arbitrary, denies procedural fairness, and is without any support in the City Agenda Forum Guidelines or common law.
  - s. The Mayor has no power to so radically change the format of the Agenda Forums without approval of Council, and further changing the Local Law.
  - t. The State Government's amendments to the Local Government Act under section 10 allows the Council (not the Mayor) to suspend the Local Law, but it does not allow the Mayor or Council to make new local laws or change them on the fly.
  - u. The City has previously obtained legal advice to this effect.
  - v. Section 10 of the Act does not limit meetings to 2 hours.
  - w. A higher standard is expected of the Mayor.
  - x. In Cr Johnson's view by trying to change the agenda forum without the support of Council and contrary to legal advice. The Mayor embarrassed the whole Council in front of the public through his disruptive behaviour and lack of understanding of law and meeting procedure.
  - y. Cr Johnson did not breach Regulation 4 – he was just doing his job asking questions in line with the Agenda Forum Guidelines. The Mayor disrupted the meeting by interrupting Cr Johnson without reason. The Mayor was not maintaining order, he was disruptive.
  - z. Cr Johnson did not breach regulation 7 – in fact Cr Johnson had to leave the chamber to ensure that the applicant had the chance to answer his lawful and reasonable questions. Cr Johnson did not cause any detriment to anyone, the Mayor created the detriment.
20. Cr Johnson also supplied the following supporting documentation:
- a. Copy letter dated 1 May 2020 from McLeods to the City regarding the legality of suspension of Local Laws;
  - b. City of Swan Guideline - Council Agenda Forums – adopted 15 February 2017; and
  - c. Letter dated 26 June 2020 from Mayor Bailey to Cr Johnson regarding his behaviour at the Agenda Forum.

#### **Regulation 4**

21. Regulation 4 reads:

*“(1) In this regulation —*

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



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

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

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

*...*

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

### **Regulation 7**

23. Regulation 7 prohibits councillors engaging in conduct to either gain an advantage for themselves (or another party) or cause detriment to another party and specifically provides as follows:

#### ***“7. Securing personal advantage or disadvantaging others***

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

(a) *to gain directly or indirectly an advantage for the person or any other person; or*

(b) *to cause detriment to the local government or any other person.*

(2) *Subregulation (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.*

24. The Complainant has not made any allegation that there was any intention to provide an advantage to any particular party, so the Panel has only considered regulation 7(1)(b) of the Regulations in this decision.

### **Panel’s Consideration**

#### **Regulation 4**

25. To make a finding of a minor breach of regulation 4 of the Regulations the Panel must be satisfied, to the required standard, that:

- a. Cr Johnson was a councillor at the time of the alleged breach and the time of the determination;
- b. the conduct occurred during a council or committee meeting; and
- c. Cr Johnson breached a valid provision of the City of Swan Meeting Procedures Local Law 2019.

#### **Cr Johnson was a Councillor at the relevant times**

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

27. This element is met.



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

28. Pursuant to the Act council and committee meetings are treated more formally and as a distinct type of meeting (as opposed to briefings or other types of meetings) and are subject to specific provisions.
29. The Act specially recognises “ordinary” and “special” Council meetings, committee meetings and electors’ meetings. It does not define or describe agenda forums or briefings or other kinds of general City meetings with a more administrative nature.
30. This distinction is usually made as Council and Committee meetings are where Council is called upon to make formal binding decisions, and are therefore subject to special voting and other formal procedures. Other types of meetings are considered to be more administrative in nature to assist the Council, but not be part of the formal Council decision making process.
31. Despite the fact that the Local Law is adopted by the City for proceedings during City agenda forums (for ease of conducting those meetings), this element is not met as the conduct described in the Complaint did not occur during a council or committee meeting as defined in the Act.
32. As such, any conduct that took place during the Agenda Forum cannot be considered to be in breach of Regulation 4.
33. This element cannot be met.

#### Cr Johnson breached a valid provision of the City of Swan Meeting Procedures Local Law 2019

34. As the above element cannot be met, this element does not need to be discussed further.

#### Conclusion

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

#### **Regulation 7(1)(b)**

36. To make a finding of a minor breach of regulation 7(1)(b) of the Regulations the Panel must be satisfied to the required standard that:
  - a. Cr Johnson was an elected member at the time of the alleged breach and the time of the determination;
  - b. Cr Johnson made use of his office as Council member of the City;
  - c. when viewed objectively, such use was an improper use of Cr Johnson’s office in that it:
    - i. involved a breach of the standards of conduct that would be expected of a person in the position of councillor by reasonable persons; and
    - ii. was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty; and



- d. Cr Johnson engaged in the conduct in the belief that detriment would be suffered by another person.

Cr Johnson was an Elected Member at the relevant times

37. Cr Johnson was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.
38. This element is met.

Cr Johnson made use of his office as Council Member of the City

39. Cr Johnson was attended the relevant briefing meeting in his capacity as an elected member.
40. This element is met.

Cr Johnson's use was improper

41. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or a lack of wisdom<sup>9</sup>. It requires an abuse of power or the use of the councillor's position in a manner that such councillor knew (or ought to have known) was not authorised.
42. Impropriety does not depend on a councillor's consciousness of impropriety. It is to be judged objectively and does not involve an element of intent<sup>10</sup>.
43. Any decision as to what is "improper" cannot be made in isolation but must be considered in the relevant context including the specifics of the relevant event as well as councillor's formal role and responsibilities.
44. In the Complaint, the Complainant asserts that Cr Johnson acted improperly when he used his position as a Councillor to re-open a debate regarding the management of public deputations after a ruling had already been made by the Presiding Member and voted on by Council.
45. Cr Johnson asserts that the decision as to the procedure of deputations was arbitrary, denied procedural fairness, and was without any support in the City Agenda Forum Guidelines or common law.
46. Cr Johnson also makes several allegations regarding the conduct of the CEO and the Presiding Member, however, the Panel asserts that a response to a breach complaint is not the correct forum for allegations of other parties breaching the Regulations or Act.
47. Clause 1.3 of the Local Law asserts that the purpose is to provide for the proper conduct of meeting *including* agenda forums. The following provisions are relevant as to decision procedural issues with respect to the matters raised in the Complaint.

***agenda forum*** means a forum open to the public (except for matters of a confidential nature), held prior to an ordinary Council meeting for the purpose of receiving questions and deputations and for Councillors to seek additional information on items on the agenda for an ordinary Council meeting and at which no decisions are made;

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<sup>9</sup> Complaint of Minor Breach No. SP 3 of 2013

<sup>10</sup> *Chew v R* [1992] HCA 18



**procedural motion** means a motion that relates to how the meeting is conducted;

## 2.6 Deputations

- (1) Time is allocated at agenda forums and special council meetings for members of the public to provide a deputation on a matter listed on the agenda for the relevant Council meeting.
- (2) Deputations in respect to late items or urgent business which are not available to the public at the time of the agenda forum may be provided at the ordinary meeting of Council.
- (3) Any person wishing to make a deputation is to apply to the CEO for approval at least 8 hours prior to the commencement of the agenda forum, or meeting as the case may be.
- (4) The CEO may either—
  - (a) approve a request; or
  - (b) refer a request to the Presiding Member.
- (5) The Presiding Member may either—
  - (a) approve a request; or
  - (b) refer a request to the agenda forum or meeting, as the case may be, to decide by simple majority whether or not to hear a deputation.
- (6) A person making a deputation—
  - (a) is not to address the agenda forum or meeting for more than 10 minutes; or
  - (b) may by decision of the Presiding Member be restricted to speaking for less than 10 minutes if the pressure of business for that agenda forum or meeting so requires.
- (7) Following a speaker's deputation, members may ask the speaker questions relating to the item or seek clarification of issues raised by the speaker but no discussion will be allowed.

## 7.1 Permissible procedural motions

A member may move any of the following procedural motions—

- (a) that the motion be now put;
- (b) that the meeting proceed to the next business;
- (c) that the matter lie on the table;
- (d) that debate be adjourned;
- (e) that the meeting be adjourned;
- (f) refer to a committee;
- (g) refer back to a committee; or
- (h) that the ruling of the Presiding Member be disagreed with.

## 11.2 When this local law does not apply

(1) In situations where—

- (a) one or more provisions of this local law have been suspended; or
- (b) a matter is not regulated by the Act, the Regulations or this local law,

the Presiding Member is to decide questions relating to the conduct of the meeting.

(2) The decision of the Presiding Member under subclause (1) is final, except where a motion of dissent is moved and carried in accordance with Part 7.

(3) Notwithstanding the provisions of subclause (1), the Presiding Member may call for a vote on a ruling open to him or her under subclause (1).

(4) The vote is to be taken without a motion and without debate and the Presiding Member shall be bound by the outcome of the vote.

48. In addition, the City has specifically adopted the Guideline - Council Agenda Forums ("**the Guidelines**"). Clause 2.4 of the Guidelines provides as follows:

*"As per the common law rules for the conduct of public meetings, the presiding member determines all procedural matters for the conduct of an agenda forum."*

49. Further, several parts of section 2.6 of the Local Law are repeated or summarised in the Guidelines.



50. The Local Law was purported to be varied by the formal suspension of certain provisions of the Local Law, including section 2.6 as to deputations. However, such suspension was subsequently revoked at the Ordinary Council meeting of the 6 May 2020.
51. Therefore, as at the Agenda Forum on 24 June 2020 section 2.6 of the Local Law was in force.
52. Further, being an enacted Local Law, the Local Law overrides any provision of the Agenda Guidelines to the extent of any inconsistency.
53. Cr Johnson asserts that:
  - a. it was not reasonably necessary to limit the deputation time or meeting time;
  - b. that the Presiding Member does not have the power to do these things or make new local laws; and
  - c. a few minutes extra to ask some important questions would not do any harm.
54. The matter of timing of an agenda forum is silent in the Act, the Regulations and the Local Law. As such, section 11.2(1)(b) of the Local Law applies.
55. Therefore, it was within the power of the Presiding Member to limit the timeframe of the Agenda Forum as a whole. The Panel further considers that this was done in the interests of the Local Government to reduce risk.
56. In the email dated 23 June 2020 to all councillors it was clearly set out that the time frame for deputations was limited (both for each deputation, question time and the total time spent). It is asserted that this was to minimise the timeframe of the meeting to assist in managing COVID-19 risk.
57. Section 2.6(6)(b) of the Local Law specifically permits the Presiding Member to reduce the time of deputations if the pressure of the business for that agenda forum so requires. The Panel considers that the limited timeframe of the Agenda Forum constituted the required “pressure of business” to permit the exercise of the power granted by this section.
58. In respect to the section 2.6 of the Local Law regarding the ability of elected members to ask questions, the Panel notes that there is no minimum or maximum time frame specified in such section.
59. As such, the Panel finds that section 11.2(1)(b) of the Local Law applies to the extent that it permitted the Presiding Member to specify that questions could be asked, provided that the total time limited of 5 minutes for deputations and questions was not exceeded.
60. Given the above, the Panel finds, to the required standard, that the Presiding Member was permitted to place a time limit on the time for deputations and questions (and to give notice of this by email directly from himself or via the City Administration) due to the reduced timeframe for agenda forums.
61. At the time during the Agenda Forum that Cr Johnson was informed that the timeframe for the deputation and questions had expired, he requested a motion of dissent to extend the timeframe to permit questions to be asked (**“the Motion”**).



62. The Panel considers this an exercise of Cr Johnson's rights under section 11.2(2). The Panel, however, notes that such Motion would not be considered a permissible procedural motion as defined in section 7.1 of the Local Law.
63. Pursuant to section 11.2(2) of the Local Law, once the Motion failed to carry, the decision of the Presiding Member was considered final.
64. Despite the failure of the Motion, Cr Johnson continued to argue with the Presiding Member several times and to assert that the Presiding Member was disrupting the meeting.
65. Cr Johnson was on clear notice that there would be time restrictions on deputation at the Agenda Forum. Further, once Cr Johnson's Motion had not passed, it was simply not appropriate to continue to argue the matter or interrupt the Presiding Member.
66. With due respect to Cr Johnson, procedural matters at meetings and agenda forums are largely within the discretion of the Presiding Member. It is not the role of a single councillor to decide what is "reasonable" or not based on personal opinion, especially where there has been due notice of the proposed procedural matters.
67. For the reasons given above, the Standards Panel finds to the required standard that:
  - a. Cr Johnson's actions were in breach of:
    - i. section 4.8 of the Local Law as Cr Johnson repeatedly interrupted the Presiding Member; and
    - ii. section 5.1 of the Local Law as Cr Johnson failed to comply with a direction from the Presiding Member; and
  - b. that such conduct was improper and not of a standard expected of a local councillor.
68. Despite the fact the elements required to find a breach of Regulation 4 cannot be met, it is still a reasonable expectation that councillors will abide by the proper meeting procedures that are in force and it is open for the Panel to find that failure to abide by such meeting procedures is improper behaviour by a councillor.
69. In addition to the above, the City has a "*Code of Conduct for Councillors and Committee Members*" published September 2015 ("**the Code**") which sets out certain expectations in respect to the conduct of Councillors to be read in conjunction with the Regulations. The relevant sections of the Code are as below:
  - a. High Ethical Standard

*" Councillors and Committee Members of the City of Swan should aspire to high ethical standards including those in Regulation 3(1) of the Local Government (Rules of Conduct) Regulations 2007. The standards in Regulation 3(1) prescribe the following conduct:-*

....

*4. Avoid damage to the reputation of the local government; and*

....

*7. Treat others with respect and fairness; and*

....."



b. Personal Behaviour

*“(a) Councillors and Committee Members will:*

*(i) act, and be seen to act, properly and in accordance with the requirements of the law and the terms of this Code;.....”*

70. In the relevant circumstances, the Panel finds it more likely than not that Cr Johnson breached the above sections of the Code in that he acted in a manner that did not show respect and fairness to the Presiding Member and acted generally in a manner that was likely to damage the reputation of the local government.
71. Given the above, the Panel finds that it is more likely than not the conduct by Cr Johnson was improper as:
- a. the conduct was in breach of the Local Law and the Code;
  - b. the conduct was of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
  - c. the conduct is deserving of a penalty.
72. This element is met.

Cr Johnson intended to cause a disadvantage

73. “Detriment” means loss, damage or injury. It is construed widely and includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage.
74. It is not necessary to find whether any detriment was actually suffered<sup>11</sup>, but an intent to cause such detriment must be established.
75. The Complainant asserts that Cr Johnson’s behaviour was disrespectful to the Presiding Member, disrespectful to the remaining members of the public who were waiting to make their deputations and caused embarrassment to Council.
76. Cr Johnson asserts he was he was just doing his job by asking questions in line with the Agenda Forum Guidelines.
77. The Panel has carefully reviewed the two exchanges involving Cr Johnson in the recording of the Agenda Forum. Although Cr Johnson may have had the initial intention to assert his right to ask questions, the Panel finds, to the required standard, that once Cr Johnson’s Motion had been lost and he continued to berate the Presiding Member, Cr Johnson’s intention was to harass and intimidate the Presiding Member into complying with his wishes.
78. Further, the Panel considers that certain further comments and conduct of Cr Johnson amounted to an attempt to denigrate the Presiding Member including:
- a. accusing the Presiding Member of “disrupting the meeting”, wasting time and of “making it up” as he “goes along”;
  - b. stating sarcastically “this is why you’re elected?”; and

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<sup>11</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59 at [72]



- c. repeatedly interrupting, and ignoring the rulings of, the Presiding Member.
79. Given the above, the Panel finds that it is more likely than not that Cr Johnson's conduct was intended to cause a detriment to the Presiding Member.
80. Despite the fact that Cr Johnson's conduct may have caused some embarrassment to the City, the Panel does not find that Cr Johnson had any intent to do so, but was focused on the Presiding Member.
81. This element is met.

#### Conclusion

82. Given the above, the elements required to find a breach of regulation 7(1)(b) of the Regulations have been met.

#### **Panel's Findings**

83. Cr Johnson did not commit a breach of Regulation 4 of the Regulations and therefore did not commit a minor breach.
84. Cr Johnson did commit a breach of Regulation 7(1)(b) of the Regulations and therefore did commit a minor breach.

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Emma Power (Member)

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Peter Rogers (Member)

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Gordon MacMile (Deputy Member)



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## Local Government Standards Panel

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Complaint Number	SP 2020-059
Legislation	<i>Local Government Act 1995 (WA)</i>
<b>Complainant</b>	<b>Mr Michael Foley</b>
<b>Respondent</b>	<b>Councillor Ian Johnson</b>
Local Government	<b>City of Swan</b>
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i>
Panel Members for Penalty Consideration	Mr Gordon MacMile (Presiding Member) Councillor Deborah Hopper (Member) Ms Elanor Rowe (Member)
Heard	12 August 2020 Determined on the documents
Penalty Considered	17 September 2020
Outcome	Training

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### DECISION AND REASONS FOR DECISION

5 November 2020

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#### DEFAMATION CAUTION

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## Introduction

1. At its meeting on 12 August 2020, the Panel found that Councillor Ian Johnson (“Cr Johnson”), a councillor for the City of Swan (“the City”), committed one minor breach under the Local Government Act 1995 (WA) (“the Act”) and regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) (“the Regulations”) at the Agenda Forum held on 24 June 2020, when he disagreed with and repeatedly interrupted the presiding member (“Minor Breach”). The Panel found that Cr Johnson did not commit a breach of Regulation 4 with respect to the same conduct.
2. On 28 August 2020, the Panel published its Finding and Reasons for Finding (“Findings”) that Cr Johnson had breached Regulation 7(1)(b). The Panel reviewed all the evidence presented to it and made the following statements:
  - “63. Pursuant to section 11.2(2) of the Local Law, once the Motion failed to carry, the decision of the Presiding Member was considered final.
  64. Despite the failure of the Motion, Cr Johnson continued to argue with the Presiding Member several times and to assert that the Presiding Member was disrupting the meeting.
  65. Cr Johnson was on clear notice that there would be time restrictions on deputation at the Agenda Forum. Further, once Cr Johnson’s Motion had not passed, it was simply not appropriate to continue to argue the matter or interrupt the Presiding Member.
  66. With due respect to Cr Johnson, procedural matters at meetings and agenda forums are largely within the discretion of the Presiding Member. It is not the role of a single councillor to decide what is “reasonable” or not based on personal opinion, especially where there has been due notice of the proposed procedural matters.
  - .....
  77. The Panel has carefully reviewed the two exchanges involving Cr Johnson in the recording of the Agenda Forum. Although Cr Johnson may have had the initial intention to assert his right to ask questions, the Panel finds, to the required standard, that once Cr Johnson’s Motion had been lost and he continued to berate the Presiding Member, Cr Johnson’s intention as to harass and intimidate the Presiding Member into complying with his wishes.”
  78. Further, the Panel considers that certain further comments and conduct of Cr Johnson amounted to an attempt to denigrate the Presiding Member.....”

## Jurisdiction and Law

3. The Panel convened on 17 September 2020 to consider how it should deal with the Minor Breach. The Panel accepted the advice of the Department of Local Government, Sport and Cultural Industries (“the Department”) that on this date there was no available information to indicate that Cr Johnson had ceased to be, or was disqualified from being, a councillor.



## Possible Sanctions

4. Section 5.110(6) of the Act provides that the Panel is to deal with a minor breach by:
- (a) *ordering that no sanction be imposed; or*
  - (b) *ordering that —*
    - (i) *the person against whom the complaint was made be publicly censured as specified in the order;*  
*or*
    - (ii) *the person against whom the complaint was made apologise publicly as specified in the order;*  
*or*
    - (iii) *the person against whom the complaint was made undertake training as specified in the order;*  
*or*
    - (iv) *the person against whom the complaint was made pay to the local government specified in the order an amount equal to the amount of remuneration and allowances payable by the local government in relation to the complaint under Schedule 5.1 clause 9;*
- or*
- (c) *ordering 2 or more of the sanctions described in paragraph (b).*
5. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach. Under section 5.110(6)(a), the Panel may order that no sanction be imposed, not to reverse the finding of a breach, but to indicate that in all the circumstances the relevant councillor should not be penalised further.

## Councillor Johnson's Submissions

6. If the Panel finds that a councillor has committed a minor breach, it must give the councillor an opportunity to make submissions to the Panel about how it should deal with the breach under section 5.110(6).<sup>1</sup>
7. By a letter dated 31 August 2020, Cr Johnson was:
- i. notified of the Panel's Finding of the Minor Breach;
  - ii. provided with a copy of the Panel's Findings; and
  - iii. offered an opportunity to make submissions as to how the Minor Breach should be dealt with under section 5.110(6) of the Act
8. On 2 September 2020, the Department received a submission from Cr Johnson in which:

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<sup>1</sup> *Local Government Act 1995 (WA)*, s 5.110(5).



- a. he acknowledged that he has a lot to learn about how conflict can be dealt with agreeably;
- b. he had attended a meeting of the Bayswater City Council on 25 August 2020, to see how other councillors conduct themselves during meetings, and he stated that he learned a lot; and
- c. he proposed that he attend a training course on dealing with conflict and that he had asked the City's Chief Executive Officer to book him onto such a course.

### **Panel's Consideration**

9. Guidance on the factors which the Panel may consider in determining the appropriate penalty to impose, include, but are not limited to:
  - a. the nature and seriousness of the breaches;
  - b. the councillor's motivation for the contravention;
  - c. whether or not the councillor has shown any insight and remorse into his / her conduct;
  - d. whether the councillor has breached the Act knowingly or carelessly;
  - e. the councillor's disciplinary history;
  - f. the likelihood or not of the councillor committing further breaches of the Act;
  - g. the councillor's personal circumstances at the time of the conduct, and at the time of imposing the sanction;
  - h. the need to protect the public through general deterrence and maintain public confidence in local government; and
  - i. any other matters which may be regarded as aggravating conduct or mitigating its seriousness.
10. Cr Johnson has not previously been found to have committed any minor breaches.
11. The Panel found that Cr Johnson breached Regulation 7(1)(b) when he disagreed with and repeatedly interrupted the presiding member at an Agenda Forum held on 24 June 2020, with the intention of causing detriment to the presiding member. The Panel does not consider it appropriate to impose no sanction in relation to the Minor Breach as this would indicate that it was so minor that no penalty is warranted.
12. However, the Panel also does not consider it is appropriate to make an order for censure for Cr Johnson's actions, as they were not so serious to justify such an order. When the Panel makes an order that a Notice of Public Censure be published, the Notice is published by the local government's CEO, at the expense



of the local government; such expense is significant where the Notice is to be published in a newspaper or newspapers. Likewise, the Panel also does not find that an order that Cr Johnson pay to the City a sum of money is warranted.

13. The options left for the Panel to consider are to order Cr Johnson to undertake training or make a Public Apology.
14. The circumstances in which it may be appropriate for the Panel to order that the council member concerned undertake training include where the member communicates to the Panel:
  - a. their acknowledgement that they have committed the minor breach, and their willingness to undertake training; or
  - b. their acknowledgement that they have committed the minor breach, but that such breach occurred through their lack of knowledge or education on the issue or issues concerned; or
  - c. their remorse or contrition for their offending conduct in committing the minor breach.
15. Cr Johnson took the opportunity to respond to how the Panel should deal with the Minor Breach in a reasonable and receptive manner. He had also been proactive in taking positive steps, to help him not repeat his offending conduct. The Panel agrees that training, rather than a public apology, will be of use to Cr Johnson and is the appropriate penalty.
16. The sanction of an order to undertake training also aligns with the intent of the Act and the purpose of the civil penalties under the Act to ensure future compliance with the statutory obligations imposed on councillors for the better protection of the public.

### **Panel's Decision**

17. Having regard to the Findings, the matters set out herein, and the general interests of local government in Western Australia, the Panel's decision on how the Minor Breach is to be dealt with under s5.110(6) of the Act, is that pursuant to subsection (b)(iii) of that section, Cr Johnson is ordered to undertake training as set out in the attached Order.



A handwritten signature in blue ink, appearing to read 'G MacMile'.

Gordon MacMile (Deputy Presiding Member)

A handwritten signature in blue ink, appearing to read 'E Rowe'.

Elanor Rowe (Deputy Member)

A handwritten signature in blue ink, appearing to read 'D Hopper'.

Deborah Hopper (Deputy Member)



## ORDER

Delivered 5 November 2020

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### DEFAMATION CAUTION

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### THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

Within four (4) months of the date of this Order, Councillor Ian Johnson, a member of the City of Swan, shall undertake:

1. the training course for Elected Members "*Dealing with Conflict*" provided by WA Local Government Association (WALGA) for a period of seven and a half (7.5) hours; or
2. a training course with substantially similar learning outcomes provided by an alternative registered training organisation for a similar duration, but for a period of at least five (5) hours.

Gordon MacMile (Deputy Presiding Member)

Elanor Rowe (Deputy Member)

Deborah Hopper (Deputy Member)



## NOTICE TO THE PARTIES TO THE COMPLAINT RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (the Panel) advises:

- (1) Under section 5.125 of the *Local Government Act 1995* the person making a complaint **and** the person complained about each have the right to apply to the State Administrative Tribunal (the SAT) for a review of the Panel's decision in this matter. In this context, the term "decision" means a decision to dismiss the complaint or to make an order.
- (2) By rule 9(a) of the *State Administrative Tribunal Rules 2004*, subject to those rules an application to the SAT under its review jurisdiction **must be made within 28 days of the day on which the Panel (as the decision-maker) gives a notice** [see the Note below] under the *State Administrative Tribunal Act 2004 (SAT Act)*, section 20(1).
- (3) The Panel's ***Breach Findings and these Findings and Reasons for Finding – Sanctions***, constitute the Panel's notice (i.e. the decision-maker's notice) given under the *SAT Act*, section 20(1).

**Note:**

- (1) This document may be given to a person in any of the ways provided for by sections 75 and 76 of the *Interpretation Act 1984*. [see s. 9.50 of the *Local Government Act 1995*]
- (2) Subsections 75(1) and (2) of the *Interpretation Act 1984* read:
  - (1) Where a written law authorises or requires a document to be served by post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, **service shall be deemed** to be effected by properly addressing and posting (by pre-paid post) the document as a letter to the last known address of the person to be served, and, **unless the contrary is proved, to have been effected at the time when the letter would have been delivered in the ordinary course of post.** [Bold emphases added]
  - (2) Where a written law authorises or requires a document to be served by registered post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, then, if the document is eligible and acceptable for transmission as certified mail, the service of the document may be effected either by registered post or by certified mail."
- (3) Section 76 of the *Interpretation Act 1984* reads:

"Where a written law authorises or requires a document to be served, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, without directing it to be served in a particular manner, service of that document may be effected on the person to be served —

  - (a) by delivering the document to him personally; or
  - (b) by post in accordance with section 75(1); or
  - (c) by leaving it for him at his usual or last known place of abode, or if he is a principal of a business, at his usual or last known place of business; or
  - (d) in the case of a corporation or of an association of persons (whether incorporated or not), by delivering or leaving the document or posting it as a letter, addressed in each case to the corporation or association, at its principal place