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## Local Government Standards Panel

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Complaint Number	SP 2020-030
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Ms Chileya Luangala</b>
<b>Respondent</b>	<b>Councillor Rosemary Madacsi</b>
Local Government	Shire of Toodyay
Regulation	Regulations 6, 7 and 10 of the <i>Local Government (Rules of Conduct)</i> <i>Regulations 2007</i>
Panel Members	Mr Michael Connolly (Presiding Member) Ms Elanor Rowe (Deputy Member) Ms Deborah Hopper (Deputy Member)
Heard	16 June 2020 Determined on the documents
Finding	One breach of Regulation 6

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### FINDING AND REASONS FOR FINDING

Delivered 12 August 2020

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#### DEFAMATION CAUTION

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## Summary of the Panel's decision

1. The Local Government Standards Panel ("the Panel") found that Councillor Rosemary Madacsi ("Cr Madacsi"), a councillor for the Shire of Toodyay ("the Shire"), committed one breach under the *Local Government Act 1995 (WA)* ("the Act") and regulation 6 of the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations") when she made comments on Facebook that disclosed information from a document marked confidential by the City's Acting Chief Executive Officer and from meetings that were held behind closed doors to discuss confidential matters. The Panel found that Cr Madacsi did not commit a breach of Regulation 7 and Regulation 10 in relation to the same comments.

## Jurisdiction and procedural fairness

2. The Act makes provision for the circumstances in which a council member commits a minor breach.<sup>1</sup>
3. On 20 April 2020, the Department of Local Government, Sport and Cultural Industries ("the Department") received a Complaint of Minor Breach Form dated 16 April 2020 ("Complaint") signed by Ms Chileya Luangala ("the Complainant"). The Complaint contained three allegations of breaches of the Regulations when Cr Madacsi made comments on Facebook and allegedly:
  - a. disclosed information from a document marked confidential by the Complainant (in her capacity as Acting Chief Executive Officer of the Shire) and from meetings that were held behind closed doors to discuss confidential matters (Regulation 6);
  - b. placed the Shire potentially at a risk of being challenged as to whether a redundancy was genuine thereby disadvantaging the Shire by bringing it into disrepute (Regulation 7(1)(b)); and
  - c. implied that employees, whose employment had been or might be terminated by way of redundancy were in some way incompetent or unqualified, thereby causing them disadvantage and harming their prospect of finding alternative employment (Regulation 10).
4. On 30 April 2020, the Department advised Cr Madacsi of the Complaint and invited her to respond. The Department sent Cr Madacsi a copy of the original Complaint and all the supporting documents provided by the Complainant.
5. Under the Act the Panel is required to consider a complaint of a minor breach and make a finding as to whether the alleged breach occurred.<sup>2</sup> On 16 June 2020, the Panel convened to consider the Complaint.
6. The Panel:
  - (a) accepted the Department's advice, based on information from the Western Australian Electoral Commission, that Cr Madacsi was a councillor at the time of the alleged breaches, having been elected on 19 October 2019, and was still a Councillor when the Panel met on 16 June 2020;

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

<sup>2</sup> Section 5.110(2)(a) of the Act.



- (b) was satisfied the Complaint had been made within six months after the alleged breaches are said to have occurred<sup>3</sup>;
  - (c) was satisfied the Complaint had been dealt with in accordance with the administrative requirements in the Act for dealing with complaints of minor breaches<sup>4</sup>; and
  - (d) was satisfied that the Department had provided procedural fairness to Cr Madacsi.
7. If a councillor has previously committed two or more minor breaches, the Panel may send the complaint to the Chief Executive Officer of the department assisting the relevant Minister at the time instead of considering the Complaint itself.<sup>5</sup> Cr Madacsi has not previously been found to have committed any minor breaches, and therefore the Panel did not consider sending the Complaint to the Chief Executive Officer of the Department.
8. Based on the information referred to in paragraphs 2 to 7 above the Panel found it had jurisdiction to determine whether Cr Madacsi had breached Regulations 6, 7 and 10 in connection with the Complaint.

### **Panel's role**

9. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.
10. Any finding, that a councillor has committed a minor breach, must be based on evidence from which it may be concluded that it is more likely than not that the breach occurred than that it did not occur (the required standard of proof).<sup>6</sup>
11. Where direct proof of an alleged fact, proposition or conduct is not available, in order to find the allegation, proposition or conduct has been established, the Panel must be satisfied from the evidence that it is more probable than not that it has occurred. The Panel cannot make a finding that the alleged fact, proposition or conduct occurred if the evidence merely supports two or more conflicting but equally possible inferences.<sup>7</sup>
12. For a finding that a councillor has breached a particular regulation the Panel must be satisfied that every element of the particular regulation has been established to the required standard of proof.

### **Regulation 6**

13. Regulation 6 provides:

#### ***"6. Use of information***

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<sup>3</sup> Section 5.107(4) of the Act

<sup>4</sup> Sections 5.107, 5.108, 5.109 of the Act.

<sup>5</sup> Sections 5.110(2)(b), 5.111(1) of the Act.

<sup>6</sup> Section 5.106 of the Act.

<sup>7</sup> *Bradshaw v McEwens Pty Ltd* (1951) 217 ALR 1, paragraph 5.



(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 s5.23(2) of the Act;

**confidential document** means a document marked by the CEO to clearly show that the information in the document is not to be disclosed;

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

(2) *A person who is a council member must not disclose –*

(a) *information that the council member derived from a confidential document;*

(b) *information that the council member acquired at a closed meeting other than information derived from a non-confidential document.*

(3) *Subregulation (2) does not prevent a person who is a council member from disclosing information –*

(a) *at a closed meeting; or*

(b) *to the extent specified by 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.”*

#### Elements of regulation 6(2)(a)

14. Regulation 6(2)(a) provides that a person who is a council member must not disclose information that the council member derived from a confidential document.

15. In light of regulation 6(3), the essential issues or elements which need to be satisfied in order for a contravention of regulation 6(2)(a) to have occurred are that it is more likely than it is not that:

a) a Councillor disclosed information<sup>8</sup>; and

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<sup>8</sup> The word ‘information’ is given its ordinary meaning, which is knowledge or facts communicated about a particular subject, event etc; Shorter Oxford English Dictionary (6<sup>th</sup> edition). It is not limited to ‘advice’, legal, strategic or otherwise; *Corr and Local Government Standards Panel* [2012] WASAT 14 at para [50].



- b) the disclosed information was information the disclosing Councillor derived from a document that was marked by his or her local government's CEO, or at the CEO's direction, to clearly show that the information in the document was not to be disclosed; and
- c) the disclosed information was not already in the public domain (ie it was not generally available to all persons<sup>9</sup>) at the time of the disclosure by the disclosing Councillor, and the disclosure did not occur in any of the ways identified in regulation 6(3).

#### Elements of regulation 6(2)(b)

16. Regulation 6(2)(b) provides that a person who is a council member must not disclose information they acquired at a closed meeting other than information derived from a non-confidential document.

17. Generally, the essential elements which need to be satisfied in order for a contravention of regulation 6(2)(b) to have occurred are that it is more likely than it is not that:

- a. a councillor disclosed information; and
- b. the disclosed information was information the disclosing councillor acquired 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
- c. the disclosing Councillor did not derive the disclosed information from a non-confidential document; and
- d. the disclosed information was not information already in the public domain at the time of the disclosure by the disclosing Councillor, and the disclosure did not occur in any of the ways identified in regulation 6(3).

18. "Disclose" is defined as "*make (secret or new information) known*"<sup>10</sup>.

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

19. Regulation 7(1)(b) provides:

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

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

.....

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

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<sup>9</sup> Mazza and Local Government Standards Panel [2009] WASAT 165 at paragraphs [82] – [85]

<sup>10</sup> Oxford English Dictionary online edition



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

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

Elements of Regulation 7(1)(b)

21. In order to find a breach of Regulation 7(1)(b), the Panel must be satisfied to the required standard of proof that:

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

*Fourth element - meaning of "to make improper use of....office"*

22. The Macquarie dictionary definition of "*improper*" is "*not in accordance with propriety of behaviour, manners, etc; unsuitable or inappropriate for the purpose or occasion; abnormal or irregular.*"<sup>11</sup> The Shorter Oxford dictionary definition is "*irregular, wrong; unsuitable, inappropriate; unbecoming, unseemly.*"<sup>12</sup>

23. Whether there is impropriety is to be assessed objectively: would a reasonable person with knowledge of the duties, powers and authority of a councillor, and all the circumstances of the particular case, form the view that the councillor had

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<sup>11</sup> Macquarie Dictionary, Revised Third Edition.

<sup>12</sup> Shorter Oxford English Dictionary, Sixth Edition.



breached the standards of conduct expected of a councillor?<sup>13</sup> “*For behaviour to be improper it must be such that a right-thinking person would regard the conduct as so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty.*”<sup>14</sup>

24. Under the Act Panel members must have regard to the general interests of local government in Western Australia.<sup>15</sup> It is in the interests of local government that councillors are, and are seen to be, professional and respectful in their dealings with fellow councillors, local government employees and members of the public.
25. Regulation 3 sets out general principles to guide councillors’ behaviour, although contravention of any of these does not amount to a minor breach.<sup>16</sup> Regulation 3 provides, among other things, that councillors should act with reasonable care, diligence and integrity and treat others with respect and fairness.
26. The meaning of “*improper*” must be considered in the context of relevant legislation, such as the Act and the Regulations, and other rules and standards that apply to a councillor’s role and conduct, such as the local government’s Code of Conduct, and the circumstances and context of the case.<sup>17</sup> All these provisions form part of the backdrop to the Regulations and give context to a complaint but the alleged conduct must also be judged in the particular circumstances.
27. Conduct can be improper even though the councillor’s judgment is that it isn’t improper. A councillor’s use of his or her office can be improper even though the councillor is intending to benefit the local government, the council or the ratepayers and residents.<sup>18</sup>

Fifth element - meaning of “*to cause detriment to the local government or any other person*”

*Detriment*

28. “*Detriment*” means loss, damage or injury.<sup>19</sup> It includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage. A person can suffer detriment through others thinking less favourably of them.<sup>20</sup>
29. For regulation 7(1)(b) to be satisfied it is not necessary to show that the local government or the person concerned actually suffered detriment.<sup>21</sup> However it is not enough to show that the local government or the person concerned suffered detriment, or could have suffered detriment. The Panel must find that it is more

<sup>13</sup> *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 27, referring to *R v Byrnes* (1995) 183 CLR 501.

<sup>14</sup> *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 9, referring to *Robbins v Harness Racing Board* [1984] VR 641.

<sup>15</sup> Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).

<sup>16</sup> Regulation 3.

<sup>17</sup> *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 10.

<sup>18</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64, referring to *Treby* 2010.

<sup>19</sup> Macquarie Dictionary Revised Third Edition, 2001.

<sup>20</sup> *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraphs 31, 32.

<sup>21</sup> *Treby* 2010, paragraph 96, referring to *Chew v The Queen* 1992 CLR 626 (*Chew* 2010).



likely than not that the councillor believed that his or her actions would cause detriment and intended to cause detriment.<sup>22</sup>

30. “*To cause detriment*” has been interpreted as meaning “*in order to*” or “*for the purpose of*” causing detriment, or “*with the will to*” cause detriment.<sup>23</sup> There can be a finding of intent if, after considering all the evidence, the only reasonable inference is that the councillor intended to cause detriment.<sup>24</sup>

### **Regulation 10(3)**

31. Regulation 10(3) provides:

#### **“10. Relations with local government employees**

(3) *If a person, in his or her capacity as a council member, is attending a council meeting, committee meeting or other organised event and members of the public are present, the person must not, either orally, in writing or by another means –*

(a) *make a statement that a local government employee is incompetent or dishonest; or*

(b) *use offensive or objectionable expression in reference to a local government employee.”*

#### *Elements of regulation 10(3)(a)*

32. Subject to Regulation 10(4), the essential elements which need to be satisfied for a contravention of Regulation 10(3) to have occurred are that it is more likely than it is not that:

- a. the Councillor attended a Council meeting, Committee meeting or other organised event in his or her capacity as a Councillor;
- b. the Councillor either orally, in writing or by some other means, made a statement which a member or members of the public present heard or otherwise became aware of at the time it was made; and
- c. viewed objectively, the Councillor’s statement was that an employee of the Councillor’s local government was incompetent or dishonest.

#### *Elements of Regulation 10(3)(b)*

33. The essential elements which need to be satisfied for a contravention of regulation 10(3)(b) to have occurred are that it is more likely than it is not that:

- a. a Councillor attended a Council meeting, Committee meeting or other organised event in his or her capacity as a Councillor;

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<sup>22</sup> *Re and Local Government Standards Panel [2014] WASAT 111*, paragraph 51, referring to *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd [2013] FCA 1342*.

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

<sup>24</sup> *Treby 2010*.



- b. the Councillor either orally, in writing or by some other means, used an expression which it is more likely than not that a member or members of the public present heard or otherwise became aware of;
- c. the expression was an offensive or objectionable expression; and
- d. the expression was an offensive or objectionable expression in reference to an identified employee of the Councillor's local government.

### **Substance of the Complaint**

34. As Acting Chief Executive Officer of the Shire ("CEO"), the Complainant met with Councillors behind closed doors ("Closed Door Meetings") to conduct a review of the Shire's services ("Services Review") as follows on:

- 10 March 2020 – "*Review of Services: Corporate Services, Planning & Development, Works & Services*"; and
- 24 March 2020 – "*Review of Services: Community Development*".

35. On 12 and 13 April 2020, Cr Madacsi published two Facebook posts as outlined below:

- a. The first post ("First Post") appeared on the "*Let's talk Toodyay*" Facebook page on 12 April 2020:

The CEO is not the public face of the Shire, the President is and he has kept you informed with comprehensive updates of the Shire affairs.

Everything Samantha has mentioned has been done.

The Shire are sending out regular updates as they are received from State and Federal sources and regular updates of changes within the Shire.

Budget details haven't been released yet as the process hasn't finished what is essentially a organisational restructuring.

At the same time we are finishing the CEO recruitment, drastically changing services and budgets to ease the burden for our community and preparing for a coronavirus recovery.

- b. The second post ("Second Post") appeared on the "*Toodyay matters of the moment*" Facebook page on 13 April 2020:



Rosemary Madacsi 🗨️

Ace, this is a strong joint effort between council and senior staff.

The restructure is not drastic but mainly about efficiencies, so the most competent and qualified staff should be retained.

With covid-19, you are right it is about redirecting reserves and other cash to put aside in case it's needed.

The cost of water is something I have been driving for a while and will continue to do so, it's a significant cost yet water is essential. A rebate is a very valid suggestion Ace, thank you.

21 h Like Reply

36. The Complainant has serious concerns with the following particular comments from Cr Madacsi's First and Second Posts respectively:

*"Budget details haven't been released yet as the process hasn't finished what is essentially a organisational restructuring."* ("First Comment").

*"The restructure is not drastic but mainly about efficiencies, so the most competent and qualified staff should be retained."* ("Second Comment").

(together "the Comments").

#### First Allegation – breach of Regulation 6

37. The Complainant alleges that Cr Madacsi's Comments disclosed information from both a document that the Complainant marked as confidential and from the Closed-Door Meetings on 10 and 24 March 2020 that were held to discuss confidential matters.

#### Second Allegation – breach of Regulation 7(1)(b)

38. In making the Comments, Cr Madacsi used her position as a council member to disclose information that she only had access to as a council member.
39. At the time of the Complaint, the Complainant was still in the process of implementing recommendations from two confidential reports provided to Councillors relating to the Services Review. Any Shire staff positions that were terminated as a result of the Services Review were because of redundancies. A genuine redundancy means that a position no longer requires filling; in no way should a genuine redundancy be linked to an employee's performance and / or qualifications.
40. However, the Comments made by Cr Madacsi potentially provide an avenue for staff (whose positions were terminated) to challenge whether the redundancy was genuine and carried out in accordance with the *Fair Work Act 2009*. It is likely that Cr Madacsi's conduct will cause detriment to the Shire.



### Third Allegation – breach of Regulation 10(3)

41. The Complainant alleges that Cr Madacsi explicitly stated (or strongly implied) in her Comments that employees whose employment had been (or might be) terminated by way of redundancy, were in some way incompetent or unqualified. In doing so, Cr Madacsi caused damage to the affected employees and hurt their prospects of finding alternative future employment.

#### **Cr Madacsi's Response**

42. Cr Madacsi submits that the information as detailed in the Complaint is incomplete and has been taken out of context and gives an erroneous impression that is not supported by fact. Cr Madacsi also denies that she committed the alleged conduct as detailed in the Complaint. She states that she is extremely aware of confidentiality issues and would not, and did not, breach her duty. Nor would she or does she believe that she cast adverse reflections upon Shire staff.

43. Cr Madacsi submits that the community knew what was occurring even prior to her commenting and this was so despite confidentiality being required of council and staff members and the isolation that was occurring due to the COVID-19 situation. The changes to services were because of a budgetary review brought about by the new council:

- a. The first "*Long Term Financial Workshop*" for the 2020/2021 budget occurred on 9 December 2019. It was apparent to the new council that department reviews and a reassessment of services were imperative to reduce operational costs.
- b. The subject of the Shire's financial position was public knowledge because of a series of articles in the Toodyay Herald newspaper spanning at least two years ("Newspaper Articles").
- c. On 20 March 2020, the public were informed of a need to reassess services (or even remove them) by the President in a Shire Press Release ("Press Release"):



26 March 2020

Press Release

Cr Bill Manning  
Shire President



Administration Centre

FOR IMMEDIATE RELEASE

**A message from the President**

The Shire has been active in addressing the issues raised by the Coronavirus pandemic.

Our Environmental Health Officer has been carrying out a risk audit of Shire facilities and other public venues to assess those areas where the public are at greater risk of being exposed to the virus. As a result, the Library and Museums will be closed for six months. Advice has also been given to the owners of other venues such as the supermarket and shops as to steps they should take to reduce the risks to the public. Many of the events and festivals over the next six months have been cancelled.

The State Government has amended Regulations under the Local Government Act to permit councils to hold Council and Committee meetings by electronic means rather than in person where a public emergency has been declared under the Public Health Act.

The public will be able to observe proceedings of Council meetings electronically and can still raise questions by sending them in prior to the meeting. For the time being, the Shire will be adopting these measures.

In response to the request from the Premier for local authorities not to increase rates, fees and charges for the next financial year to assist those impacted financially by the restrictions imposed to combat the virus, we are carefully examining all our expenses to see where savings can be made. We will do our best to achieve a balanced budget for next year without increasing rates, fees and charges. This will probably mean scaling back some current services or even cutting them. As far as possible this will involve only non-essential services.

To assist local authorities in framing their budgets for next year, the State Government has indicated it will consider postponing asset revaluations and extending the date for adoption of budgets. Tendering rules may be relaxed to assist local authorities in providing quicker stimulus for their local economies.

I urge you all to regularly visit the State and Federal government websites for the latest advice and to rely on the facts from reliable sources.

Please heed the advice to stay at home and only go out where necessary. Practise social distancing and the recommended hygiene measures. Be mindful of those in the community who may need assistance in various ways. We will get through this.

  
Cr Bill Manning  
SHIRE PRESIDENT

44. Furthermore, in late March / early April 2020, a community member spoke to Cr Madacsi about the retrenchment of one of the City's staff "as if it was common knowledge". It was the first she knew that the retrenchments had been enacted.

45. Then, on 10 April 2020, a community member made the following comment on Facebook:

*"Yep. But the senior building surveyor and IT guys have already been sacked effectively as of 2 weeks ago. And no replacement of the BMO as yet."*

46. Residents had also remarked on the dismissals / redundancies of employees publicly on social media:

*"Have the recent dismissals and also redundancies of employees, with rumours that more may happen, have anything to do with trying to keep the budget down to eliminate rate increases and create future funds for this Covid 19 stuff. Or is there some sort of organisational restructure happening and if so are the staff qualified to be in their new positions."*

First Allegation – Regulation 6

47. The Comments did not disclose information from confidential documents. It only appears so because the context in which Cr Madacsi commented was not conveyed clearly in the Complaint.



48. As the Acting CEO executed decisions from the Services Reviews, more information became public fact, especially in light of the news on the budget and the Shire Press Release. The absence of some staff came to the attention of those who needed to deal with them, and news spread in the community that those services had ceased. As questions were asked, the picture became apparent. Indirectly, this was how the reason for the Services Review became known.

#### Second Allegation – Regulation 7(1)(b)

49. The allegation that Cr Madacsi disclosed information she only had access to because she was a council member is an assumption and not based on fact.

50. The state of the budget was officially known, having been identified many times in the media and by the Shire's auditors. The community had raised issues with regard to Shire inefficiencies for years and most candidates in the October 2019 local government election included those issues in their material. Redundancies and a services restructure, which included staff, were an expectation of the community.

51. Genuine redundancies did occur. It was publicly accepted and the community and employees knew from the Shire Press Release and Newspaper Articles that the budget was the most likely cause of the need to scale back (or restructure) some of the current services and even cut items.

52. The staff who were made redundant were aware the services they had provided had been removed; the community knew the staff had left and the actual services had ended. It was all public knowledge and therefore, Cr Madacsi's comments could not disadvantage others nor put the Shire at risk of adverse action.

#### Third Allegation – Regulation 10(3)

53. A resident had asked the following question on Facebook ("Question"):

*"Any idea of what the restructure will be? I would say this would be causing a fair bit of stress in the administration office and hopefully they manage the personnel properly as I'd imagine there will be a fair bit of backstabbing and butt kissing going on to maintain their employment. I hope they keep the most competent and qualified staff for the jobs and not just the ones who butt kiss their way through their employment."*

54. Cr Madacsi was replying to the Question when she published the Second Post, and the word "efficiencies" in the Second Comment was linked to a restructure, not the retainment of staff:

*"The restructure is not drastic but mainly about efficiencies, so the most competent and qualified staff should be retained."*

The above was not a statement but an assumption, conveyed by context. The Complainant did not acknowledge in the Complaint that the individual who had asked the Question obviously knew those events had occurred, nor that Cr Madacsi's words paraphrased the Question.

55. Cr Madacsi accepts that her words '*so the most competent and qualified staff should be retained*', if taken out of context, could be viewed adversely but only if that service had been retained. However, the Shire had removed those services



from the organisational structure and therefore, the redundancy was verifiable to a prospective employer.

### Conclusion

56. Cr Madacsi states that she is very mindful of what she says, and the responsibilities of her office and that her history as a councillor reflects this.

### **Panel's Consideration**

#### First Allegation – Regulation 6

57. The allegation is that when Cr Madacsi made the Comments on Facebook, she disclosed information from:

- a. a document that the Complainant had marked as confidential; and
- b. Closed-Door Meetings that were held to discuss confidential matters.

Therefore, it is breaches of both Regulations 6(2)(a) and 6(2)(b) that is alleged.

58. The First and Second Comments were as follows:

*“Budget details haven’t been released yet as the process hasn’t finished what is essentially a organisational restructuring.”*

*“The restructure is not drastic but mainly about efficiencies, so the most competent and qualified staff should be retained.”*

59. The Panel finds that the Comments contained the following pieces of information (“Information”):

#### *First Comment*

- Shire budget details had not been released;
- They had not been released because the “*process*” had not finished; and
- The “*process*” that Council was carrying out was an organisational restructure.

#### *Second Comment*

- The organisational restructure was not drastic;
- The organisational restructure was mainly about efficiencies; and
- The most competent and qualified staff should be retained.

60. The Complainant does not specify what pieces of information as outlined above were disclosed from either a confidential document or the Closed-Door Meetings (or both). While the allegation is generalised in this respect, the Panel notes the



sensitive nature of issues of confidentiality, and that information pertaining to such matters are to be dealt with carefully by parties.

*Regulation 6(2)(a) – information from a document marked confidential*

61. The First and Second Posts were published publicly on social media. Therefore, the first element of Regulation 6(2)(a) (that a Councillor disclosed information) is satisfied.
62. The second element of Regulation 6(2)(a) is that the disclosed information was information derived from a document marked by the CEO that was not to be disclosed.
63. The Complainant, who was the Acting CEO at the time, alleged that the Comments disclosed information from a document that she had marked as confidential. Cr Madacsi submits that that is incorrect and that it only appeared so, as the “*context*” in which she commented was not conveyed clearly in the Complaint.
64. The Panel has considered all the evidence before it and considers the Complainant’s position to be the more plausible in the circumstances. The CEO of a local government may declare that information from documentation or supporting material from an item on a Council or Committee meeting agenda is to remain confidential and mark the document accordingly.
65. Cr Madacsi’s argument that it only appears that she disclosed information from a document marked confidential by the CEO because of the way in which the Complaint was set out, is not compelling in the circumstances and Cr Madacsi does not provide any substantive evidence to support it. Furthermore, it is based on the proposition that the information was already in the public domain, however, that is a separate matter and is dealt with below.
66. Therefore, the Panel finds that it is more likely than not that Cr Madacsi’s Comments did disclose information from a confidential document and that the second element of Regulation 6(2)(a) is satisfied.
67. With regard to the third and final element of Regulation 6(2)(a) (whether the disclosed information was already in the public domain), Cr Madacsi submits the information that she disclosed was already available to the public at the time she published the Comments.
68. The Panel has considered all the evidence, particularly the copies of the Shire Press Release, the Newspaper Articles and the excerpts of social media exchanges / comments included by Cr Madacsi as evidence. Based on all the evidence before it, the Panel finds it more likely than not that some of the Information disclosed by Cr Madacsi in her Comments, was not already in the public domain, when she published the Comments on Facebook:

*Shire Press Release*

- a. The Press Release related to the ongoing coronavirus pandemic. It stated:

*“In response to the request from the Premier for local authorities to increase rates, fees and charges for the next financial year to assist those impacted financially by the restrictions imposed to combat the virus, we are carefully examining all our expenses*



*to see where savings can be made. We will do our best to achieve a balanced budget for next year without increasing rates, fees and charges. This will probably mean scaling back some current services or even cutting them. As far as possible this will involve only non-essential services."*

- b. The Press Release referred to the probable "scaling back" of some services "or even cutting them". However, the Press Release left open what steps the Shire would need to take and how the situation would ultimately be managed; the Shire President used phrases such as: "We will do our best" and "This will probably mean...". Therefore, it is clear that at the time of Press Release, the situation was still uncertain. On the other hand, Cr Madacsi's Comments confirmed that the Shire was going through an "organisational restructuring" and also went further by referring directly to changes in the employment status of Shire staff as a consequence.

#### *Newspaper Articles*

- c. Likewise, with regard to the Newspaper Articles, they mention a "Shire deficit" and refer to the Shire's financial position generally. However, again, the Panel finds that Cr Madacsi's Comments went further in disclosing specific information on issues not covered in the articles.

#### *Social Media exchanges*

- d. Cr Madacsi submits (and provides supporting evidence) that some members of the community were seemingly already aware that there had been changes with regard to some Staff members' employment and therefore, they indirectly implied they knew what was happening in terms of the Services Review. However, there are several comments from members of the public stating that they believed the Shire might require "additional" employees and "extra permanent staff" during that period which contradicts Cr Madacsi's position.
- e. It is also clear that some members of the Community were very much uncertain as to what was happening at the Shire in terms of the Services. The issue of a "restructure" was raised by one member of the public but in the form of a question (rather than an affirmative statement) regarding whether the "recent dismissals and also redundancies" were in relation to the Shire's budget or because of "some sort of organisational restructure". In response, Cr Madacsi stated:

*"The redundancies were budgetary, strong action was needed for the budget to be manageable and this of course flowed on to service and staffing. We are downsizing, not swapping staff around."*

- f. It is apparent from the evidence that there was a discussion via social media amongst some members of the public regarding what was occurring at the Shire. However, while a small number of people may have directly / indirectly touched on the subject of the Shire Services and the situation with regard to some staff, that did not mean it was correct for Cr Madacsi to conclude that the Information was already in the public domain. Cr Madacsi directly referred to a "process" being carried out that was essentially an "organisational restructuring", that it was not "drastic" and was mainly about "efficiencies", and she also made direct reference to Shire staff. These pieces of Information were



not “*notorious*” facts at the time Cr Madacsi published the Comments and the disclosure of the Information was not justified on that basis.

69. The Panel is satisfied that the disclosed information was not already in the public domain and that the disclosure did not occur in any of the other ways identified in regulation 6(3).

70. Therefore, the Panel finds that the essential elements of Regulation 6(2)(a) have been satisfied.

*Regulation 6(2)(b) – information from a Closed-Door Meeting*

71. The First and Second Posts were published publicly on social media. Therefore, the first element of Regulation 6(2)(b) (that a Councillor disclosed information) is satisfied.

72. The second element of Regulation 6(2)(b) is whether a councillor disclosed information that they acquired at a closed council or committee meeting. Cr Madacsi does not deny that she disclosed information from the Closed-Door Meetings that were held on 10 and 24 March 2020, and based on the evidence before it, the Panel finds it more likely than not that she did do so and that this element is satisfied. Furthermore, the Panel is satisfied that Cr Madacsi did not derive the disclosed information from a non-confidential document (third element).

73. With regard to the fourth and final element of Regulation 6(2)(b), and whether the disclosed information was already in the public domain, the Panel repeats its findings at paragraph 68(a)-(f) above and finds this element is satisfied. Again, the Panel finds that the disclosure did not occur in any of the ways identified in Regulation 6(3).

74. Based on the evidence before it the Panel finds it is more likely than not that Cr Madacsi disclosed information that she became privy to as a Councillor from a confidential document and / or the Closed-Door Meetings in contravention of Regulation 6(2).

**Findings**

75. Accordingly, for the above reasons, the Panel finds that Cr Madacsi did breach Regulation 6(2) in relation to the Complaint.

Second Allegation

*First, second and third elements*

76. The Panel finds that Cr Madacsi engaged in the conduct which is the subject of the Second Allegation, and that she was a councillor and was acting as a councillor at all relevant times. The first, second and third elements of Regulation 7(1)(b) are established.

*Whether Cr Madacsi acted improperly (fourth element)*

77. Based on the evidence before it, the Panel is satisfied that the fourth element has been established in relation to the Second Allegation and finds that Cr Madacsi did



act improperly. The Panel makes this finding because it is satisfied to the required standard of proof that a reasonable person would consider that Cr Madacsi did not meet the standards of conduct expected of a councillor when she made the Comments:

- a. The Panel has already found that Cr Madacsi disclosed Information from a confidential document and / or Closed-Door Meetings when she made the Comments.
- b. Councillors play an important community leadership role and it is their duty to ensure that confidential information is treated as such, so as not to harm, prejudice and compromise the interests of the Shire or Council or any other party. The maintenance of confidentiality by council members is a serious obligation and a high level of integrity is required to ensure public confidence remains regarding the proper access and use of confidential information.
- c. Cr Madacsi's obligations arose not only from the Act and the Regulations, but also the Shire's Code of Conduct. The Panel finds that Cr Madacsi did not use the requisite care when dealing with the Information.

78. Based on the evidence before it, the Panel finds that Cr Madacsi's actions were wrongful and inappropriate and that she breached the standards expected of an elected member when she made the Comments.

*Whether Cr Madacsi intended to cause detriment to the local government or any other person.*

79. The Panel is not satisfied that Cr Madacsi intended to cause the Shire or its employees' detriment when she made the Comments:

- a. Members of the community often look to their elected representatives to provide leadership and guidance. To be effective, council members need to communicate with the people that they represent to understand their views and concerns. Communication is a multi-faceted process that needs to flow both ways to be effective and Councillors are required to provide information to the community about the policies and decisions of council.
- b. Questions had been asked for various reasons as to what was happening at the Shire in terms of its Services. One way that Cr Madacsi kept in touch with the community during this period was via social media. The Panel finds it plausible that when Cr Madacsi made the Comments, her intention was to update electors and explain why and how decisions had been made by Council rather than cause detriment to any party.

## **Findings**

80. For a finding that a councillor has breached a particular regulation the Panel must be satisfied that every element of the particular regulation has been established to the required standard of proof. The Panel is not satisfied that the fifth element has been established and accordingly, the Panel finds that Cr Madacsi did not breach Regulation 7(1)(b) in relation to the Second Allegation.



Third Allegation – Regulation 10(3)(a) and 10(3)(b)

81. As stated above, for a finding that a councillor has breached a particular regulation the Panel must be satisfied that every element of the particular regulation has been established to the required standard of proof.
82. The Complainant does not specify whether it is a breach of Regulation 10(3)(a) or 10(3)(b) that is alleged. However, it is an essential element of both that the Councillor attended a Council meeting, Committee meeting or other organised event in his or her capacity as a Councillor when the alleged conduct occurred. However, in this case, the conduct occurred when Cr Madacsi published the Comments on Facebook. Therefore, the Panel finds that this element is not satisfied.

**Findings**

83. Accordingly, for the above reasons, the Panel finds that Cr Madacsi did not breach Regulation 10(3) in relation to the Third Allegation.

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Michael Connolly (Presiding Member)

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Elanor Rowe (Deputy Member)

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Deborah Hopper (Deputy Member)



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## Local Government Standards Panel

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Complaint Number	SP 2020-030
Legislation	<i>Local Government Act 1995 (WA)</i>
<b>Complainant</b>	<b>Ms Chileya Luangala</b>
<b>Respondent</b>	<b>Councillor Rosemary Madacsi</b>
Local Government	<b>Shire of Toodyay</b>
Regulation	Regulations 6, 7 and 10 of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i>
Panel Members for Penalty Consideration	Mr Gordon MacMile (Presiding Member) Councillor Deborah Hopper (Member) Ms Elanor Rowe (Member)
Heard	16 June 2020 Determined on the documents
Penalty Considered	17 September 2020
Outcome	Training

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### DECISION AND REASONS FOR DECISION

Delivered 29 October 2020

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#### 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 16 June 2020, the Panel found that Councillor Rosemary Madacsi (“Cr Madacsi”), a councillor for the Shire of Toodyay (“the Shire”), committed one minor breach under the Local Government Act 1995 (WA) (“the Act”) and regulation 6 of the *Local Government (Rules of Conduct) Regulations 2007* (WA) (“the Regulations”) when she made comments on Facebook that disclosed information from a document marked confidential by the City’s Acting Chief Executive Officer and from meetings that were held behind closed doors to discuss confidential matters (“Minor Breach”). The Panel found that Cr Madacsi did not commit a breach of Regulation 7 and Regulation 10 with respect to the same conduct.
2. On 12 August 2020, the Panel published its Finding and Reasons for Finding (“Findings”) that Cr Madacsi had breached Regulation 6. The Panel reviewed all the evidence presented to it and made the following statements:

*“Regulation 6(2)(a) – information from a document marked confidential*

.....

64. *The Panel has considered all the evidence before it and considers the Complainant’s position to be the more plausible in the circumstances. The CEO of a local government may declare that information from documentation or supporting material from an item on a Council or Committee meeting agenda is to remain confidential and mark the document accordingly.*
65. *Cr Madacsi’s argument that it only appears that she disclosed information from a document marked confidential by the CEO because of the way in which the Complaint was set out, is not compelling in the circumstances and Cr Madacsi does not provide any substantive evidence to support it. Furthermore, it is based on the proposition that the information was already in the public domain, however, that is a separate matter and is dealt with below.*
66. *Therefore, the Panel finds that it is more likely than not that Cr Madacsi’s Comments did disclose information from a confidential document and that the second element of Regulation 6(2)(a) is satisfied.*
67. *With regard to the third and final element of Regulation 6(2)(a) (whether the disclosed information was already in the public domain), Cr Madacsi submits the information that she disclosed was already available to the public at the time she published the Comments.*
68. *The Panel has considered all the evidence, particularly the copies of the Shire Press Release, the Newspaper Articles and the excerpts of social media exchanges / comments included by Cr Madacsi as evidence. Based on all the evidence before it, the Panel finds it more likely than not that some of the Information disclosed by Cr Madacsi in her Comments, was not already in the public domain, when she published the Comments on Facebook.*

.....

*Regulation 6(2)(b) – information from a Closed-Door Meeting*

.....



72. *The second element of Regulation 6(2)(b) is whether a councillor disclosed information that they acquired at a closed council or committee meeting. Cr Madacsi does not deny that she disclosed information from the Closed-Door Meetings that were held on 10 and 24 March 2020, and based on the evidence before it, the Panel finds it more likely than not that she did do so and that this element is satisfied. Furthermore, the Panel is satisfied that Cr Madacsi did not derive the disclosed information from a non-confidential document (third element).*
73. *With regard to the fourth and final element of Regulation 6(2)(b), and whether the disclosed information was already in the public domain, the Panel repeats its findings at paragraph 68(a)-(f) above and finds this element is satisfied. Again, the Panel finds that the disclosure did not occur in any of the ways identified in Regulation 6(3).*
74. *Based on the evidence before it the Panel finds it is more likely than not that Cr Madacsi disclosed information that she became privy to as a Councillor from a confidential document and / or the Closed-Door Meetings in contravention of Regulation 6(2)."*

### **Jurisdiction and Law**

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

### **Possible Sanctions**

4. Section 5.110(6) of the Act provides that the Panel is to deal with a minor breach by:
  - (a) *ordering that no sanction be imposed; or*
  - (b) *ordering that —*
    - (i) *the person against whom the complaint was made be publicly censured as specified in the order;*  
*or*
    - (ii) *the person against whom the complaint was made apologise publicly as specified in the order;*  
*or*
    - (iii) *the person against whom the complaint was made undertake training as specified in the order;*  
*or*
    - (iv) *the person against whom the complaint was made pay to the local government specified in the order an amount equal to the amount of remuneration and allowances payable by the local government in relation to the complaint under Schedule 5.1 clause 9;*

*or*



(c) *ordering 2 or more of the sanctions described in paragraph (b).*

5. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach. Under section 5.110(6)(a), the Panel may order that no sanction be imposed, not to reverse the finding of a breach, but to indicate that in all the circumstances the relevant councillor should not be penalised further.

### **Councillor Madacsi's Submissions**

6. If the Panel finds that a councillor has committed a minor breach, it must give the councillor an opportunity to make submissions to the Panel about how it should deal with the breach under section 5.110(6).<sup>1</sup>
7. By a letter dated 13 August 2020, Cr Madacsi was:
- i. notified of the Panel's Findings of the Minor Breach;
  - ii. provided with a copy of the Panel's Findings; and
  - iii. offered an opportunity to make submissions as to how the Minor Breach should be dealt with under section 5.110(6) of the Act
8. On 27 August 2020, the Department received a submission from Cr Madacsi in which she submitted that no sanction be imposed and that:
- a. she categorically denied that she disclosed information from a confidential document or a closed-door meeting. She is extremely aware of confidentiality and would not and did not breach her duty as a councillor;
  - b. she accepted her comments were unwise and took full responsibility for the impression they caused. However, it was simply an "*unfortunate coincidence of terminology in a public discussion of known events that were occurring.*";
  - c. the Panel's decision was erroneous; her intent to correct a misconception in the manner she did was ill advised but was not evidence of a breach; and
  - d. there is no evidence of prior impropriety during her previous four years on Council and she has a reputation for honesty.

### **Panel's Consideration**

9. Guidance on the factors which the Panel may consider in determining the appropriate penalty to impose, include, but are not limited to:
- a. the nature and seriousness of the breaches;
  - b. the councillor's motivation for the contravention;

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



- c. whether or not the councillor has shown any insight and remorse into his / her conduct;
  - d. whether the councillor has breached the Act knowingly or carelessly;
  - e. the councillor's disciplinary history;
  - f. the likelihood or not of the councillor committing further breaches of the Act;
  - g. the councillor's personal circumstances at the time of the conduct, and at the time of imposing the sanction;
  - h. the need to protect the public through general deterrence and maintain public confidence in local government; and
  - i. any other matters which may be regarded as aggravating conduct or mitigating its seriousness.
10. Cr Madacsi has not previously been found to have committed any minor breaches.
  11. The Panel found that Cr Madacsi breached Regulation 6 when she made comments on Facebook that disclosed information from a document marked confidential by the City's Acting Chief Executive Officer and from meetings that were held behind closed doors to discuss confidential matters. The disclosure of confidential information is a serious matter, and the Panel does not consider it appropriate to impose no sanction in relation to the Minor Breach as this would indicate that it was so minor that no penalty is warranted.
  12. However, the Panel also does not consider it is appropriate to make an order for censure for Cr Madacsi's actions, as they were not so serious to justify such an order. When the Panel makes an order that a Notice of Public Censure be published, the Notice is published by the local government's CEO, at the expense of the local government; such expense is significant where the Notice is to be published in a newspaper or newspapers. Likewise, the Panel also does not find that an order that Cr Madacsi pay to the City a sum of money is warranted.
  13. The options left for the Panel to consider are to order Cr Madacsi to undertake training or make a Public Apology.
  14. In the circumstances, the Panel considers training, rather than a public apology, is the appropriate penalty. In her response to how the Minor Breach should be dealt with, Cr Madacsi used the opportunity to again defend her conduct and restate that she did not commit the Minor Breach. However, she also acknowledged to some extent that she had misjudged the situation and the content of the posts when she made the comments on Facebook. Therefore, it is the Panel's view that the appropriate penalty for Cr Madacsi is to undertake specified training. This will be of use to her, so as to help her properly identify and deal with confidential information and to help prevent a repeat of the offending conduct in future.
  15. The sanction of an order to undertake training also aligns with the intent of the Act and the purpose of the civil penalties under the Act to ensure future compliance



with the statutory obligations imposed on councillors for the better protection of the public.

### **Panel's Decision**

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

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

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Gordon MacMile (Deputy Presiding Member)

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

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Elanor Rowe (Deputy Member)

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

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Deborah Hopper (Deputy Member)



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## ORDER

Delivered 29 October 2020

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### DEFAMATION CAUTION

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### THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

Within four (4) months of the date of this Order, Councillor Rosemary Madacsi, a member of the Shire of Toodyay, shall undertake:

1. the training course for Elected Members "Serving on Council" provided by WA Local Government Association (WALGA) for a period of fifteen (15) hours; or
2. a training course with substantially similar learning outcomes provided by an alternative registered training organisation for a similar duration, but at least ten (10) hours.

Gordon MacMile (Deputy Presiding Member)

Elanor Rowe (Deputy Member)

Deborah Hopper (Deputy Member)



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

The Local Government Standards Panel (the Panel) advises:

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

**Note:**

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

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

  - (a) *by delivering the document to him personally; or*
  - (b) *by post in accordance with section 75(1); or*
  - (c) *by leaving it for him at his usual or last known place of abode, or if he is a principal of a business, at his usual or last known place of business; or*

(d) *in the case of a corporation or of an association of persons (whether incorporated or not), by delivering or leaving the document or posting it as a letter, addressed in each case to the corporation or association, at its principal place*