



Local Government Standards Panel

Complaint Number	20240419
Legislation	<i>Local Government Act 1995</i>
Complainant	Ms Lori-Ann Shibish
Respondent	Councillor Gemma Johnston
Local Government	Shire of Esperance
Regulation	Regulation 17, Regulation 18, Regulation 19 Regulation 20 and Regulation 21 of the <i>Local Government (Model Code of Conduct) Regulations 2021</i> Regulation 34D of the <i>Local Government (Administration) Regulations 1996</i>
Panel Members	Mr Tim Fraser (Presiding Member) Mrs Emma Power (Member) Cr Peter Rogers (Member)
Heard	29 November 2024 Determined on the documents
Finding	1 x Breach Regulation 18

FINDING AND REASONS FOR FINDING Delivered 20 January 2025

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Summary of the Panel's decision

1. On 29 November 2024, the Panel found that Councillor Gemma Johnston a councillor of the Shire of Esperance (**"the Shire"**):
 - a. did not commit a minor breach pursuant to the *Local Government Act 1995 (WA)* (**"the Act"**) and Division 4 and Regulation 17 of the *Local Government (Model Code of Conduct) Regulations 2021* (**"the Regulations"**);
 - b. did commit a minor breach pursuant to the Act and Division 4 and Regulation 18 of the Regulations;
 - c. did not commit a minor breach pursuant to the Act and Division 4 and Regulation 19 of the Regulations;
 - d. did not commit a minor breach pursuant to the Act and Division 4 and Regulation 20 of the Regulations; and
 - e. did not commit a minor breach pursuant to the Act and Regulation 34D of the *Local Government (Administration) Regulations 1996* (**"the Administration Regulations"**),
when she undertook various conduct relating to protests relating to a proposed Marine Park as further set out in paragraph 14 and 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:

¹ Section 5.106 of the Act



- 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.
 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 20 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 16 May 2024.
14. In the complaint form, the Complainant alleges that Cr Johnston has breached, variously, regulation 17 of the Regulations, regulation 18 of the Regulations, regulation 19 of the Regulations, regulation 20 of the Regulations, regulation 21 of the Regulations and regulation 34D of the Administration Regulations when she:
 - a. used her "inside knowledge" as an elected member to arrange a flashmob to speak to Minister Punch following his attendance at a meeting of Councillors ("**Allegation 1**");
 - b. allegedly she spoke on behalf of Council when speaking to Minister Punch which was a conflict of interest ("**Allegation 2**");
 - c. claimed she had Shire permission to create a Facebook Page promoting a protest event ("**Allegation 3**");
 - d. allegedly failed to obtain the necessary permits to hold a protest event on 24 April 2024 ("**Allegation 4**");

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)

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



- e. made an allegedly disparaging remark to a fellow councillor on Facebook (**“Allegation 5”**); and
 - f. made false statements on ABC Radio regarding obtaining the necessary permissions to hold the protest event (**“Allegation 6”**);
 - g. issued a verbal “move on” to a stall holder and subsequently posted criticism of that party on Facebook (**“Allegation 7”**),
- as further referred to in paragraph 17 below (**“the Complaint”**).
15. The Panel convened on 29 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; and
 - ii. a Councillor when the Panel met on 29 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:
- a. On 2 April 2024, Cr Johnston used her inside knowledge of the attendance at a Shire Council meeting by Fisheries Minister Punch which she communicated to others to organise a flash mob outside the Council chambers.
 - b. Cr Johnston prepared herself with signage and fishing related props and approached Mr Punch to insist he address the assembled crowd. Cr Johnston held a protest sign beside him for media photos.
 - c. As Cr Johnston is a Shire Councillor and the Minister and public that gathered may not have been aware that her request to him to speak to the crowd was not

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

⁷ Section 5.107 and 5.109 of the Act



approved by Council. In her own words *“I clearly didn’t take no for an answer and instead insisted on helping him get up.”* She goes on to say *“now we just need him to help drop this Marine Park nonsense ...”*.

- d. Despite Cr Johnston’s disclaimer on the Facebook page relating to the protest, to those not on this Facebook page, her actions on the day and her position as a Shire Councillor could be perceived her speaking on behalf of Council which is a conflict of interest.
- e. Did Cr Johnston use her inside information about the timing of the arrival of Minister Punch at Council Chambers to organise the flash mob?
- f. Following this, Cr Johnston was the organiser of a more formal protest of the proposed marine park held on 28 April 2024. Cr Johnston identified herself on Facebook as the organiser and the administrator of the event and used Facebook to promote the event. The Facebook page, named *“We Oppose The Proposed Marine Park”*, contained two separate posts by Cr Johnston stating she had the permission of the Shire President/CEO (4 April 2024) and Shire Council (9 April 2024) to create the page.
- g. There are a recorded 4200+ members of her Facebook page who potentially may have seen these posts proclaiming high level Shire permissions.
- h. For Cr Johnston’s second planned event, Cr Johnston failed to obtain the necessary Shire permits for holding an event, for placing temporary structures on Shire Council grounds, for using the Shire council office property, for service of food and for blocking traffic.
- i. In the lead up to the protest event, on 24 April 2024, Cr Johnston made a disparaging comment to a fellow councillor on Facebook questioning his position to not attend the protest and stating:

“You told me tonight after Council you wouldn’t be attending the protest on Sunday as it doesn’t stand for anything - maybe ask your people who ‘elected’ you and are also in this group what they think about this??”
- j. The Complainant personally attended the Esperance police station on the Friday 26 April 2024 to enquire if the planned event had been granted permits to block traffic and was informed by police that they had no knowledge of the planned event, nor had any permits been requested or issued.
- k. The Complainant then phoned the Shire of Esperance events team to enquire if food or event permits had been issued and was told that the Shire had not received any requests for any permits from anyone in connection with the planned event, however they did say they were aware of it and discussed it at the morning meeting.
- l. It has been reported that about 1,000 people attended Cr Johnston’s unauthorised event.
- m. The day following the event, Cr Johnston went on ABC radio, was identified as a Shire Councillor, (also incorrectly identified as the Shire President) and stated



the lack of permits was just an administrative error and stated she had permission to carry on with the event by a Shire Director and that due to the lack of time to process a permit at this late stage, the Director said it was unreasonable to expect her to so. In her comments she refers to the Director as someone "*whom I know very well*".

- n. Cr Johnston further stated she had a police permit which allowed her to block traffic on Andrew Street and the Esplanade as the protest used the streets to move between the Shire Council Offices and the Shire reserve and Bold Park on the foreshore. The Complainant would request she produce the police permits and that the Shire Director be asked to confirm what exactly was his advice to her and the meaning of the inference to '*knowing him well*'.
 - o. Further, a Facebook thread of posts suggest that during the set up for this event, Cr Johnston intimated a verbal 'move on' notice to a licenced coffee van and threatened to report him for breaching his licence for not parking in an authorised place, as he was parked where she wanted to park her protest truck. She then posted criticism of the business owner on Facebook (screen shots attached as well as newspaper articles).
18. The Complainant also provided the following additional information:
- a. various newspaper articles; and
 - b. various Facebook posts by Cr Johnston and others on the Private Group page "*We oppose the propose South Coast Marine Park*".

The Respondent's Response

19. By an email dated 18 July 2024, Cr Johnston provided a response to the Complaint from her legal advisors.
20. Cr Johnston denies that she had made any minor breach.
21. The legal advisors of Cr Johnston provided the following comments and arguments regarding the Complaint as summarised by the Panel:

Making use of information obtained from her role as councillor

- a. It is alleged that Cr Johnston used information gained from her role as a councillor to organise a "*flash mob outside council chambers*". This claim is simply false.
- b. On 2 April 2024, the Minister had made a public statement including:

"Councillors and senior Shire staff will meet with Don Punch, Minister for Regional Development, Disability Services, Fisheries, Seniors and Ageing, and Volunteering. This meeting is not confidential; however, like similar meetings, it is not open to the public or "silent spectators".



- c. This was published by the Shire as a media release. The fact that the meeting is clearly stated as not being confidential, makes clear that Cr Johnston, acting off information that an ordinary member of the public would have access to, became aware of the Minister's attendance at the Shire Council meeting on 2 April 2024. It was not in her capacity as a Councillor in which she received this information.
- d. Although Cr Johnston had knowledge of the Ministers visit prior, as the CEO had emailed an invite out to all Councillors on the 13 March 2024, Cr Johnston did not share this information with any members of the public. It wasn't until Cr Johnston was made aware of the Minister's attendance through the promptings of another member of the community.
- e. This timeline of events shows Cr Johnston was informed of the Minister's attendance through another member of the community. Hence, she did not, as the complaint alleged, use her position as a Councillor to obtain knowledge of the Minister's attendance and then share this with the public to organise the protest.
- f. The initial information did not come from Cr Johnston and was certainly not given any express information which was privy to her and not shared with any other member of the community.
- g. It is clear that the meeting was not kept confidential and other members of the community were made aware of the meeting.
- h. The protest was organised on a last-minute basis as Cr Johnston only became involved after other community members had informed her that they knew of the Ministers scheduled visit to attend at the Council chambers.
- i. Cr Johnston only was able to make banners and placards for the rally on the morning of the rally because she was not aware of the Minister's visit until prompted by Kathryn Virgo on 2 April 2024.
- j. It was only after the Esperance community was more broadly aware of the Minister's attendance that she posted information about the Minister's attendance onto her Facebook page.

Allegations that Cr Johnston attended the protest and addressed the Minister in her role as councillor

- k. Cr Johnston did not attend the Council meeting where the Minister was present. This is because the Minister would be in attendance together with Shelley Payne MLC, who is a Labor politician that lives immediately adjacent to Cr Johnston. Cr Johnston has had a long and ongoing dispute with Ms Payne.
- l. Additionally, Cr Johnston makes clear that she did not insist that the Minister attend to speak to the crowd that assembled and did not inform Mr Punch that she was a Councillor, nor that she was there in her role as a Councillor. Mr Punch had no idea that Cr Johnston was a Councillor throughout their interaction at the protest rally.



- m. Cr Johnston introduced herself to the Minister in her capacity as Gemma Johnston and not as a councillor. It was also the Minister who then offered to speak to the people who had attended the protest and the garden beds were used in fact to give him some height to be able to address the protesters. The media that was in attendance did not take photos of Cr Johnston holding any signs and there is no media provided showing this.
- n. The Facebook post that states: "*I clearly didn't take no for an answer and instead insisted on helping him get up.*" was saying that she did not take no for an answer for using the garden bed.
- o. It was the Minister himself that had suggested he would address the crowd and it was Cr Johnston that suggested he would use the garden bed for doing so. The rapport between the Minister and Cr Johnston was very cordial, Cr Johnston even referred to him as a 'good sport' in her Facebook post.
- p. At all times Cr Johnston was careful to make clear that she was acting or speaking in her own capacity as an individual and not for and on behalf of the Council.
- q. Media reports about the event do not indicate that Cr Johnston was using her authority or her station as councillor with regards to the event.

Allegations that Cr Johnston gave the appearance that the Facebook page was organised and sanctioned by the Esperance Council.

- r. Civic leaders are un-surprisingly involved from time to time in matters of a public interest nature that is expected, or persons who might be elected to Council. It is true that Cr Johnston had asked for permission from the Shire President/CEO to make the Facebook page. Cr Johnston had the required and necessary permissions from the Shire President/CEO to initially create this Facebook group as can be seen in the email exchange provided.
- s. What is not true is that Cr Johnston had ever indicated that the page had "*high level permissions*" to the extent that the page was organised by the Council. This can be seen in the disclaimer on the page that:

" the views expressed here are my personal views only and should not be taken to represent the decisions of opinions of either the Council as a whole or its staff."
- t. Before creating the Facebook page, Cr Johnston talked to the CEO and Ms Christiane Smith (Shire Media Manager) to receive permission and advice when making and running the Facebook page.
- u. Following the advice given to her by Ms Smith, Cr Johnston included in the Facebook page a clear disclaimer indicating that the page displayed only Cr Johnston's personal views and not any views or affiliation with the Council. It is clear that there were no such "high-level permissions" or any indication that the page was representative or spoke for the Council.



Allegations that Cr Johnston breached the law in organising the protest as she failed to obtain the necessary and required approvals from the Police for the event to be held.

- v. With regards to the permit, two days before the formal rally the Shire Director contacted Cr Johnston to advise her that normally a Shire Permit would be required for such a public gathering.
- w. The rally was well published prior and as soon as Cr Johnston became aware of the Director's email, she informed him that she would come down to attend to any such permit application. Permission for the rally was requested from the Shire President, Ron Chambers, and was received.
- x. It was then that the Director verbally advised Cr Johnston that he would not require it on this occasion, but it is something that she needed to bear in mind for future occasions. Accordingly, Cr Johnston did not ignore requirements in effect of permits or use her permission to avoid legal requirements.
- y. In respect of the Police permits, this is attended by another of the organisers, who expressly handed the Esperance Police the relevant permits. A rally permit form to the Police was completed and submitted.

The alleged disparaging remark made by Cr Johnston on 24 April 2024

- z. Council members may express opinions and may do so firmly in their role as councillor. In her post, Cr Johnston was merely expressing her opinion that the other councillor's opinion that the protest did not mean anything would be at odds with their voters who were attending the protest and thus would think that the protest has meaning. In any case, any interaction with fellow Council members on Cr Johnston's Facebook pages did not breach of any of the Code of Conduct requirements.
 - aa. At all stages, Cr Johnston made clear that she was speaking in a capacity of a local resident even if she was described within the media as being a Local Councillor, she was free to speak on matters and express her own views. She did so and cannot now be held to have breached the Local Government Act.
22. Cr Johnston also provided the following supporting documentation:
- a. Text messages of 3 April 2024 regarding proportion of placards up for the Ministers Rally/Protest.
 - b. Facebook Post by Cr Johnston of 3 April 2024 on Esperance Community Notice Board page;
 - c. Extract from online article ABC News "Locals Sceptical of Park" – no date provided;
 - d. Extract from newspaper article dated 5 April 2024 entitled "*Residents give Punch marine park message*" – source not provided –
 - e. Email chain between Cr Johnston from Ms Christiane Smith regarding creation of Facebook Group;



- f. Various emails between Cr Johnston, Mr Shane Burge and Cr Jennifer Obourne regarding ABN Radio interview;
- g. Various emails between Cr Johnston and Cr Ron Chambers relating to protest approvals; and
- h. Copy Application for a permit to hold a public meeting and/or conduct a procession dated 24 April 2024 annexed to correspondence to local Police.

PANEL'S CONSIDERATION

GENERAL

- 23. The Panel notes that the Complainant has not attributed any particular Regulation to each of the separate Allegations of breach but rather selected most of the available Regulations on the Complaint Form.
- 24. The Panel will not generally engage in a "fishing expedition" where various information is provided to it in a "scatter gun" approach and the Panel is left to try and establish a breach for each Regulation nominated from whatever is provided.
- 25. By way of summary, and as further discussed below, in this case the Panel considers that:
 - a. there is no express allegation in the Complaint which relates to a breach of regulation 17, being the use of a resource of the local government;
 - b. Allegation 1, Allegation 2, Allegation 3; Allegation 4, Allegation 5, Allegation 6 and Allegation 7 related to an alleged breach of Regulation 18;
 - c. Allegation 3 and Allegation 7 could be considered to be related to an alleged breach of Regulation 19;
 - d. there is no allegation in the Complaint which relates to a breach of regulation 20, being relationships with government employees; and
 - e. Allegation 1 could plausibly relate to an alleged breach of Regulation 21;
 - f. there is no allegation in the Complaint which relates to a breach of regulation 34D being a contravention of a local law as to conduct.

REGULATION 17

- 26. Regulation 17 prohibits the use of government resources in certain circumstances and provides as follows:

" 17. Misuse of local government resources

(1) In this clause —



electoral purpose means the purpose of persuading electors to vote in a particular way at an election, referendum or other poll held under the Act, the Electoral Act 1907 or the Commonwealth Electoral Act 1918;

resources of a local government includes —

(a) local government property; and

(b) services provided, or paid for, by a local government.

(2) A council member must not, directly or indirectly, use the resources of a local government for an electoral purpose or other purpose unless authorised under the Act, or by the local government or the CEO, to use the resources for that purpose.”

27. To find a breach of Regulation 17 the Panel must be satisfied that it is more likely than it is not that:
 - a. the resource used was a “local government resource”; and
 - b. Cr Johnston directly or indirectly used such local government’s resources for an identified electoral purpose or any other purpose; and
 - c. such purpose was not authorised under the Act or by the council or the Shire’s CEO.
28. The term ‘resource’ is not defined in the Regulations or in the Act. However, the term ‘local government property’ is defined in section 1.4 of the Act to mean “anything, whether land or not, that belongs to, or is vested in, or under the care, control or management of, the local government”.
29. The noun ‘resource’ is relevantly defined in The Macquarie Dictionary (5th ed, 2009) at page 1408 as “(Often plural) Money or any property which can be converted into money; assets”.
30. The noun “asset” is defined in the Macquarie Dictionary as “a useful thing or quality” and “an item of property; an economic resource”.⁸
31. There is no allegation contained in the Complaint which supports a breach of regulation 17, being the use of a resource of the local government – i.e. there is no resource expressly alleged to have been used in this case.
32. As such, it is impossible to establish a breach of Regulation 17 in this case and the Panel will not further consider this Regulation here.

REGULATION 18

⁸ Yates and Local Government Standards Panel [2012] WASAT 23 at [30] – [37]



33. Regulation 18 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:
- “ 18. Securing personal advantage or disadvantaging others**
- (1) *A council member must not make improper use of their office —*
- (a) *to gain, directly or indirectly, an advantage for the council member or any other person; or*
- (b) *to cause detriment to the local government or any other person.*
- (2) *Subclause (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.”*
34. To make a finding of a minor breach of regulation 18 of the Regulations the Panel must be satisfied to the required standard that:
- a. Cr Johnston was an elected member or a candidate at the time of the alleged breach and the time of the determination;
 - b. Cr Johnston made use of her office as Council member or candidate of the Shire;
 - c. when viewed objectively, such use was an improper use of Cr Johnston’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. Either:
 - i. In respect to regulation 18(1)(a) Cr Johnston engaged in the conduct with the intention of gaining an advantage for herself or another party.
 - ii. In respect to regulation 18(1)(b) Cr Johnston engaged in the conduct in the belief that detriment would be suffered by another person.
35. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or lack of wisdom. 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.
36. 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.
37. 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.
38. In the case of impropriety arising from an abuse of power, a councillor's alleged knowledge or means of knowledge of the circumstances in which the power is



exercised and his or her purpose or intention in exercising the power will be important factors in determining whether the power has been abused⁹.

39. The definitions of the noun 'advantage' in the Shorter Oxford English Dictionary (6th ed) include: a favouring circumstance; something which gives one a better position, benefit; increased well-being or convenience or pecuniary profit.
40. The Panel considers the term 'advantage' in regulation 18(1)(a) is to be construed widely, and includes a financial or a non-financial benefit, gain or profit, or any state, circumstance, opportunity or means specially favourable.¹⁰
41. It is not necessary to find whether any advantage actually gained¹¹ but an intent to gain such advantage must be established.
42. "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.
43. It is not necessary to find whether any detriment was actually suffered, but an intent to cause such detriment must be established.

Allegation 1, Allegation 2, Allegation 3 , Allegation 4 and Allegation 6

Regulation 18 - Panel Consideration of Elements of Breach

Cr Johnston was an Elected Member or a Candidate at the relevant times

44. Cr Johnston was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.
45. This element is met.

Cr Johnston made use of her office as Council Member of the Shire

46. In this case there are two separate issues to be considered with respect to this Complaint:
 - a. whether Cr Johnston was acting in her capacity as a local councillor when undertaking the conduct; and
 - b. whether Cr Johnston (irrespective of what capacity she was acting) was purporting to speak on behalf of, or represent, Council.
47. These are two entirely different issues which should not be confused or conflated. When a councillor is acting in their role as an elected member, this does not necessarily equate to that councillor being deemed to be reflecting the view of the

⁹ Treby and Local Government Standards Panel [2010] WASAT 81 (at 31); Chew v The Queen (1992) 173 CLR 626 (at 640 - 641 [Dawson JJ]); R v Byrnes (1995) 183 CLR 501 – (at 514 - 515 [Brennan, Deane, Toohey and Gaudron JJ] and at 521 [McHugh J]).

¹⁰ Complaint SP 12 and 13 of 2011

¹¹ *Yates and Local Government Standards Panel* [2012] WASAT 59 at [72]



- Shire or Council as a whole. Elected members are permitted to hold differing views on all matters that arise and (subject to compliance with the conduct Regulations) to promote those views to the community.
48. For the purposes of this element, the Panel is solely concerned with whether Cr Johnston was acting in her capacity as a local councillor.
 49. It is asserted by Cr Johnston that she was at no time acting in her capacity as a local councillor in operating the relevant protests, but rather, she was acting as a local resident and that the Facebook Group “*We Oppose the Proposed South Coast Marine Park*” (“**the Facebook Group**”) disclaimers and relevant media reporting confirm this position.
 50. It is further noted that:
 - a. the Facebook page was at that time administered and moderated by “*Gemma Johnston*” (not councillor Gemma Johnston);
 - b. Cr Johnston approached the Shire with respect to starting the relevant Facebook Group and it was discussed that Cr Johnston would be proceeding in a personal capacity, and not with Shire support and input;
 - c. The Group and various posts contained the following disclaimer:

“ Disclaimer: The views expressed here are my personal views only and should not be taken to represent the decisions and opinions of either the Council as a whole or it’s staff”
 51. However, it is not only the relevant party’s assertion as to their capacity that should be taken into account and an objective assessment of the context must be undertaken.
 52. In *Cain and Local Government Standards Panel [2022] CC 167*:

“ ... the fact that a Facebook post is sent or made from a private account is not decisive of whether the email or post constitutes a use of a councillor’s office and the relevant context must be considered.”
 53. In this case the Marine Park is a matter that:
 - a. was of local importance;
 - b. was a matter that the Shire and Council would (in due course) be asked to provide a formal position on); and
 - c. Cr Johnston was attempting to guide the community to rally against.
 54. Further, in the Facebook Group Cr Johnston referred to “election promises” made by her, attending Council Meetings and further referred another councillor and his duty to electors in his capacity as an elected member.
 55. The emails between Cr Johnston and the Shire appear to have slightly confused the relevant issue. Even if the Facebook Page was not to be operated by the Shire, and did not contain or promote the formal position of the Shire, this does not automatically



mean that the Facebook Page was conducted by Cr Johnston in her personal capacity.

56. It is highly common for local councillors to operate private/limited Facebook pages for their constituents, and for those pages or groups to predominantly be used to assist the relevant councillor to communicate with their local community. These pages are never operated by the local authority, nor deemed to be resources of the Shire, or considered to reflect the Shire's position in any way. However, such pages are not operated by those local councillors in their solely private capacity, but rather as an elected member who is attempting to communicate with and guide community members as to certain local issues.
57. It is a difficult argument to make that where a local councillor is closely involved in an important issue which affects their constituents and the relevant local government that they can simply divorce themselves of their role as a local councillor and instead claim to be acting as a private individual.
58. When a local councillor takes office they agree to "*duly, faithfully, honestly, and with integrity, fulfil the duties of the office for the people in the district according to the best of their judgment and ability.*" This includes taking a position as to local matters which they consider reflect the views of community members.
59. It is apparent on the face of the matter that Cr Johnston was acting as a leader of the local community and was acting to communicate with and guide the local municipality as to the issue of the Marine Park (being an important local issue).
60. To be clear, there is nothing improper or incorrect with this type of conduct.
61. The Panel further comments that whether or not Minister Punch was aware Cr Johnston was a local councillor is largely irrelevant to whether Cr Johnston was acting in her capacity as a local councillor. In any event, the Panel considers it to be highly unlikely that Minister Punch was not aware of her status given he was specifically attending the area to meet with Council members.
62. In the context that:
 - a. although the Facebook Group was private (i.e. a party would need to request permission to join) it was a group that was generally open to the community and had a large following;
 - b. various posts/comments by Cr Johnston specifically refer to her role as an elected member;
 - c. the purpose of the Facebook Group is clearly to allow Cr Johnston to interact with her constituents and promote her view as to the relevant issue; and
 - d. Cr Johnston was purporting to communicate with and guide the local municipality,the Panel finds that it is more likely than not that Cr Johnston was acting in her capacity as an elected member and made use of her office as a council member when undertaking the alleged conduct.
63. This element is met.



64. To clarify the Panel does not find that Cr Johnston was speaking on behalf of the Shire but rather promoting her own views (although a finding as to this is not necessary for this element).

Cr Johnston's use was improper

65. The Complainant has alleged that Cr Johnston has acted improperly by:
- a. used her “inside knowledge” as an elected member to arrange a flashmob to speak to Minister Punch following his attendance at a meeting of Councillors (**“Allegation 1”**);
 - b. speaking on behalf of Council when speaking to Minister Punch which was a conflict of interest (**“Allegation 2”**);
 - c. allegedly claiming she had “high level” Shire permission to create a Facebook Page promoting a protest event (**“Allegation 3”**);
 - d. allegedly failing to obtain the necessary permits to hold a protest event on 24 April 2024 (**“Allegation 4”**);
 - e. making false statements on ABC Radio regarding holding the permissions to hold the protest event (**“Allegation 6”**);
66. The Panel has dealt with these items at the same time as they all deal with conduct relating to the Facebook Group and protest organisation.
67. With respect to Allegation 1:
- a. The Panel refers to its comments set out in paragraphs 109 to 113 inclusive below.
 - b. There has been no evidence provided that the knowledge that Minister Punch would be attending the Shire building was “inside information” or obtained improperly in any manner. The information appears to be firmly in the public domain.
 - c. The Panel finds to the required standard that there was no improper use of such information.
68. With respect to Allegation 2:
- a. In this case the Panel notes that the Facebook Group was:
 - i. clearly established to be a group which was not endorsed by the Shire, nor promoted Shire views;
 - ii. contained various and repeated disclaimers confirming that the Facebook Group and any arranged the protest group did not represent the *“decisions and opinions of either the Council as a whole or its staff”*.
 - b. Cr Johnston further made it clear in any media interview that she was not acting on behalf of the Shire.



- c. In this case there is no conduct or publication which would lead to a reasonable inference that Cr Johnston approached Minister Punch as a representative of, or on behalf of, the Council.
 - d. Further it is not a “conflict of interest” of any kind for Cr Johnston to speak to Minister Punch whether in her role as a local councillor or a community member. It is perfectly within her role as council member to speak to State politicians with respect to matters that affect her local community.
69. With respect to Allegation 3:
 - a. It appears that the Complainant is alleging that it was improper for Cr Johnston to assert that she had permission to create the Facebook Group.
 - b. It is solely speculation by the Complaint (who would have no way of knowing) that permission was or was not received by any party to create the page.
 - c. On the evidence provided, it is clear that Cr Johnston did discuss the creation of the page with the Council and Shire officers prior to its creation.
 - d. In any event, the Facebook Group does not purport to have “high level” permissions or to be operated by, or promote the position of, the Shire. As such, Cr Johnston would not, in any event., have required any permission to create the Facebook Group and was entirely entitled to do so either in her capacity as an individual elected member or a private citizen.
70. With respect to Allegation 4:
 - a. Although it appears that the permissions received to undertake the protest were last minute and, in some cases, informal, the Panel is satisfied that the protest was known about and permitted by the Shire and the Police.
 - b. The Panel further notes that the purpose of the Minor Breach System to identify and discourage the conduct of local councillors which interferes with the proper and usual operation of the local government.
 - c. In this case it is alleged that Cr Johnston did not exactly follow a particular administrative permit process. From her own enquiries the Complainant was aware that the Shire was aware of the event. Further the event went ahead without being stopped or disputed.
 - d. This is not the type of conduct matter which requires review or adjudication by the Panel.
71. With respect to Allegation 6:
 - a. It is alleged that Cr Johnston falsely claimed on ABC Radio that:
 - i. she claimed she knew the Shire Director “very well”;
 - ii. the lack of permits was an “administrative error” and that she had permission to hold the event; and
 - iii. she had a police permit.



- b. The Complainant did not provide the Panel with a transcript or recording of the interview.
 - c. The Panel is unclear as to why it would be a conduct breach to claim a local councillor knows another elected member very well. This cannot be reasonably construed as improper and the Panel considers this allegation to be outside of the scope of matters the Panel is intended to consider.
 - d. In respect to the lack of permits, the Panel has been provided with correspondence from Cr Johnston that establishes that:
 - i. although there were some administrative oversights and delays, establishes the Shire and Director knew of the event and that the Director gave agreement verbally and in writing to proceed in this case; and
 - ii. a permit from the Police was applied for in writing.
 - e. In the event that the Shire was willing to waive or amend its administrative requirements to obtain a formal permit for the protest, that is matter to be raised with the Shire, not the Panel.
 - f. Further, the Complainant has demanded that Cr Johnston be obliged to provide permits and confirm the advice received. It is not the Panel's role to provide evidence to the Complainant. If the Complaint was unsure whether the permits had, in fact, been received, she could request this information from the Shire in a formal capacity following the protest event rather than make a complaint to the Panel on a speculative basis.
72. Due to the above the Panel finds that it is more likely that not that Cr Johnston did not act improperly with respect to any of the above allegations.
73. This element is not met.

Remaining elements

74. As the above element cannot be met the Panel has not further considered the remaining elements in respect to Allegation 1, Allegation 2, Allegation 3 , Allegation 4 and Allegation 6.

Conclusion

75. The elements required to find a breach of regulation 18 of the Regulations have not been met with respect to Allegation 1, Allegation 2, Allegation 3 , Allegation 4 and Allegation 6.

Allegation 5 - Regulation 18 - Panel Consideration of Elements of Breach

Cr Johnston was an Elected Member or a Candidate at the relevant times



76. Cr Johnston was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.

77. This element is met.

Cr Johnston made use of her office as Council Member of the Shire

78. The Panel refers to its comments in paragraphs 45 to 60 inclusive above.

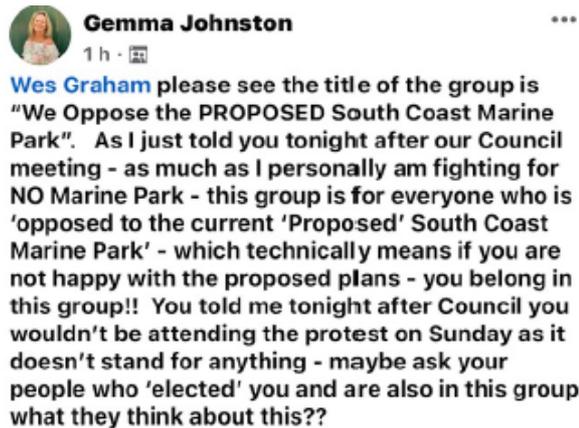
79. This element is met.

Regulation 18(1)(a) Cr Johnston intended to gain an advantage

80. The Complainant has not made any allegation of any advantage that was being sought by making the relevant Facebook Comment.

Regulation 18(1)(b) Cr Johnston intended to cause a disadvantage

81. In this case the Complainant has alleged that the following comment made on Facebook (in the “*We Oppose The Proposed Marine Park*” group) was disparaging towards Cr Wes Graham:



(“the Comment”).

82. Cr Johnston has asserted that Council members may express opinions and that she was merely expressing her view that Cr Graham’s opinion would be at odds with their voters which does not breach of any of the Code of Conduct requirements.

83. The Panel considers that although it is open for Cr Johnston to disagree with Cr Graham as to the effectiveness of a protest rally, the Comment goes a step further in that it:

- a. was made in a public forum, which was unnecessary given that the conversation referred to clearly took place in person at an earlier time;
- b. strongly implies that in not supporting or attending the protest Cr Graham is not properly undertaking his statutory role of representing the local community; and
- c. appears to be an attempt to publicly embarrass Cr Graham for not supporting or attending the protest.



84. The Panel finds that this constitutes a breach of *the Shire of Esperance Code of Conduct Council Members, Committee Members and Candidates established February 2021 (“the Code”)* in that it breaches the obligations under:
- a. Clause 1.3(1)(a) to “*treat others with respect, courtesy and fairness*”:
 - i. It was discourteous to make this comment in a public forum; and
 - ii. The Comment was not fair in content that it accuses Cr Graham of not undertaking his statutory role correctly by not supporting the protest.
 - b. Clause 2.2(1)(a) to ensure that the use of social media complies with the Code:
 - i. The Comment does not comply with the Code.
 - c. Clause 2.3(d) that an elected member “*must not disparage the character of another council member, committee member or candidate or a local government employee in connection with the performance of their official duties*”:
 - i. the Comment reflected adversely on Cr Graham and disparages Cr Graham’s actions in that it invites the public to think less of him in his role as an elected member; and
 - ii. the Comment implies Cr Graham is not undertaking his duties correctly as an elected member by not supporting the protest.
85. Using a public comment was not appropriate in the circumstances where Cr Graham was perfectly entitled to hold a different view as to the effectiveness of the protest. His lack of support or non-attendance of the same:
- a. was not indicative of his position on the Marine Park; and
 - b. cannot be reasonably be construed as evidence he was not representing the electors in the community.
86. A councillor is able to meaningfully participate in the good government of the persons in the district and to duly, faithfully, honestly and with integrity fulfil the duties of the office for the people in the district according to his or her best judgment and ability, without reflecting adversely upon the character or actions of, or imputing any motive to, another member or an officer of the local government. Indeed, good government requires courtesy amongst those elected to govern¹².
87. Cr Johnston should have considered the manner of addressing Cr Graham and the content of her post more carefully in this instance.
88. Given the above, the Panel finds that it is more likely than not the Comment was improper as:
- a. the conduct was in breach of 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

¹² *Treby and Local Government Standards Panel* [2009] WASAT 224 at 19



c. the conduct is deserving of a penalty.

89. This element is met.

Conclusion

90. The elements required to find a breach of regulation 18 of the Regulations have been met with respect to Allegation 5.

Allegation 7 – Regulation 18 - Panel Consideration of Elements of Breach

Cr Johnston was an Elected Member or a Candidate at the relevant times

91. Cr Johnston was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.

92. This element is met.

Cr Johnston made use of her office as Council Member of the Shire

93. In this case it is alleged that Cr Johnston issued a verbal “move on” to a stall holder and subsequently posted criticism of that party on Facebook.

94. However, the Complainant has not provided any further commentary or evidence regarding this allegation in the Complaint so the Panel is unable to find to the required standard that Cr Johnston was acting in her capacity as an elected member.

95. This element is not met.

Remaining elements

96. As the above element cannot be met the Panel has not further considered the remaining elements in respect to Allegation 7.

Conclusion

97. The elements required to find a breach of regulation 18 of the Regulations have not been met with respect to Allegation 7.

REGULATION 19

98. 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.”

99. 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;
 - 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 Council or CEO did not authorise such taking on, involvement or participation¹³.

Allegation 3 – Regulation 19 - Panel Consideration of Elements of Breach

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

100. In this case, the Complainant has implied in the Complaint that Cr Johnston took on an administrative role when she was involved in arranging a protest relating to the proposed marine park.
101. In this case, it is clear from all documentation provided that the protest was organised by Cr Johnston and not the Shire itself.
102. As the Shire was not involved with the creation or undertaking of such protest, there is no argument to be made that Cr Johnston was taking on an administrative role.
103. As noted above, it is perfectly acceptable for local councillors to promote issues and interests and undertake or attend functions which concern the local community. This does not mean that the councillor is taking on an administrative role, but is rather acting in their capacity as a local councillor under the Act to:
- a. represent the interests of electors, ratepayers and residents of the district; and
 - b. facilitate communication between the community and the council.

¹³ Yates and Local Government Standards Panel [2012] WASAT 59



104. As this element cannot be met, the Panel is not able to make any finding of breach in respect to this regulation.

Conclusion

105. The elements required to find a breach of regulation 19 of the Regulations have not been met with respect to Allegation 3.

Allegation 7 – Regulation 19 - Panel Consideration of Elements of Breach

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

106. In this case, the Complainant has implied in the Complaint that Cr Johnston took on an administrative role when she allegedly provided a verbal ‘move on’ notice to a licenced coffee van and threatened to report him for breaching his licence for not parking in an authorised place.

107. No further information or evidence was provided by the Complainant with respect to this allegation in the Complaint.

108. As such the Panel cannot make any finding with respect to this allegation to the required standard.

Conclusion

109. The elements required to find a breach of regulation 19 of the Regulations have not been met with respect to Allegation 7.

REGULATION 20

110. Regulation 20 regulates councillors’ interactions with local government employees:

“ 20. Relationship with local government employees

(1) *In this clause —*

local government employee means a person —

(a) *employed by a local government under section 5.36(1) of the Act;*
or

(b) *engaged by a local government under a contract for services.*

(2) *A council member or candidate must not —*

(a) *direct or attempt to direct a local government employee to do or not to do anything in their capacity as a local government employee; or*

(b) *attempt to influence, by means of a threat or the promise of a reward, the conduct of a local government employee in their capacity as a local government employee; or*



- (c) *act in an abusive or threatening manner towards a local government employee.*
- (3) *Subclause (2)(a) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.*
- (4) *If a council member or candidate, in their capacity as a council member or candidate, is attending a council or committee meeting or other organised event (for example, a briefing or workshop), the council member or candidate must not orally, in writing or by any other means*
—
- (a) *make a statement that a local government employee is incompetent or dishonest; or*
- (b) *use an offensive or objectionable expression when referring to a local government employee.*
- (5) *Subclause (4)(a) does not apply to conduct that is unlawful under The Criminal Code Chapter XXXV.”*
111. To make a finding of a minor breach of **regulation 20(2)(a)** of the Regulations the Panel must be satisfied that it is more likely than not that:
- Cr Johnston was a councillor at the time of the alleged breach;
 - Cr Johnston gave or tried, or made an effort, to give a direction, order or command to another person to do or not to do something in the other person's capacity as a local government employee;
 - the direction, order or command was to a local government employee as defined in regulation 20(1) of the Regulations; and
 - the direction, order or command was not part of anything that the councillor did as part of the deliberations at a council or committee meeting.
112. To make a finding of a minor breach of **regulation 20(2)(b)** of the Regulations the Panel must be satisfied that it is more likely than not that:
- Cr Johnston was a councillor at the time of the alleged breach;
 - Cr Johnston tried or made an effort to affect, sway or produce an effect on the conduct of a local government employee in their capacity as a local government employee; and
 - Cr Johnston' effort to affect, sway or produce an effect was carried out by means of either:
 - a threat by Cr Johnston; or
 - a promise of reward by Cr Johnston.
113. For the purposes of Regulation 20(2)(b):
- a threat by a Councillor is a declaration of an intention to inflict punishment, pain or loss on, or to take any action detrimental or unpleasant to, the employee (or



- on someone, or to something, that the employee cares about) in retaliation for, or conditionally upon, some action or course;
- b. a promise of a reward is a promise or undertaking by the Councillor to give the employee something having a value, or to do or not do something where the act or omission concerned has some value or advantage for or to the employee; and
 - c. a threat or a promise of reward may be made expressly or by implication.
114. To make a finding of a minor breach of **regulation 20(2)(c)** of the Regulations the Panel must be satisfied that it is more likely than not that:
- a. Cr Johnston was a councillor or a candidate at the time of the alleged breach;
 - b. Cr Johnston acted in an abusive or threatening manner; and
 - c. the conduct was towards a local government employee as defined in regulation 20(1) of the Regulations.
115. In respect to whether conduct is “*abusive or threatening*” the definitions of “abusive” and “threatening” are respectively as follows:
- “Abusive:**
1. *a. using harsh, insulting language*
b: harsh and insulting
c: using or involving physical violence or emotional cruelty
 2. *characterized by wrong or improper use or action¹⁴“*
- “Threatening**
1. *expressing or suggesting a threat of harm, danger, etc.*
 2. *indicating or suggesting the approach of possible trouble or danger¹⁵”*
116. To make a finding of a minor breach of **regulation 20(4)(a)** of the Regulations the Panel must be satisfied that it is more likely than not that:
- a. Cr Johnston was a councillor at the time of the alleged breach and was acting in his capacity as a councillor at the time of the alleged conduct;
 - b. Cr Johnston was attending a council meeting, committee meeting or other organised event at the time of the alleged conduct; and
 - c. Cr Johnston made a comment that stated or imply that the government employee was incompetent or dishonest.

¹⁴ “Abusive.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/abusive>. Accessed 7 May. 2021.

¹⁵ “Threatening.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/threatening>. Accessed 7 May. 2021.



117. To make a finding of a minor breach of regulation 20(4)(b) of the Regulations the Panel must be satisfied that it is more likely than not that:
- a. Cr Johnston was a councillor at the time of the alleged breach and was acting in his capacity as a councillor at the time of the alleged conduct;
 - b. Cr Johnston was attending a council meeting, committee meeting or other organised event at the time of the alleged conduct; and
 - c. Cr Johnston used an offensive or objectionable expression when referring to a local government employee.

Regulation 20 - Panel Consideration

118. There is no allegation contained in the Complaint that Cr Johnston:
- a. tried, or made an effort, to give a direction, order or command to a local government employee;
 - b. tried or made an effort to affect, sway or produce an effect on the conduct of a local government employee by means of either a threat by Cr Johnston, or a promise of reward by Cr Johnston;
 - c. acted in an abusive or threatening manner towards any local government employee; or
 - d. used an offensive or objectionable expression when referring to a local government employee.
119. As such, it is impossible to establish a breach of Regulation 20 in this case and the Panel will not further consider this Regulation here.

REGULATION 21

120. Regulation 21 prevents the disclosure of confidential or restricted information obtained by a councillor and reads as follows:

“21. Disclosure of information

(1) In this regulation —

closed meeting means a council or committee meeting, or a part of a council or committee meeting, that is closed to members of the public under section 5.23(2) of the Act;

confidential document means a document marked by the CEO, or by a person authorised by the CEO, to clearly show that the information in the document is not to be disclosed;

document includes a part of a document;



non-confidential document means a document that is not a confidential document.

- (2) *A council member must not disclose information that the council member —*
- (a) *derived from a confidential document; or*
 - (b) *acquired at a closed meeting other than information derived from a non-confidential document.*
- (3) *Subclause (2) does not prevent a council member from disclosing information —*
- (a) *at a closed meeting; or*
 - (b) *to the extent specified by the council and subject to such other conditions as the council determines; or*
 - (c) *that is already in the public domain; or*
 - (d) *to an officer of the Department; or*
 - (e) *to the Minister; or*
 - (f) *to a legal practitioner for the purpose of obtaining legal advice; or*
 - (g) *if the disclosure is required or permitted by law.”*

121. To make a finding of a minor breach in respect to regulation 21 of the Regulations the Panel must be satisfied that:
- a. Cr Johnston was an elected member at the time of the breach and at the time the matter was determined; and
 - b. that it is more likely than not that:
 - i. Cr Johnston disclosed information to someone who at the time was not also a Councillor of the same local government; and
 - ii. the disclosed information was acquired by Cr Johnston either:
 - A. from a confidential document; or
 - B. at a council or committee meeting, or a part of a council or committee meeting, that was closed to members of the public under section 5.23(2) of the Act; and
 - iii. if the information was acquired at a closed council or committee meeting, Cr Johnston did not derive the disclosed information from a non-confidential document; and
 - iv. the disclosed information was not information already in the public domain or the disclosure did not occur in any of the ways identified in regulation 21(3).



Allegation 1 – Regulation 21 - Panel Consideration of Elements of Breach

Cr Johnston was an elected member at the relevant times

122. Cr Johnston was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.

123. This element is met.

The disclosed information was information Cr Johnston acquired:

- from a confidential document; or
- at a council or committee meeting (or part thereof) that was closed to members of the public under section 5.23(2) of the Act

124. It is alleged that Cr Johnston used “inside information” in order to prepare and attend a protest to Minister Punch after he had attended a meeting with certain local councillors.

125. With due respect to the Complainant in order for there to be a breach of regulation 22 “inside information” must be acquired from either:

- a. a document that has been marked by the CEO, or by a person authorised by the CEO, to clearly show that the information in the document is not to be disclosed; or
- b. was disclosed during a closed meeting.

126. From the wording of the Complaint, the Complainant is clearly only speculating that Cr Johnston used “inside information” and there is no evidence to support any implication that the knowledge that Minister Punch was attending the Shire chambers was confidential in any way.

127. Conversely, it is apparent that several members of the public were aware of the visit and that the same was also confirmed by public statement by the Shire.

128. This element is not met.

Remaining elements

129. As the above element cannot be met the Panel has not considered the remaining elements in this case.

Conclusion

130. The elements required to find a breach of regulation 21 of the Regulations have not been met.

PANEL’S FINDINGS

131. Cr Johnston did not commit a breach of Regulation 17 of the Regulations and therefore did not commit a minor breach.



132. With respect to Allegation 5 Cr Johnston did commit a breach of Regulation 18 of the Regulations and therefore did commit a minor breach.
133. With respect to Allegation 1, Allegation 2, Allegation 3 , Allegation 4, Allegation 6 and Allegation 7, Cr Johnston did not commit a breach of Regulation 18 of the Regulations and therefore did not commit a minor breach.
134. Cr Johnston did not commit a breach of Regulation 19 of the Regulations and therefore did not commit a minor breach.
135. Cr Johnston did not commit a breach of Regulation 20 of the Regulations and therefore did not commit a minor breach.
136. Cr Johnston did not commit a breach of Regulation 21 of the Regulations and therefore did not commit a minor breach.

Signing

Tim Fraser (Presiding Member)

Emma Power (Member)

Peter Rogers (Member)



Local Government Standards Panel

Complaint Number	20240419
Legislation	<i>Local Government Act 1995 (WA)</i>
Complainant	Ms Lori-Ann Shibish
Respondent	Councillor Gemma Johnston
Local Government	Shire of Esperance
Regulation	Regulation 18 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	29 November 2024 Determined on the documents
Penalty Considered	24 February 2025
Outcome	Public Apology

DECISION AND REASONS FOR DECISION

Delivered 31 March 2025

DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005 (WA)*, 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



Introduction

1. At its meeting on 29 November 2024, the Panel found that Councillor Gemma Johnston, a councillor of the Shire of Esperance (**“the Shire”**), committed a minor breach under the *Local Government Act 1995* (WA) (**“the Act”**) and regulation 18 of Division 4 of the *Local Government (Model Code of Conduct) Regulations 2021* (**“the Regulations”**) when she made a Facebook Post which disparaged the character of another elected member of the Shire (**“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 January 2025, 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
 - (iii) *the person against whom the complaint was made undertake training as specified in the order;*
or

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



- (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 6 February 2025 the Department received a response from Cr Johnston.
8. Cr Johnston provided the following comments:
 - a. Cr Johnston would like to choose training for her sanction as clearly it is important that she receives more training in this area.

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. In this case the Panel acknowledges that Cr Johnston recognises that she requires more training regarding the conduct the subject of the breach and the Panel is satisfied that Cr Johnston will be more cautious in respect to making public comments towards other councillors in the future.

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



13. Despite the request for training, the Panel notes that where a councillor has made a single error in conduct relating to interactions with others, formal training is not likely necessary when any further breach can be managed by simply being more prudent and reflective before making public comments.
14. The Panel further notes the councillor who the comment was made about (Cr Graham) was not the party who made the Complaint.
15. However, the conduct was undertaken in a public forum and expressly questioned the integrity and actions of another councillor of the Shire.
16. Therefore, the Panel considers that a public apology is the appropriate sanction in the circumstances.
17. Making a public apology is a significant sanction, being a personal admission by the individual of wrongdoing³. It is a suitable and appropriate penalty when a councillor's conduct:
 - a. adversely affects particular individuals⁴; and/or
 - b. does not meet the standards other councillors seek to uphold.
18. In the relevant circumstances, the Panel considers that making a public apology is an adequate sanction and that it is not necessary to make an order in accordance with Schedule 5.1 clause 9 of the Act that Cr Johnston recoup to the Shire the costs of the Department incurred with respect to the Complaint.

³ *Treby and Local Government Standards Panel* [2010] WASAT 81 (Pritchard J).

⁴ *Treby and Local Government Standards Panel* [2010] WASAT 81 [127] (Pritchard J).



Panel's decision

19. The Panel orders pursuant to section 5.110(6)(b)(ii) of the Act that, in relation to the one breach of regulation 18 of the Regulations, Cr Johnston make a public apology in terms of the attached Order.

Signing

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

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

The general law of defamation, as modified by the *Defamation Act 2005 (WA)*, 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

THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor Gemma Johnston, a councillor for the Shire of Esperance **publicly apologise** as specified in paragraph 3; OR
2. Failing compliance with paragraph 3 within the specified timeframe, then paragraph 4 shall apply.

Public Apology

3. On the ordinary council meeting of the Shire of Esperance first occurring after the expiration of **28 days** from the date of service of this Order on her, Cr Johnston shall:
 - i. attend the relevant ordinary council meeting;
 - ii. ask the presiding person, or acting presiding person, for his or her permission to address the meeting to make a public apology to the public;
 - iii. make the apology immediately after Public Question Time or during the Announcements part of the meeting, or at any other time when the meeting is open to the public, as the presiding person thinks fit; and
 - iv. address the Council and public as follows, without saying any introductory words before the address, and without making any comments or statement after the address:

"I advise this meeting that:

- i. A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened Regulation 18 of the *Local Government (Model Code of Conduct) Regulations 2021*, when I made a comment which disparaged the character and actions of another councillor of the Shire, Cr Graham, in a Facebook post.
- ii. The Panel found that I breached Regulation 18 by my conduct.
- iii. I acknowledge that I should have not made the Facebook comment and I now apologise to Cr Graham and my fellow councillors."



4. If Councillor Gemma Johnston fails to, or is unable to, comply with the requirements of paragraph 3 above in the required time frame THEN, within the next **28 days** following the ordinary council meeting referred to in paragraph 3 above the Chief Executive Officer of the Shire of Esperance shall arrange for the notice of public apology to be published:
 - a. on the Facebook Page of the Shire of Esperance shall in no less than 10 point font size; and
 - b. in an appropriate place on the website of the Shire of Esperance shall in no less than 10 point font size; and
 - c. in the next occurring issue of any Shire of Esperance shall public newsletter (if any) whether in electronic or print copy) in no less than 10 point font size.

PUBLIC APOLOGY BY COUNCILLOR GEMMA JOHNSTON

A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened Regulation 18 of the *Local Government (Model Code of Conduct) Regulations 2021*, when I made a comment which disparaged the character and actions of another councillor of the Shire, Cr Graham, in a Facebook post.

The Panel found that I breached Regulation 18 by my conduct.

I acknowledge that I should have not made the Facebook comment and I now apologise to Cr Graham and my fellow councillors.

Appeal

5. In the event that, prior to the date for compliance with the above Orders, Cr 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 such appeal in writing,THEN:
 - c. compliance with the above Orders may be delayed until the State Administrative Tribunal has made a finding in respect to the decision; and
 - d. 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.”*