



Local Government Standards Panel

Complaint Number	20240418
Legislation	<i>Local Government Act 1995</i>
Complainant	Councillor Jennifer Obourne
Respondent	Councillor Gemma Johnston
Local Government	Shire of Esperance
Regulation	Regulation 19 of the <i>Local Government (Model Code of Conduct) Regulations 2021</i>
Panel Members	Mr Tom Griffiths (Presiding Member) Ms Emma Power (Member) Mr Peter Rogers (Member)
Heard	11 November 2024 Determined on the documents
Finding	1 x Breach Regulation 19

FINDING AND REASONS FOR FINDING Delivered 20 December 2024

DEFAMATION CAUTION

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Summary of the Panel's decision

1. On 11 November 2024, the Panel found that Councillor Gemma Johnston the councillor of the Shire of Esperance (**"the Shire"**) did commit a minor breach pursuant to the *Local Government Act 1995 (WA)* (**"the Act"**) and Division 4 and Regulation 19 of the *Local Government (Model Code of Conduct) Regulations 2021* (**"the Regulations"**) when she engaged an external planning consultant in respect to a matter on the Agenda of the Ordinary Council Meeting of 26 March 2024, as further set out in paragraph 17 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 and the *Local Government (Administration) Regulations 1996* provide for the circumstances in which a council member commits a minor breach.
4. Section 5.105(1) of the Act provides that a council or committee member commits a minor breach if the council or committee member contravenes a rule of conduct. Division 4 of the Regulations sets out the rules of conduct for council members and candidates.
5. Regulation 34D of the *Local Government (Administration) Regulations 1996* also provides that the contravention of a "local law as to conduct" is a minor breach pursuant to the Act.
6. 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.¹
7. 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.
8. 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 accurate²; and
 - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding³.
9. The Panel does not possess investigative or supervisory powers.⁴ The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials in the public domain or published by the relevant local authority's website.

¹ Section 5.106 of the Act

² *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1

³ *Briginshaw v Briginshaw* (1938) 60 CLR 336

⁴ *Re and Local Government Standards Panel* [2015] WASC 51 (at paragraph 24)



10. 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.
11. The Panel also must have regard to the general interests of local government in Western Australia⁵.
12. 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

13. On 17 May 2024 the Panel received a complaint from Ms Felicity Ann Baxter acting as complaints officer of the Shire ("**the Complaints Officer**"). The same enclosed a Complaint of Minor Breach Form dated 7 May 2024.
14. In the complaint form, the Complainant alleges that Cr Johnston has breached regulation 19 of the Regulations when she engaged an external planning consultant in respect to a matter on the Agenda of the Ordinary Council Meeting of 26 March 2024, as referred to in paragraph 17 below ("**the Complaint**").
15. The Panel convened on 11 November 2024 to consider the Complaint.
16. The Panel:
 - a. accepted the advice of the Department of Local Government, Sport and Cultural Industries ("**the Department**") that, based on information published on the Western Australian Electoral Commission's website, Cr Johnston was:
 - i. elected to the Council of the Shire in October 2023 for a term expiring in October 2027;
 - ii. a Councillor at the time of the alleged breach; and
 - iii. a Councillor when the Panel met on 11 November 2024;
 - b. was satisfied the Complaint was made within six months after the alleged breach occurred⁶;
 - c. was satisfied that the Shire's Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of a minor breach⁷;
 - d. was satisfied the Department had provided procedural fairness to Cr Johnston; and
 - e. found it had jurisdiction to consider the Complaint.

The Specifics of the Complaint

17. The Complainant provided the following comments and arguments in respect to the Complaint as summarised by the Panel:

⁵ Section 8(6) of Schedule 5.1 of the Act

⁶ Section 5.107(4) and 5.109(2) of the Act

⁷ Section 5.107 and 5.109 of the Act



- a. With regards to Item 12.1.1 in the Agenda of the Ordinary Council Meeting of 26 March 2024, Cr Johnston obtained external information without consultation or permission.
 - b. Cr Johnston engaged and paid an external planning consultant to refute the Shire's information contained in the Agenda. Cr Johnston subsequently used this information to try to convince Councillors to vote against the Officer's recommendation.
 - c. Cr Johnston has a long history of angst with the Shire regarding planning disputes.
18. The Complainant also provided:
- a. Copy of Agenda Item 12.1.2;
 - b. Email chain referring matter to WALGA for advice;
 - c. Email dated 25 March 2024 from the external Consultant to Cr Johnson;
 - d. Email dated 25 March 2024 from Cr Johnston and councillors of the Shire forwarding email from consultant.

The Respondent's Response

19. By an email dated 18 July 2024, Cr Johnston's legal advisors provided a response to the Complaint.
20. Cr Johnston denies that she has committed any minor breach.
21. Cr Johnston's legal advisors provided the following comments and arguments regarding the Complaint as summarised by the Panel:
 - a. The prohibition contained in the Regulations states that Cr Johnston, as a councillor, is not permitted to involve herself in operational matters.
 - b. However, there is an exception contained in subclause 19(2) of the Regulations as follows:

“ Subclause (1) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.”
 - c. A councillor must not only read agendas, but fully inform themselves on matters about which they are expected to make a decision. Cr Johnston is entitled to inform herself on matters of the agenda in any way she sees fit and is not obliged to only accept those matters which are put to her by internal advice.
 - d. There is no prohibition within the Regulations preventing Cr Johnston from informing herself in any way that is possible in respect of matters that are on the Agenda. Councillors may obtain external advice from other experts such as planners, lawyers, or any other expert so that they are able to be fully informed on matters the subject of their decision-making responsibilities.
 - e. While the CEO's role is to advise the council in relation to the functions of a local government, per Section 5.4I (a) and (b) of the Local Government Act, this speaks about the functions of the CEO.



- f. It is wrong to read this section as if it prohibits a councillor from obtaining information from any other source so that a councillor only makes information based on what the CEO may provide.
- g. A councillor must make a decision for a proper purpose, without bias, informing themselves to the extent necessary about the subject matter such that they can decide if said decision is in the interests of Local Government. To prevent a councillor from informing themselves as they consider necessary is to constrain the discretion of the councillor to fulfil their duty at common law. The ordinary business judgement rule would apply to the ambit of a councillor's role and require them to:
 - i. make the judgment in good faith for a proper purpose; and
 - ii. do not have a material personal interest in the subject matter of the judgment; and
 - iii. inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
 - iv. rationally believe that the judgment is in the best interests of the local government.
- h. By obtaining a separate planning report Cr Johnston did not involve herself in matters of the administration. Her role was to deliberate on a matter that was before Council and apply her discretion. Cr Johnston has not acted contrary to the Conduct Rules by involving herself in matters of administration by obtaining and circulating her own planning report.
- i. To limit the role of a councillor to properly inform themselves and limit it to only those matters provided by the CEO will set a very poor precedent.
- j. Cr Johnston has not involved herself in operational matters of administrative nature which is beyond her governance role by obtaining a relevant separate planning report. There is no basis to this complaint.
- k. Upholding this complaint would limit Councillors who are exercising their decision-making responsibilities as they would only be limited to the information provided by the CEO, regardless of its veracity or bias.

PANEL'S CONSIDERATION

Regulation 19

22. Regulation 19 prohibits councillors engaging in conduct that is intended to be undertaken by the administration of a local government and specifically provides as follows:

"9. Prohibition against involvement in administration

- (1) A person who is a council member must not undertake a task that contributes to the administration of the local government unless authorised by the local government or by the CEO to undertake that task.*



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

23. To make a finding of a minor breach of regulation 19 of the Regulations the Panel must be satisfied that:
- a. Cr Johnston was a councillor at the time of the alleged breach and at the time the determination was made; and
 - b. it is more likely than not that:
 - i. Cr Johnston took on, or was involved in, or participated in, the performance, attempted performance, or part performance of a function or responsibility under which the Act or by delegation it is for the local government’s CEO to perform or direct;
 - ii. such taking on, involvement or participation contributed something to the administration of the local government;
 - iii. such taking on, involvement or participation was not done as part of the deliberations at a council meeting; and
 - iv. the local government or CEO did not authorise such taking on, involvement or participation⁸.

Panel Consideration of Elements of Breach

Cr Johnston was a Councillor at the relevant times

24. Cr Johnston was a councillor at the time of the alleged breach and at the time the Panel considered the Complaint.
25. This element is met.

Did Cr Johnston on the performance of an administrative function of the Shire

26. The Act distinguishes between the roles of council and the staff employed by the local government, or the “administration”. Local governments are bodies corporate of which the Council is the governing body.
27. A council discharges its role by formulating policy and overseeing the performance of a local government’s functions. The day to day management of a local government is entrusted to the CEO⁹.
28. The role of the Council therefore includes making local laws, overseeing the allocation of the local government’s finances and resources and determining its policies. The role of individual councillors is to represent the interests of electors, ratepayers and residents of the district. The administration advises councillors to assist in their decision-making and implements policies determined by Council and Council’s other decisions.

⁸ Yates and Local Government Standards Panel [2012] WASAT

⁹ *Town of Cambridge v The Hon David Templeman MLA, Minister for Local Government; Heritage; Culture and the Arts* [2020] WASC 350 - Tottle J at 91



29. It is the established role of the administration to appoint and engage experts *on behalf of Council* and then provide that information to Council so that the same is done in accordance with the required standards and policies.
30. It is argued by Cr Johnston's legal advisors that Cr Johnston is entitled to inform herself in whatever matter she feels fit in respect to making a proper decision as to any item before the Council.
31. This shows a fundamental misunderstanding of the nature of regulation 19 and the Complaint.
32. In this case, the contentious issue is not the fact that Cr Johnston independently sought out further information. Cr Johnston is entitled to do this for her own personal use and at her own cost if she so desires. The contentious issue is that Cr Johnston then forwarded this information to the other councillors to consider as part of the relevant Agenda Item.
33. The emails provided to the Panel clearly indicate that:
 - a. Cr Johnston purported to be engaging Edge Planning on behalf of the Council in order for them to provide alternatives "*that we as Council should consider*"; and
 - b. Cr Johnston sent this information to the councillors prior to the relevant Ordinary Council meeting for consideration in respect to the relevant item.
34. It is simply not open for any elected member to unilaterally undertake functions of the administration, especially in a manner which ignores purchasing and procurement policies and the related quotation requirements which are in place to achieve value for rate payer's money, transparency and accountability.
35. This is not to say that it is not open to Council to agree to appoint a further consultant where it considers that the administration did not (or cannot) provide an appropriate report.
36. It would have been well within the role of Cr Johnston to state she did not believe the report to be sufficient and to move that the decision be deferred to allow further information or reports to be sourced by the administration.
37. The role of Council is to consider and make decisions on the material before it. It is the express role of the administration to provide the relevant materials for consideration. It is not the role of any elected member to engage any expert, or seek further advice, on behalf of Council *unless expressly authorised*.
38. As such, even if a councillor is attempting to be helpful, or wishes to support their alternate resolution, engaging and instructing an expert, such as a town planner, to provide advice or a report and then providing the same to Council is clearly an administrative function.
39. Given the above, the Panel finds it is more likely than not that Cr Johnston did take on, involve herself with or undertake an administrative function of the Shire in appointing and engaging a town planner to undertake a report and providing the report to Council for consideration
40. This element is met.



The taking on, involvement or participation contributed to the administration of the local government

41. In order to “*contribute*” the relevant action must “*play a part in the achievement of a result*”¹⁰.
42. In this case, it is clear that:
 - a. the advice from the town planner was forwarded to Councillors to consider prior to the relevant Ordinary Council Meeting; and
 - b. such information was used to support a motion that was moved by Cr Johnston.
43. The Panel therefore finds that it is more likely than not that the obtaining of the advice contributed to the administration of the local government by being included as material before councillors to consider in making a decision.
44. This element is met.

The taking on, involvement or participation was not done as part of the deliberations at a council meeting

45. It is argued by Cr Johnston’s legal advisors that the engagement and instruction of the town planner by Cr Johnston was done as part of deliberations at a Council Meeting.
46. This argument is misconceived in this instance.
47. If Cr Johnston had only appointed the town planner and sought advice to inform her own decision-making process, then this argument may be valid, however, in this case Cr Johnston distributed the email/information to councillors for them to consider as part of the relevant agenda item (being Cr Johnston’s proposed alternate resolution).
48. This was taking on a further role of providing the relevant information for consideration by the Council (in substantially the same manner as a report would be provided by the administration).
49. This element is met.

The local government or CEO did not authorise such taking on, involvement or participation

50. The Panel is satisfied from the emails provided by the Chief Executive Officer of the Shire, that Cr Johnston was not authorised to either procure or share the relevant information or report.
51. This element is met.

Conclusion

52. The elements required to find a breach of regulation 19 of the Regulations have been met.

¹⁰ Yates and Local Government Standards Panel [2012] WASAT at 56



Panel's Findings

53. Cr Johnston did commit a breach of Regulation 19 of the Regulations and therefore did commit a minor breach.

Signing

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Tim Fraser (Signed on behalf of Tom Griffiths)

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Emma Power (Member)

A handwritten signature in black ink, appearing to be 'P Rogers'.

Peter Rogers (Member)



Local Government Standards Panel

Complaint Number	20240418
Legislation	<i>Local Government Act 1995 (WA)</i>
Complainant	Councillor Jennifer Obourne
Respondent	Councillor Gemma Johnston
Local Government	Shire of Esperance
Regulation	Regulation 19 of the <i>Local Government (Model Code of Conduct) Regulations 2021</i>
Panel Members for Penalty Consideration	Ms Emma Power (Presiding Member) Mr Ethan Redshaw (Member) Cr Peter Rogers (Member)
Heard	11 November 2024 Determined on the documents
Penalty Considered	24 February 2025
Outcome	Training

DECISION AND REASONS FOR DECISION

Delivered 31 March 2025

DEFAMATION CAUTION

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Introduction

1. At its meeting on 11 November 2024, the Panel found that Councillor Gemma Johnston, a councillor of the Shire of Esperance (**“the Shire”**), committed two minor breaches under the *Local Government Act 1995* (WA) (**“the Act”**) and regulation 22 of Division 4 of the *Local Government (Model Code of Conduct) Regulations 2021* (**“the Regulations”**) when she engaged an external planning consultant in respect to a matter on the Agenda of the Ordinary Council Meeting of 26 March 2024 (**“the Minor Breach”**).

Jurisdiction and Law

2. The Panel convened on 24 February 2025 to consider how it should deal with the Minor Breaches.
3. 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 Johnston had ceased to be, or was disqualified from being, a councillor.
4. 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).¹
5. By a letter dated 20 December 2024, Cr Johnston was:
 - a. notified of the Panel’s finding of the Minor Breaches;
 - b. provided with a copy of the Panel’s Finding and Reasons for Finding; and
 - c. offered an opportunity to make submissions as to how the Minor Breaches should be dealt with under section 5.110(6) of the Act.

Possible Sanctions

6. Section 5.110(6) of the *Local Government Act 1995* (WA) (**“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

¹ *Local Government Act 1995* (WA), s 5.110(5).



- (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).*

Cr Johnston's Submissions

7. By an email dated 24 January 2025 the Department received a response from Cr Johnston.
8. Cr Johnston provided the following comments and arguments, as summarised by the Panel:
 - a. Cr Johnston would choose training for a sanction, however, she intends to appeal the matter to the State Administrative Tribunal.

Panel's Consideration

9. Section 5.110(6) is solely about penalty. The Panel does not have the power to review any finding of a breach.
10. The Panel may order under section 5.110(6)(a), that no sanction be imposed, not to reverse the Panel's finding of a breach, but to indicate that in all the circumstances the relevant councillor should not be penalised further.
11. Guidance as to the factors which the Panel may consider in determining the appropriate penalty to impose include, but are not limited to, the following:
 - 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. likelihood or not of the councillor committing further breaches of the Act;
 - g. personal circumstances at the time of conduct, and of imposing the sanction;
 - h. 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 seriousness².
12. Cr Johnston has not shown any insight into the relevant breach.
13. It is an integral part of the role of a local councillor that they understand the strict separation between the role of the administration of the local government and their role of the elected members.
14. Obtaining a town planning report and *distributing it to the whole of Council* in order to assist them to undertake their decision-making process is clearly an administrative function.
15. It is not in the public interest for elected members to disregard or avoid the procurement policies of the relevant local government or to circumvent the usual procedure of the qualified administrative staff making officer recommendations on items before council.
16. To clarify, it was acceptable for Cr Johnston to obtain a report for her own purposes. However, Cr Johnston went further than this in providing it to the remainder of the Council for consideration in voting on a particular matter.
17. The Panel deems that it is prudent that Cr Johnston undertake training to refresh her understanding of her role as an elected member.
18. 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.
19. In the relevant circumstances, the Panel considers that undertaking training is an adequate sanction and that it is not necessary to order that Cr Johnston recoup to the Shire the costs of the Department incurred in accordance with Schedule 5.1 clause 9 with respect to the Complaint.

² *Chief Executive Officer, Department of Local Government and Communities and Scaffidi* [2017] WASAT 67 (S).



Panel's decision

20. The Panel orders pursuant to section 5.110(6)(b)(iii) of the Act that, in relation to the Minor Breach of regulation 17 of the Regulations, Cr Johnston undertake training in terms of the attached Order.

Signing

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Ethan Redshaw (Member)

A handwritten signature in black ink, appearing to read 'E Power'.

Emma Power (Member)

A handwritten signature in black ink, appearing to read 'P Rogers'.

Peter Rogers (Member)



ORDER

Delivered 31 March 2025

DEFAMATION CAUTION

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THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

Councillor Gemma Johnston, a councillor for the Shire of Esperance, **undertake training** as specified in paragraph 1 below.

Training

1. Within 4 months of the date of this Order, Councillor Gemma Johnston, a councillor for the Shire of Esperance, shall undertake:
 - a. the training course for Elected Members “*Planning Practices - Essentials*” provided by WA Local Government Association (WALGA) for a period of no less than 7 hours, attending either in person or via e-learning (if available); or
 - b. a training course with substantially similar learning outcomes provided by an alternative registered training organisation for a period of not less than 7 hours.

Appeal

2. In the event that, prior to the date for compliance with the above Orders, Councillor Gemma Johnston:
 - a. commences an appeal the decision of the Standards Panel to the State Administrative Tribunal in accordance with section 5.125 of the *Local Government Act 1995*; and
 - b. notifies the Complaints Officer of the Shire of such appeal in writing,

THEN:

- c. compliance with such Orders may be delayed until the State Administrative Tribunal has made a finding in respect to the decision; and

such Orders may be amended by an order of the State Administrative Tribunal.



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 of business or principal office in the State.”*