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## Local Government Standards Panel

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Complaint Number	SP 2021-041
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Councillor Murray Scott</b>
<b>Respondent</b>	<b>Councillor Michael Southwell</b>
Local Government	<b>Shire of Capel</b>
Regulation	Regulation 7 of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mr Tim Fraser (Presiding Member) Cr Peter Rogers (Member) Mrs Emma Power (Member)
Heard	24 June 2021 Determined on the documents
Finding	No Breach x 4 - Regulation 7(1)(b) of the Regulations. Breach x 4 - Regulation 7(1)(b) of the Regulations.

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### FINDING AND REASONS FOR FINDING

Delivered 18 August 2021

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#### DEFAMATION CAUTION

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## Summary of the Panel's decision

1. On 24 June 2021, the Panel found that Councillor Michael Southwell, the Shire President of the Shire of Capel (**"the Shire"**):
    - a. did not commit a minor breach pursuant to the *Local Government Act 1995 (WA)* (**"the Act"**) and Regulation 7 of the *Local Government (Rules of Conduct) Regulations 2007* (**"the Regulations"**) when he:
      - i. asked a series of 5 and 7 questions of the Shire relating to management of a bushfire that took place in the Shire in October 2020;
      - ii. raised and moved a motion without notice at the Ordinary Council Meeting of 25 November 2020 of the Shire;
      - iii. made a statement relating to the interviewing of Cr Scott at the Ordinary Council Meeting of 25 November 2020 of the Shire; and
      - iv. raised and moved a motion without notice at the Ordinary Council Meeting of 16 December 2020 to remove Mr Chris Scott as a Member of the Bush Fire Advisory Committee and Bush Fire Control Officer; and
    - b. did commit a minor breach pursuant to the Act and the Regulations when he:
      - i. made various allegedly improper statements in support of a motion without notice at the Ordinary Council Meeting of 16 December 2020;
      - ii. published a motion with notice with "reasons for Motion" in the Agenda for the Ordinary Council Meeting of 20 January 2021;
      - iii. made a Facebook Post on 20 December 2020 which contained allegedly misleading comments;
      - iv. made a Facebook Post on 31 January 2021 which restated the motion and reasons for motion previously published in the Agenda for the Ordinary Council meeting of 20 January 2021,
- as set out in paragraph 15 below.

## The Panel's Role

2. Under section 5.110(2) of the Act the Panel is required to consider a minor breach complaint and make a finding as to whether the alleged minor breach occurred.
3. The Act provides for the circumstances in which a council member commits a minor breach.<sup>1</sup>
4. The Panel may make a finding that a councillor has committed a minor breach of the Act and Regulations based on evidence from which it may be concluded that it is more likely that the alleged breach occurred than it did not occur.<sup>2</sup>

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

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



5. In order to find a breach, it must be established that each element of the relevant Regulation is more likely than not to have been breached or met.
6. In considering whether a minor breach is established the Panel must consider:
  - a. all evidence provided and, where there are conflicting circumstances, inferences or evidence, must come to a reasonable conclusion that any circumstance, inference or evidence relied upon is more likely than not to have occurred or be accurate<sup>3</sup>; and
  - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding<sup>4</sup>.
7. The Panel does not possess investigative or supervisory powers.<sup>5</sup> The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials published by the relevant local authority's website.
8. It is the responsibility of both complainants and respondents to provide the Panel with all information they wish the Panel to consider when making its determination.
9. The Panel also must have regard to the general interests of local government in Western Australia<sup>6</sup>.
10. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

### **Jurisdiction and Procedural Fairness**

11. On 16 April 2021 the Panel received a complaint from Mr Tom Kettle acting as complaints officer of the Shire ("**the Complaints Officer**"). The same enclosed a Complaint of Minor Breach Form dated 9 April 2021.
12. In the complaint form, the Complainant alleges that Cr Southwell has breached regulation 7 of the Regulations when Cr Southwell:
  - a. asked a series of 5 and 7 questions of the Shire relating to management of a bushfire that took place in the Shire in October 2020 ("**Allegation 1**");
  - b. raised and moved a motion without notice at the Ordinary Council Meeting of 25 November 2020 of the Shire ("**Allegation 2**");
  - c. made a statement relating to the interviewing of Cr Scott at the Ordinary Council Meeting of 25 November 2020 of the Shire ("**Allegation 3**");
  - d. raised and moved a motion without notice at the Ordinary Council Meeting of 16 December 2020 to remove Mr Chris Scott as a Member of the Bush Fire Advisory Committee and Bush Fire Control Officer ("**Allegation 4**");

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

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

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

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



- e. made various allegedly improper statements in support of the motion without notice at the Ordinary Council Meeting of 16 December 2020 (**“Allegation 5”**);
  - f. published a motion with notice in the Agenda for the Ordinary Council Meeting of 20 January 2021 to remove Mr Chris Scott as a Member of the Bush Fire Advisory Committee and Bush Fire Control Officer and included a “reasons for Motion” in the Agenda (**“Allegation 6”**);
  - g. made a Facebook Post on 20 December 2020 which contained allegedly misleading comments (**“Allegation 7”**);
  - h. made a Facebook Post on 31 January 2021 which restated the motion and reasons for motion previously published in the Agenda for the Ordinary Council meeting of 20 January 2021 (**“Allegation 8”**),  
as set out in paragraph 15 (together **“the Complaint”**).
13. The Panel convened on 24 June 2021 to consider the Complaint.
14. 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 Southwell was:
    - i. elected to the Council of the Shire in October 2017 for a term expiring in October 2021;
    - ii. a Councillor at the time of the alleged breach; and
    - iii. a Councillor when the Panel met on 24 June 2021;
  - b. was satisfied the Complaint was made within six months after the alleged breach occurred<sup>7</sup>;
  - 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 breach<sup>8</sup>;
  - d. was satisfied the Department had provided procedural fairness to Cr Southwell; and
  - e. found it had jurisdiction to consider the Complaint.

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

15. The Complainant provided the following comments and arguments in respect to the Complaint as summarised by the Panel:
- a. In issues raised and public comments made over the three months following a bushfire in North Boyanup on 25 October 2020 (**“the Bushfire”**), Cr. Michael

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

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

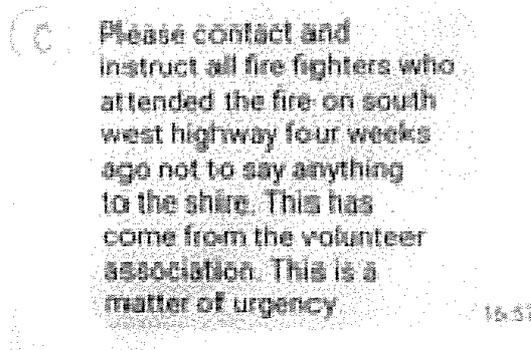


Southwell placed on the public record a series of misleading and offensive statements, false assertions and intimidating proposals that:

- i. caused detriment, distress and disadvantage to the Complainant, his family members, his reputation and good name as a bushfire volunteer
  - ii. damaged the mutually respectful working relationships between the Shire's Volunteer Bushfire Brigade and the Council,
- b. He did this using his position as a councillor and as Shire President and Presiding Member.

### *Background*

- c. In the weeks after the fire, Mr. C. Scott, the Chief Fire Officer, communicated with the volunteer brigades via 3 text messages to all brigade captains and fire control officers involved with the Bushfire:
- i. requesting reports be submitted;
  - ii. calling a meeting to debrief the fire; and
  - iii. on 18 November 2020 (after concerned bushfire volunteers had informed him that they had been approached individually by a Shire officer regarding conducting an investigation of the fire) a message explaining that the Volunteer Fire Association had instructed fire fighters not to discuss the matter due to legal implications as follows:



### **(“the Text Message”)**

- d. On 3 November 2020 the Director Infrastructure and Development provided Cr. Southwell a response to his (repeated) questions of 25 October 2020 and 3 November 2000 regarding the management of the Bushfire and the steps taken to secure ambulance transport for a volunteer who had received burns to her hand.
- i. All other councillors were copied into the email and were thus informed of both Cr. Southwell's questions and the shire officer's answers.
- e. On 30 November 2020 the Manager Human Resources & Executive Services, forwarded an email to the Acting Chief Executive Officer (“**CEO**”) and confirming that the Complainant had confirmed he was available if required to make a statement regarding the Bushfire.



- i. Councillors were aware of this since the 27 November Council Meeting and the Complainant also forwarded a copy of this email to all councillors 14 January 2021.
- f. 11 November 2020 the CEO commissioned the Manager Human Resources and Executive Service to conduct an investigation and report into the Bushfire (**“the Investigation Report”**);
- g. On 2 December 2020 the following was forwarded to all councillors:
  - i. a completed Investigation Report; and
  - ii. a memo from the CEO (**“the CEO Memo”**),  
both confirming that all appropriate processes and procedures had been properly followed in the management of the Bushfire, neither suggesting there had been any negligence or fault.
  - iii. This was initially a confidential document.
- h. On 15 December 2020 the Executive Officer of the Bushfire Volunteers provided its response to the Investigation Report indicating, amongst other things, support for the inquiry process and findings.
  - i. This included an explanation of what was behind the text provided to Bushfire volunteers about who were the appropriate (and inappropriate) people with which to discuss fire incident management.
  - ii. This was initially a confidential document.

#### *Series of Questions Asked*

- i. Cr. Southwell's pursuit of the details of the Boyanup fire started on October 28 when he asked a series of 5 questions and later a further 7 questions all of which were answered on 3 November 2020. This was also sent to all councillors.
- j. While most questions are relevant one needs to ask why Cr. Southwell wanted confirmed (and consistently returned to the question of) who was the fire control officer at the scene. He would have known from the outset that it was the Complainant, as the Deputy Chief Fire Officer.

#### *November OCM*

- k. At the November Ordinary Council Meeting of 25 November 2020 (**“the November OCM”**) Cr. Southwell submitted the following Motion without Notice:

*“ That council instruct its Bush Fire Advisory Committee to meet within 5 days of receiving the report of the Shire’s enquiry into the North Boyanup Fire on 25 October 2020 to consider the report and respond to Council via the Minutes of the meeting.”*
- l. During debate the Complainant attempted to speak to set the record right in regard to who had been approached in the inquiry into the fire. He stated:



*“ I have not been interviewed, I was incident controller who ran the fire, I should have been. My log book, whatever I've got. I would put into my report, but no, I haven't been interviewed, don't think I don't respect my volunteers.*

*We get there, do the job, and make sure everyone gets home. I too contacted the lady who got injured two or three times.*

*Everything I did as incident controller is logged, everything, ambulance questions. The ambulance hit Boyanup and was diverted to category 2 situation, I had no control over it. I immediately contacted Comms centre in Perth, because regs say you can't send her in private vehicle or truck...”*

m. Cr Southwell stated:

*“ Just going to what Councillor Scott said about him not being interviewed, perhaps he wasn't interviewed because he followed the advice of our chief fire control officer who advised by text message fire officers not to cooperate with the shire and not to answer questions.”*

n. It was very clear to everyone at the OCM that the Complainant had not been approached to be interviewed for the inquiry, yet Cr. Southwell chose to ignore this fact in his November rebuttal accusation and future motions and comments on the inquiry, where he repeatedly accused the Complainant of not cooperating with the inquiry.

#### **16 December OCM**

o. At the 16 December 2020 OCM (**“the December OCM”**) Cr. Southwell brought another “Motion without Notice” as follows:

*“ That Council:*

- 1. Pursuant to section 67(3)(b) of the Bushfires Act 1954 the Shire of Capel hereby removes Mr Chris Scott as a Member of the Bush Fire Advisory Committee;*
- 2. As a consequence of Part (1) above the appointment of Mr Chris Scott as Chief Bush Fire Control Officer pursuant to section 38 (1) of the Bushfires Act 1954 is hereby Cancelled.*
- 3. Advise the Bush Fire Advisory Committee and the Department of Fire and Emergency Services WA that it has revoked the membership of Mr Chris Scott as a result of his recent instruction to Capel Volunteer Bushfire Brigades personnel via text message of November 18 “not to say anything” to Shire staff conducting an investigation into matters arising from a fire at North Boyanup on October 25.”*

#### **(“the December Motion”)**

p. No supporting documents were table. At this stage the Investigation Report was confidential.

q. Cr Southwell also made the following comments at the December OCM in public, before the meeting was closed to further consider the relevant matter/motion:



*“ I understand it's going to be a surprise to certain people, but it's a motion very fundamental, based on a very fundamental principle and very disturbing, very disturbing occurrences recently.*

*And the motion is basically about accountability.*

*This shire needs its bushfire fire, voluntary brigades to ultimately be accountable. They have to be answerable to somebody. It should be ultimately this council through this council to the community and not to an individual. It's of critical importance that the Capel Shire Council and the community we represent to have the utmost confidence in our local volunteer bushfire brigades, of their membership, of their leadership hierarchy.*

*Lately a couple of incidents have occurred which have damaged the trust which this council must have in its fire brigade leaders. The pre, the precursor to the incident to the incident on October 25 was the OCM in October in which we were asked to adopt the draft bushfire order for 20/21. On that night some amendments were brought forward and discussed. Eventually the council decided to continue with the same bushfire order it had adopted on the previous year a month later, at the next BFAC meeting, the Chief Fire Officer Chris Scott was asked to give a report.*

*He used the first part of his speech to attack the council for its deliberations and decision. quote, "He told the BFAC meeting he was very disappointed by proposed amendments of the bushfire order put up by councillors who were not members of any brigade, have no experience in this field and without any consultation. It is disrespectful to the years of experience of the shire volunteer fire fighters" he said. Having seen this I wrote to Mr Chris Scott and expressed my disappointment in him disparaging councillors in during his official capacity at a meeting of a council committee.*

*I received no reply to this but I have been informed he has lodged a complaint about my letter to a government instrumentality.*

*Then we had an occurrence on October 25 when there was a fire in, a fire incident in North Boyanup.*

*A volunteer firefighter badly burnt her hand in that incident.*

*Councillors were informed about the matter the next day.*

*Naturally we wanted to know how it occurred and if all procedures had been followed.*

*We, we asked some questions and we were told by the shire staff that they would look into the matter and answer those questions for us.*

*As a result of this Mr Chris Scott summoned about 30 senior fire-fighters from the Capel shire brigade at a meeting on Nov 12 and told them that the council President had been asking, asking questions.*



*And the meeting discussed the way of dealing with those questions. Following this meeting on 18 of November Mr Chris Scott went further, texting the following message to all Capel fire brigade captains which said, quote "Please contact and instruct all firefighters who attended the fire on Southwest Highway four weeks ago not to say anything to the shire."*

*Now, this was in the context where the shire had begun an investigation into the incident. It is my sad duty to inform you that Mr Chris Scott's brother and the Deputy Fire Controller Cr Murray Scott, who was the officer in charge of the fire on October 25 followed these instructions and refused to discuss the incident or cooperate with the person from the shire who conducted the inquiry. Therefore this meant that the findings of the report are deficient because not only did Cr Scott but other fire personnel who were at the scene of the fire on that day refused to speak to or cooperate with the inquiry so therefore we have an inquiry report which is confidential, but that inquiry report I would put to you is deficient because it hasn't interviewed some of the key personnel that were involved on the day. The findings of the investigation report... some of which I can't read because it is confidential, but anyway, they comment on that.*

*These incidents indicate that Chris Scott seems to feel that volunteer fire fighters are not answerable to this shire ... and that he is not accountable, ultimately accountable, to the shire, and that he has placed the volunteer fire-fighting structure in the shire above the people to which he should be answerable.*

*A high level of trust, cooperation and mutual respect between this shire council, its Bushfire Advisory Committee and the people fulfilling those roles. As we enter this fire season I have lost faith that Mr Chris Scott is aware of his responsibilities and he's accountable and will be accountable or answerable to this shire. As a result of his actions we can't be assured that the inquiry into the accident covered all bases and that we have all the relevant facts in front of us in relation to the incident which occurred in which a volunteer firefighter was injured. We can have no confidence that we have a comprehensive and reliable report. This is an untenable situation. This constitutes a breakdown in communication and trust between the shire and someone it has put in charge of overseeing the operations of our bushfire brigades. I move this motion as urgent business tonight because I don't believe such a situation can be allowed to continue.*

*Council should act and act decisively"*

- r. Cr Southwell:
  - i. Misleadingly referred to the Investigation Report to give an incorrect impression that it was inconclusive and there were major concerns of the adequacy and findings of the report; and



- ii. deliberately omitted portions of and misrepresented the intentions behind the text from Mr. Chris Scott to volunteers and used this distortion to base a false accusation about the Complainant's own cooperation.
- s. The motion failed due to the lack of an absolute majority.
- t. This publicly critical sacking proposal caused detriment.
- u. It was a complete lack of natural justice to the target of the motion, Mr C. Scott, as there had been no prior notification to him, or opportunity for reply been given to him.
- v. While the CEO's Memo noted the understandable reluctance of some fire-fighters to respond to questions, this clearly did not include the Complainant who co-operated with the inquiry.
- w. At the very least, the whole of this matter should have been discussed behind closed doors, however, the comment made by Cr Southwell were made prior to this matter going behind closed doors.
- x. A few points/corrections need to be made from Cr. Southwell's comments;
  - i. The comment *"We want to know if procedures were followed"*, misrepresents that it was not WE the Council, but Cr. Southwell alone who initiated the questions and pressured for answers and probe of the Bushfire.
  - ii. The comment *"We asked some questions and were told by staff"*. Again it was not WE the Council but Cr. Southwell.
  - iii. The words Cr. Southwell chose to omit, when he quoted the text attributed to Mr. C Scott advising volunteers about not saying anything to the Shire provided the reason behind the advice. This was because a fire fighter was injured and did not want her name released as there was insurance and potential legal issues involved and there are correct channels to be followed for review questions to volunteers.
  - iv. Cr. Southwell's cryptic reference to what was in the confidential Investigation Report clearly showed it had had been provided to him.
  - v. Cr Southwell chose to ignore and omit to mention the findings of the Investigation Report (that processes and procedures were correct). Cr. Southwell's only statements claimed the Investigation Report was deficient.
  - vi. Cr Southwell made several unsubstantiated judgemental accusations about the Chief Fire Officer's attitude and professionalism.

#### *20 January OCM*

- y. At the 20 January 2021 Ordinary Council Meeting (**"the January OCM"**) Cr Southwell again attempted to have the Complainant removed as a member of the Bush Fire Advisory Committee and as Deputy Chief Bush Fire Control Officer.
- z. The motion with notice was as follows:

*" That Council:*



1. Pursuant to Section 67(3)(b) of the Bush Fires Act 1954 the Shire of Capel hereby removes Cr Murray Scott as a member of the Bush Fire Advisory Committee;
2. As a consequence of part (1) above, the appointment of Cr Murray Scott as Deputy Chief Bush Fire Control Officer pursuant to Section 38(1) of the Bush Fires Act 1954 is hereby cancelled;
3. Report to the Bush Fire Advisory Committee and the Department of Fire and Emergency Services WA that it has revoked the committee membership of Cr Murray Scott due to his recent refusal to co-operate with, or participate in, a Shire investigation into matters arising from the fire at North Boyanup on October 25, at which Cr Scott acted as Fire Control Officer.”

**(“the January Motion”)**

- aa. Cr Southwell eventually declined to move the motion, however, the Agenda also included all Cr Southwell’s “reasons” so they could be placed on the Shire record. The background/reasons were as follows:

*“ It is critically important that the Capel Shire Council and through it, the community we represent and serve have the utmost confidence in our local volunteer Bush Fire Brigades and members of their leadership hierarchy.*

*Therefore, it is imperative these people remain aware of and faithful to the requirement to be accountable to the Shire Council for their actions.*

*Lately, an incident has occurred which damages irreparably the trust which this Council must have in Cr Murray Scott as one of its most senior Fire Brigade leaders.*

*In November last year I officially put questions to Shire staff, via the Acting CEO, regarding the North Boyanup fire on October 25 and an incident at that fire in which a fire fighter received severe burns to a hand and was then left waiting for more than an hour for an ambulance to convey her to the Bunbury hospital.*

*The Acting CEO ordered an inquiry. Cr Scott’s brother Mr Chris Scott who is the Chief Bush Fire Control Officer reacted to this by summoning about 30 senior fire fighters from the Shire of Capel brigades to a meeting at the Elgin Fire station on November 12.*

*This meeting canvassed ways to stop the Shire from interfering and curtailing the inquiry.*

*Following that meeting, Mr Chris Scott sent the following text message to all Capel Fire Brigade captains: ‘Please contact and instruct all fire fighters who attended the fire on south-west highway four weeks ago not to say anything to the Shire’*

*Cr Murray Scott, who had been the Fire Control Officer in charge on the day of the incident, and hence a key person who was asked to be*



*interviewed for the inquiry, followed the instruction from his brother and refused to discuss the incident or cooperate with the officer from the Shire who was conducting the inquiry.*

*The Findings of the investigation report say the investigating officer was unable to make clear and complete findings or recommendations 'Due to... a number of personnel declining to provide statements and documentation to the investigating officer'.*

*Not only did people refuse to talk -- official documents were withheld.*

*It wouldn't matter if Cr Scott was the best deputy bushfire control officer that ever walked the planet and it doesn't matter how much loved he is by his friends and neighbours for his long service in the job. If he even once decides he is not answerable to this Shire in relation to the performance of the role, then he can no longer continue fill it.*

*It is time to thank him for his services and find someone else from the ranks of experienced fire officers in our brigades to take over.*

*The people in these Bushfire Brigade jobs have substantial resources at their disposal, critical decision-making power when it comes to fires, and obviously the fate of lives and property in their hands.*

*A high level of trust, co-operation and mutual respect must exist between this Shire Council, its Bush Fire Advisory Committee and the people in those positions.*

*As it stands, Council cannot be assured that its inquiry into the October 25 incident covered all bases and unearthed all the relevant facts. We are left without a comprehensive and reliable report and as a consequence unable to ascertain whether any improvements in processes, procedures or training would be appropriate.*

*The person conducting the inquiry said some of those involved failed to co-operate.*

*These included the man in charge on the day in question, Cr Murray Scott.*

*This is an untenable situation. A breakdown in communication and trust between the Shire and a person it puts in charge of overseeing operations of its bushfire brigades cannot be allowed to continue.*

*The Council should act, and act decisively.*

*Cr Southwell ensured that his "reasons" were shared publicly without a chance provided to take the matter behind closed doors.*

- bb. These were undermining accusations which caused detriment.
- cc. Cr Southwell showed no respect for the Complainant or even for how fellow councillors felt as at the December OCM concern of impropriety of "names being named." was expressly raised as to the last motion.



- dd. The motion failed because Cr. Southwell declined to move the motion, possibly due to a strong public reaction and ratepayer petition.
- ee. The derogatory and detrimental comments about the Complainant made by Cr. Southwell in the January 2021 agenda were widely circulated online and remain on the public record.
- ff. There is no apology, retraction, or means for the Complainant to deny Cr. Southwell's published reasons including:
  - i. The incorrect comment that the Complainant failed to cooperate with the officer conducting the Investigation Report;
  - ii. the unprofessional derogatory and deceptive reference to the family relationship between Cr Scott and Mr Scott suggesting some sort of inappropriate family collusion;
  - iii. the unclear and unsubstantiated reference to withheld official documents;
  - iv. the baseless presumption that the Complainant believed himself not answerable to the Shire is offensive, disrespectful, knowingly incorrect and in poor taste.
- gg. Cr Southwell knew his comments were incorrect based on the documents that had been made available to him well before his statements in the December OCM, and before publicly submitting the accusations made in his agenda item January meeting.
- hh. A community petition signed by nearly 600 ratepayers in just 3 days offered support and requesting that Council not support Cr. Southwell's proposed January OCM motion.
  - ii. In the process of proposing the January OCM motion Cr Southwell had allowed maximum damage and embarrassment to the Complainant to occur. This compounds the damage this process had done to the public record of his competence and integrity as a Bushfire Volunteer Officer, until now a proud reputation built by long, dedicated and respected service. Such baseless undermining of the confidence in leadership and collaboration within the Bushfire volunteers teams is a threat to everyone's safety.
- jj. The previously confidential documents including the Investigation Report were supplied with the minutes of the January OCM and became public.

#### *Facebook Posts*

- kk. The Text Message was selectively quoted by Cr Southwell in his Facebook posts of 20 December 2020 and 31 January 2021 and in local publications.
- ll. When he did so he only cited the Chief Fire Officer's direction not to speak, omitting that Mr. C Scott was relaying advice from the Volunteer Bush Fire Association for the volunteers' own protection.

#### *General*



- mm. From 2 December 2020 when the Investigation Report was supplied to councillors Cr. Southwell was fully informed with the relevant information. He therefore knew that there was no evidence or reason for making accusations that the Complainant had refused to cooperate with the investigation or that there had been any mismanagement of a bushfire incident for which he had been the officer in control.
- nn. Detriment has been caused by his repeated return to these issues in November 2020, December 2020 and January 2021.
- oo. At the time of December OCM, the report was cryptically and misleadingly referred to by Cr. Southwell, he stated his personal opinion that he was not satisfied with the report and gave an incorrect impression of the report's major findings by omitting the report conclusions that all processes and procedures of the fire incident management had been satisfied.
- pp. He also deliberately omitted (and thus misrepresented) the reasons and intentions behind the text from Mr. Chris Scott to volunteers and used this distortion to base a false accusation that the Complainant had not cooperated with the investigation.
- qq. However the accurate information came out when after the January OCM when the CEO directed the Investigation Report be made public.

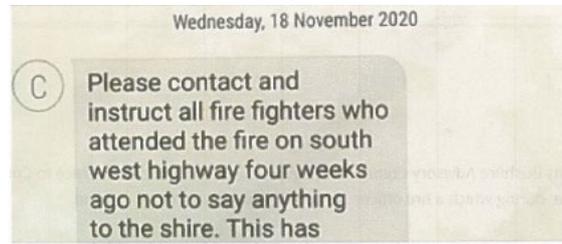
#### *Conclusion*

- rr. The Complainant is particularly concerned at the damage and innuendo that has been done to the Complainant and his family members over this Bushfire incident.
  - ss. Cr. Southwell has consistently made disrespectful and unprofessional comments, and in particular he has consistently suggested complicity between the Complainant and his brother through referring to us as "the brothers" in a manner which implies that because we are related our professional independence is compromised.
  - tt. The consistency of this style of reference shows it is deliberate and that Cr. Southwell has chosen, for his own reasons, not to use the professional more formal form of reference and therefore questions the integrity of our individual professional roles and skills.
  - uu. As a councillor now with one term in two different shires, he knows that professional respectful address is required.
16. The Complainant provided with the Complaint form the following documentation:
- a. Email dated 4 November 2020 from Mr Gick to Cr Southwell in respect to the series of questions asked;
  - b. Series of Questions asked by Cr Southwell and responses from the Shire;
  - c. Screen shot of the Text Message;
  - d. Email dated 30 November 2020 from Ms MacMillan to the CEO and Cr Scott confirming Cr Scott was not asked to provide a statement.



- e. Email dated 14 January 2021 forwarding the email referred to in paragraph 18.d to all councillors;
- f. Email dated 2 December 2020 from Ms MacMillan to all councillors including the Investigation Report and the CEO Memo and other relevant documentation.
- g. The CEO Memo dated 1 December 2020;
- h. The Investigation Report;
- i. Email dated 15 December 2020 from the Executive Officer of the Bushfire Volunteers providing a response to the Investigation Report.
- j. Newspaper Article from South Western Times 3 December 2020 by Ailish Delaney regarding the November OCM;
- k. Email dated 6 October 2020 from Cr Southwell to Mr C Scott and all councillors in regard to a BFAC meeting;
- l. Facebook Post by Cr Southwell of 20 December 2021 including the following text and image:





**(“the December Post”)**

- m. Facebook Post by Cr Southwell of 31 January 2021 setting out the motion with notice from the January OCM and the background and reasons in full (**“the January Post”**);
- n. Media release dated 26 November 2020 put on Shire Website by Cr Southwell regarding BFAC Special meeting.
- o. Facebook Post of 20 December 2020 by Cr Southwell regarding the December OCM and his motion.
- p. Copy of anonymous Article from the Gelorup – Stratham – Dalyellup Gazette – January 2021 edition (editor being Cr Southwell) entitled *“the Facts about a recent Capel fire incident and fallout”*.

**The Respondent’s Response**

- 17. By an email dated 3 May 2021, Cr Southwell provided a response to the Complaint.
- 18. Cr Southwell denies that he has committed any minor breach.
- 19. Cr Southwell provided the following comments and arguments regarding the Complaint:
  - a. The Complaint asks the Panel to consider *“issues raised and public comments made over three months”*.
  - b. A Complainant should be required to specify which statements caused the alleged detriment, rather than expect the Panel to rake over the coals of a series of events and numerous documents/transcripts to perhaps find substantiation of the allegations.
  - c. Cr Southwell has previously criticised this modus operandi.
  - d. Cr Scott has failed to specify the alleged breach complained of. Instead, he has presented a potted and coloured version of a long chain of events, leaving it up to the Panel to find a breach.
  - e. No specific action or set of words has been identified as the alleged breach, which makes it almost impossible for Cr Southwell to adequately respond or submit a detailed defence.



- f. If the Panel did choose to do the job of the Complainant and rake over all the details, statements and actions to see whether a breach might in some way be identified, Cr Southwell would be at a disadvantage having no opportunity to respond in detail to the specific breach alleged.
- g. Cr Southwell has chosen not to counter Cr Scott's inaccurate, subjective and misleading essay. This is because he does not believe it is the Panel's role to decide the rights and wrongs of a long series of events, rather it is to adjudicate on specific allegations.
- h. Cr Southwell points out there are many inaccuracies, false claims and wrong assumptions in Cr Scott's Complaint.
- i. At all times Cr Southwell acted properly and according to his roles and duties as a councillor, pursuing these matters because he believed it is in the public interest to ensure proper oversight and accountability of the activities of local bush fire brigades and their officers.
- j. All of Cr Southwell's actions and statements were a proper exercise of his functions as a councillor and Shire President.
- k. The Shire Investigation Report at Point 8 'Findings/Recommendations says;  
*“ Due to the investigating officer's lack of knowledge of DFES procedures, along with a number of personnel declining to provide statements and documentation to the investigating officer; it is difficult to produce clear findings/recommendations for this report.”*
- l. The email which seems to suggest that Cr Scott at one point offered to provide a statement to the investigating officer, who then asks the CEO whether this would be necessary, falls short of proof that he did co-operate.
- m. We have not been provided with a copy of the CEO's response to the question, nor any subsequent communication between the investigator and Cr Scott.
- n. This leaves unresolved the question of whether Cr Scott ultimately co-operated or whether he followed his brother's instruction not to co-operate. Also unanswered is the question of whether he refused to provide documentation to the investigator.
- o. Every claim Cr Scott makes in relation to Cr Southwell's motives is incorrect.
- p. The fact that Mr Chris Scott attributed his highly improper text message advice to volunteer fire fighters "not to say anything to the Shire" to the 'volunteer association' does not justify or excuse it. The so-called 'volunteer association', the Association of Volunteer Bush Fire Brigades WA Inc has denied it gave this advice.
- q. To sum up, a proper and objective analysis of Cr Southwell's actions and statements across this unfortunate incident would conclude that he acted properly in my role as councillor and Shire President, pursued the facts in the public interest as openly as possible and was seeking to ensure the community could be assured the safety of volunteer fire fighters was given the highest



priority by ensuring incidents were examined properly to see if procedures were followed correctly and accountability measures were in place if this was not so.

## **Panel's Consideration**

### **Regulation 7 and the Shire of Capel Code of Conduct**

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

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

- (1) *A person who is a council member must not make improper use of the person's office as a council member —*
- (a) *to gain directly or indirectly an advantage for the person or any other person; or*
- (b) *to cause detriment to the local government or any other person.*
- (2) *Subregulation (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.*

21. It is not alleged that Cr Southwell sought any advantage for any party, so the Panel has only considered regulation 7(1)(b) in this Complaint.
22. To make a finding of a minor breach of regulation 7(1)(b) of the Regulations the Panel must be satisfied that it is more likely than not that:
- a. Cr Southwell was an elected member at the time of the alleged breach and the time of the determination;
  - b. Cr Southwell made use of his office as Council member of the Shire;
  - c. when viewed objectively, such use was an improper use of Cr Southwell's office in that it:
    - i. involved a breach of the standards of conduct that would be expected of a person in the position of councillor by reasonable persons; and
    - ii. was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty; and
  - d. Cr Southwell engaged in the conduct in the belief that detriment would be suffered by another person.
23. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or lack of wisdom<sup>9</sup>. It requires an abuse of power or the use of the councillor's position in a manner that such councillor knew (or ought to have known) was not authorised.

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



24. Impropriety does not depend on a councillor's consciousness of impropriety. It is to be judged objectively and does not involve an element of intent<sup>10</sup>.
25. 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.
26. At the time of the conduct Shire had a "*Code of Conduct*" published in 2017 ("**the Code**") which set out certain expectations in respect to the conduct of Councillors to be read in conjunctions with the Regulations. The relevant sections of the Code are as below:
27. The relevant clauses of the Code of Conduct are as follows:
- "2. Values, principles and behaviour***
- Councillors, Committee Members and employees of the Shire of Capel are to:*
- *Act with reasonable care and diligence.*
  - *Act with honesty and integrity*
  - .....
  - *Be polite and treat others with respect and fairness.*
  - .....
  - *Make no allegations which are improper or vexatious.*
  - *Avoid causing any reasonable person unwarranted offence or embarrassment;*
  - *Respect decisions made by Council.*
  - *Refrain from publicly criticising either a Councillor, Committee Member or employee in a way that casts aspersions on their competence or credibility.*
  - *Maintain the confidentiality of documents and information assigned with this status.*
  - ....."
28. The Code provides a framework for consideration of the expected standards of behaviour of elected members and as to whether certain conduct can be viewed as "improper".
29. "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.
30. It is not necessary to find whether any detriment was actually suffered<sup>11</sup>, but an intent to cause such detriment must be established.

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

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



### **General Comments**

31. The Panel acknowledges Cr Southwell's position that it is not the role of the Panel to sort through a long Complaint and find alleged breaches.
32. The Panel further appreciates the Complaint deals with a long and complex matter which requires a certain understanding of the parties' past interactions and disputes with each other, however, the Panel comments that:
  - a. the Complaint is clear enough in the context of the specific allegations of what Cr Southwell said and wrote in each instance and such allegations are substantially corroborated by the large amount of additional documentation supplied by the Complainant;
  - b. Cr Southwell appears to understand the basis of the relevant accusations in his response.
33. The Panel also generally comments that to hold and express concern that appropriate procedures and policies were not followed in respect to the Bushfire is not inappropriate. It is correct for a Councillor and Shire President to ensure Shire processes are proper and accountable.
34. However, it is the manner in which Cr Southwell approached giving voice to his concerns that is being considered by the Panel.

### **Allegation 1 – Series of Questions Asked**

#### Cr Southwell was an Elected Member at the relevant times

35. Cr Southwell was an elected member at the time he asked a series of 5 and 7 questions of the Shire relating to management of the Bushfire that took place in the Shire in October 2020 and at the date the Panel considered the Complaint.
36. This element is met.

#### Cr Southwell made use of his office as Council Member of the Shire

37. Due to the fact that Cr Southwell was seeking this information to undertake actions in his capacity Shire President, the Panel finds that it is more likely than not that Cr Southwell was acting in his capacity as an elected member made use of his office as a council member.
38. This element is met.

#### Cr Southwell's use was improper

39. The Complainant has alleged that asking the series of 5 and 7 questions in respect to the management of the Bushfire is improper as he consistently asked who was the fire control officer at the scene, which he knew was the Complainant.
40. The Panel has reviewed the questions asked and answered finds that it is more likely than not that, in the context that a volunteer fire fighter had been injured and her treatment had been delayed, that the questions were relevant to matters he (as a councillor and Shire President) should have been reasonably informed of.



41. The action of seeking clarification as to a matter under the Shire's jurisdiction is not improper or inappropriate.
42. The Panel finds it is more likely than not asking the relevant series of 5 and 7 questions in October 2020 was not improper as such conduct:
  - a. was not in breach of the Code;
  - b. was not of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
  - c. is not deserving of a penalty.
43. This element is not met.

Cr Southwell intended detriment to be suffered by another person

44. As the above element is not met, the Panel has not further considered this element.

Conclusion

45. Given the above, the elements required to find a breach of regulation 7(1)(b) of the Regulations have not been met.

**Allegation 2 - the November Motion**

Cr Southwell was an Elected Member at the relevant times

46. Cr Southwell was an elected member at the time he brought a put a motion without notice at the November OCM.
47. This element is met.

Cr Southwell made use of his office as Council Member of the Shire

48. Due to the facts that Cr Southwell:
  - a. was attending and presiding over the November OCM in his capacity as Shire President; and
  - b. brought the relevant motion without notice in his capacity as an elected member of the Shire,

the Panel finds that it is more likely than not that Cr Southwell was acting in his capacity as an elected member made use of his office as a council member.

49. This element is met.

Cr Southwell's use was improper

50. The Complainant has alleged that bring the following motion without notice was improper:

*“ That council instruct its Bush Fire Advisory Committee to meet within 5 days of receiving the report of the Shire's enquiry into the North Boyanup Fire on 25*



*October 2020 to consider the report and respond to Council via the Minutes of the meeting.”*

**f(“the November Motion”)**

51. The Panel notes that the November Motion was amended and passed in substantially similar format, except that a period of 14 days was decided.
52. In the context that the Bushfire in question had resulted in an injury and delayed treatment of such injury, the Panel considers that it was a reasonable stance that, once the matter had been investigated, the Bush Fire Advisory Committee should consider and formally respond to the same.
53. The Panel finds that it is more likely than not that bringing the November Motion was not improper as such conduct:
  - a. was not in breach of the Code;
  - b. was not of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
  - c. is not deserving of a penalty.
54. This element is not met.

Cr Southwell intended detriment to be suffered by another person

55. As the above element is not met, the Panel has not further considered this element.

Conclusion

56. Given the above, the elements required to find a breach of regulation 7(1)(b) of the Regulations have not been met.

**Allegation 3 – November OCM Comment**

Cr Southwell was an Elected Member at the relevant times

57. Cr Southwell was an elected member at the time of the November OCM and at the date the Panel considered the Complaint.
58. This element is met.

Cr Southwell made use of his office as Council Member of the Shire

59. Due to the facts that Cr Southwell:
  - a. was attending and presiding over the November OCM in his capacity as Shire President; and
  - b. brought the November Motion and made the relevant comments in support of the November Motion in his capacity as an elected member of the Shire;



the Panel finds that it is more likely than not that Cr Southwell was acting in his capacity as an elected member made use of his office as a council member.

60. This element is met.

Cr Southwell's use was improper

61. The Complainant has alleged that the following comment by Cr Southwell was improper as it was clear the Complainant had not been approached for an interview at that stage:

*“ Just going to what Councillor Scott said about him not being interviewed, perhaps he wasn't interviewed because he followed the advice of our chief fire control officer who advised by text message fire officers not to cooperate with the shire and not to answer questions.”*

**(“the November OCM Comment”)**

62. The Panel has considered the following context in this case:

- a. it was established that Mr C Scott had sent the Text Message which expressly directed volunteer firefighters not to communicate with the Shire;
- b. earlier in the November OCM the Complainant had expressly stated that he had not been interviewed;
- c. the Complainant had not yet sent to Cr Southwell (and other councillors) the 30 November 2020 Email from Ms MacMillan to the CEO and Cr Scott confirming Cr Scott was not asked to provide a statement.

63. In this case, although Cr Southwell is clearly speculating as to why Cr Scott was not interviewed, and Cr Scott found such statement to be personally insulting, the statement is not enough to be considered:

- a. to be an improper or vexatious allegation;
- b. to cause Cr Scott unwarranted offence or embarrassment when considered objectively at that time;
- c. a public criticism of Cr which cast aspersions on their competence or credibility in breach of the Code.

64. However, the Panel does note that this statement does indicate a commencement of a pattern of behaviour by Cr Southwell as considered in the further allegations to this Complaint.

65. The Panel finds that it is more likely than not that bringing the November Motion was not improper as such conduct:

- a. was not in breach of the Code;
- b. was not of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
- c. is not deserving of a penalty.



66. This element is not met.

Cr Southwell intended detriment to be suffered by another person

67. As the above element is not met, the Panel has not further considered this element.

Conclusion

68. Given the above, the elements required to find a breach of regulation 7(1)(b) of the Regulations have not been met.

**Allegation 4 – the December Motion**

Cr Southwell was an Elected Member at the relevant times

69. Cr Southwell was an elected member at the time of the December OCM and at the date the Panel considered the Complaint.

70. This element is met.

Cr Southwell made use of his office as Council Member of the Shire

71. Due to the facts that Cr Southwell:

- a. was attending and presiding over the December OCM in his capacity as Shire President; and
  - b. brought the relevant motion in his capacity as an elected member of the Shire;
- the Panel finds that it is more likely than not that Cr Southwell was acting in his capacity as an elected member made use of his office as a council member.

72. This element is met.

Cr Southwell's use was improper

73. The Complainant has alleged that bring the following motion without notice was improper:

*"That Council:*

1. *Pursuant to section 67(3)(b) of the Bushfires Act 1954 the Shire of Capel hereby removes Mr Chris Scott as a Member of the Bush Fire Advisory Committee;*
2. *As a consequence of Part (1) above the appointment of Mr Chris Scott as Chief Bush Fire Control Officer pursuant to section 38 (1) of the Bushfires Act 1954 is hereby Cancelled.*
3. *Advise the Bush Fire Advisory Committee and the Department of Fire and Emergency Services WA that it has revoked the membership of Mr Chris Scott as a result of his recent instruction to Capel Volunteer Bushfire Brigades personnel via text message of November 18 "not to say anything" to Shire staff conducting an investigation into matters arising from a fire at North Boyanup on October 25."*



**(“the December Motion”)**

74. It is noted:
- a. the December Motion was made without notice;
  - b. despite the fact the power under the Bushfires Act to appoint Fire Control Officers had been delegated to the CEO, the Council appeared to have an appropriate power under the *Bush Fires Act 1954* to be able to make such motion;
  - c. after some initial discussion by Council, it was moved that the meeting be closed to discuss the matter behind closed doors;
  - d. the December Motion was lost 4/2 for lack of absolute majority;
  - e. at this stage the Investigation Report had been provided to councillors (on 2 December 2020) but was still confidential; and
  - f. the Executive Officer of the Bushfire Volunteers provided its response to the Investigation Report on 15 December 2020.
75. The Shire of Capel Standing Orders Local Law 2016 provide for Motions without notice as follows:
- “ 4.14 *Urgent business*
- (1) *A member, at an ordinary meeting of the Council, may move a motion involving business that is not included in the agenda for that meeting if the Presiding Member has first consented to the business being raised because the Presiding Member considers that either —*
    - (a) *the nature of the business is such that the business cannot await inclusion in the agenda for the next meeting; or*
    - (b) *the delay in referring the business to the next meeting could have adverse legal or financial implications for the local government.*
  - (2) *If a member objects to a motion moved under subclause (1), the motion is to be of no effect unless it is agreed to by an absolute majority.”*
  - (3) *Subclauses (1) and (2) do not apply to a revocation motion being considered as urgent business in accordance with clause 11.2.”*
76. Although it is debatable that the December Motion constituted “urgent business” that could not have waited until the next occurring Council meeting, it was in the discretion of Cr Southwell as Presiding Member to allow the same.
77. The December Motion may be considered somewhat excessive based upon the contents/results of the Investigation Report, however, the Panel does not consider that the same amounts to being improper in and of itself as:
- a. the motion contained essentially factual material; and
  - b. the Council then had the opportunity to discuss and vote on the proposal.



78. As such, the Panel considers that the mere bringing of the Motion was not enough to be improper.
79. The Panel finds that it is more likely than not that bringing the November Motion was not improper as such conduct:
- a. was not in breach of the Code;
  - b. was not of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
  - c. is not deserving of a penalty.
80. This element is not met.

Cr Southwell intended detriment to be suffered by another person

81. As the above element is not met, the Panel has not further considered this element.

Conclusion

82. Given the above, the elements required to find a breach of regulation 7(1)(b) of the Regulations have not been met.

**Allegation 5 – Comments made at December OCM**

Cr Southwell was an Elected Member at the relevant times

83. Cr Southwell was an elected member at the time of the December OCM and at the date the Panel considered the Complaint.
84. This element is met.

Cr Southwell made use of his office as Council Member of the Shire

85. Due to the facts that Cr Southwell:
- a. was attending and presiding over the December OCM in his capacity as Shire President; and
  - b. brought the December Motion and made the relevant comments in support of the December Motion in his capacity as an elected member of the Shire,
- the Panel finds that it is more likely than not that Cr Southwell was acting in his capacity as an elected member made use of his office as a council member.
86. This element is met.

Cr Southwell's use was improper

87. The Complainant has alleged that certain of comments made by Cr Southwell at the December OCM (as set out in paragraph 17.q) were improper.
88. The Panel has considered the following particular comments:



- a. *“Lately a couple of incidents have occurred which have damaged the trust which this Council must have in its fire brigade leaders” (“Comment 1”);*
  - b. *“...Mr Chris Scott went further, texting the following message to all Capel fire brigade captains which said, quote “Please contact and instruct all firefighters who attended the fire on Southwest Highway four weeks ago not to say anything to the Shire.” (“Comment 2”);*
  - c. *“It is my sad duty to inform you that Mr Chris Scott's brother and the Deputy Fire Controller Cr Murray Scott, who was the officer in charge of the fire on October 25 followed these instructions and refused to discuss the incident or cooperate with the person from the shire who conducted the inquiry.” (“Comment 3”);*
  - d. *“Therefore this meant that the finding of the report are deficient because not only did Cr Scott but other fire personnel who were at the scene of the fire on that day refused to speak to or cooperate with the inquiry so therefore we have an inquiry report which is confidential, but that inquiry report I would put to you is deficient because it hasn't interviewed some of the key personnel that were involved on the day.” (“Comment 4”);*
  - e. *“These incidents indicate that Chris Scott seems to feel that volunteer fire fighters are not answerable to this Shire and that he is not accountable, ultimately accountable, to the shire, and that he has placed the volunteer fire-fighting structure in the Shire above the people to which he should be answerable.” (“Comment 5”);*
  - f. *“As we enter this fire season I have lost faith that Mr Chris Scott is aware of his responsibilities and he's accountable and will be accountable or answerable to this shire. As a result of his actions we can't be assured that the inquiry into the accident covered all bases and that we have all the relevant facts in front of us in relation to the incident which occurred in which a volunteer firefighter was injured. We can have no confidence that we have a comprehensive and reliable report.” (“Comment 6”).*
89. The above comments were made in public prior to the closure of the meeting to the public.
90. The comments must be considered in the context that all councillors had received:
- a. the CEO Memo which specified:
    - i. *“It is my view that the Information that has been covered in the report verifies that there has been no fundamental breaches in procedures”;*
    - ii. that the issue of the Text had been acknowledged to be *“of concern”* and the CEO had confirmed he had asked for an explanation;
  - b. the Investigation Report which made the following Findings/Recommendations:

*“ Due to the Investigating officers lack of knowledge of DFES procedures, along with a number of personnel declining to provide statements and documentation to the investigating officer; it is difficult to produce clear findings/recommendations for this report.*



*Based on the information provided to the investigating officer the procedures outlined are considered to be within the parameters of the standard operating procedures.*

*It is open to the BFAC to provide a response to the issue of compliance in their review of the report, as well as their recommendations moving forward.”*

- c. an email from the Executive Officer of the Bushfire Volunteers which stated:

*“ While the Bushfire Volunteers association encourages open, fair and transparent communication with and between all stakeholders, it recommends extreme caution when volunteer members may feel threatened, intimidated or otherwise potentially compromised. The requirement to sign a confidentiality agreement before providing information that may be used in legal proceedings or political campaigns is an example of a situation in which the association would strongly recommend volunteers minimise personal risk by non-communication.*

*Furthermore, it is noted that the DFES Code of Conduct has recently been updated to include a requirement for DFES-managed fire volunteers to not communicate with elected representatives about the business of emergency services and must limit their communication with Departmental staff only. For Bush Fire Brigade volunteers, Local Government Councillors are the equivalent elected representatives and the CEO and delegates are the equivalent of the DFES Commissioner and staff.*

*Again, Bushfire Volunteers would prefer 100% open, fair and transparent communication with and between all stakeholders at all times. Sadly however, there are occasions when volunteers and their communities may be put at risk if others misuse their words for political or legal purposes and hence, recommend a “Miranda rights” approach.*

- d. An email from Mr C Scott including the following:

*“1. I recommended to my fellow volunteers to not discuss operational issues with Council in relation to the investigation into the North Boyanup Fire 25 October 2020 because:*

- a. Statements from volunteers were likely to be used in future legal and/or insurance proceedings,*
- b. Volunteers were not offered access to legal advice,*
- c. Volunteers were not given any assurance that their statements would not be used against them or their volunteer colleagues,*
- d. Volunteers were asked to sign a confidentiality agreement before providing information,*
- e. Many volunteers were feeling anxious or intimidated about being asked to provide statements in secret,*



- f. *Recent actions have created a perception that our volunteer brigades may not all be supported by some Members of Council,*
- g. *I sought advice from our representative association based on the above facts and it was recommended that volunteers who feel intimidated or at risk should avoid making statements unless compelled to by law."*

91. The Panel makes the following comments in respect to the various comments:
- a. **Comment 1** – the Panel considers this comment to be exaggeration and hyperbole, but not to amount to being improper;
  - b. **Comment 2** – in this case:
    - i. the reference to the Text sent by Mr C Scott was not complete which appears to be an attempt to mislead the public as to the exact nature of the Text and the stated reason the Text was provided.
    - ii. Although it was a legitimate concern that Mr C Scott sent such a message, councillors had been supplied with a response from the Bushfire Volunteers Association and Mr Scott as to why such statement was made.
    - iii. In this context Cr Southwell should have been careful at this stage to ensure that he was not asserting in public potentially misleading information that had the potential of damaging Mr Scott.
    - iv. the Panel finds to the required standard that Cr Southwell did not take due care in making Comment 2 by making the same in a manner he knew to be misleading and inflammatory and, therefore, such comment was improper.
  - c. **Comment 3** – this assertion is pure speculation.
    - i. At this stage, Cr Southwell knew that Cr Scott had not been asked to comment by the Shire. Cr Scott had expressly refuted this assertion at the November OCM.
    - ii. Cr Southwell had no reasonable basis to assert that Cr Scott had refused to discuss the matter or co-operate with the Shire.
    - iii. As such, the Panel is satisfied that it is more likely than not that Cr Southwell knew the statement was substantially false and therefore was improper.
  - d. **Comment 4** – this comment refers to the Investigation Report (at this stage confidential) as being deficient and again asserts Cr Scott as having refused to speak or co-operate with the Shire.
    - i. As noted above, Cr Southwell had no reasonable basis to assert Cr Scott had refused to speak to or co-operate with the Shire. To make such an unfounded statement was improper.
    - ii. In addition, Cr Southwell acknowledges that the Investigation Report was still confidential, but then refers to the portion of the Investigation Report that confirms certain fire personnel had not spoken with the Shire.



- iii. Cr Southwell should not have referred to that portion of the Investigation report in public in the November OCM as such can be considered a breach of confidentiality and therefore improper.
- e. **Comment 5** – this comment speculates as to Mr Scott’s motives and heavily implies that Mr Scott had acted wrongfully, that he was untrustworthy and incompetent.
  - i. Although Mr Scott’s direction in the Text may have been of concern, the further evidence provided indicated that such action was undertaken in an attempt to protect the volunteer firefighters.
  - ii. As such, the relevant comment appears to be exaggerated and dramatised in an attempt to make Mr Scott’s actions appear underhanded or dishonest.
- f. **Comment 6** – notes Cr Southwell has lost faith in Mr Scott and clearly states that Mr Scott’s actions have compromised the Investigation Report into the injury sustained by a volunteer firefighter.
  - i. In respect to Cr Southwell’s comments as to losing faith in Mr Scott, Cr Southwell is entitled to this personal opinion. Cr Southwell’s wording clearly indicates that this is only a personal opinion.
  - ii. In respect to the strong implication that Mr Scott’s actions compromised the Investigation Report, there was limited evidence available that that was the case. Although Cr Southwell may have strongly objected to Mr Scott’s actions, there was nothing in the Investigation Report that indicated any procedures or processes followed with respect to the firefighter’s injury were not followed, or that Mr Scott’s Text/direction had impacted the manner in which the Bushfire had otherwise been dealt with.
  - iii. Further, as noted above, the Investigation Report was still confidential at this stage and Cr Southwell should not have been speaking publicly regarding the contents of the same.
- 92. The Panel reiterates that even a genuine concern by a Councillor that not all procedures and processes have been correctly followed does not permit that councillor to say anything they wish, or indulge in unsupported speculation, in a public forum.
- 93. The manner in which Cr Southwell approach any perceived deficiencies in the Investigation Report was not proper. This should have been discussed behind closed doors while the Investigation Report remained confidential.
- 94. The Investigation Report did not make any finding that there was any action undertaken that was outside of standard operating procedure and did not contain any assertion that Cr Scott or Mr Scott had acted improperly.
- 95. It was also clear that, although the Text had resulted in some volunteers not providing statements to the Shire:
  - a. some of the inadequacies in the Investigation Report was due to “*Due to the Investigating officers lack of knowledge of DFES procedures*”;



- b. the Text did not contribute to the Bushfire incident that was being investigated, being the injury to a volunteer firefighter. The Text occurred following the Bushfire and, while it may have hindered the Investigation Report to some degree, there was nothing in Investigation Report that indicated that the Bushfire injury incident itself was not handled properly and professionally.
96. The Panel finds it is more likely than not that Comment 2, Comment 3, Comment 4, Comment 5 and Comment 6 were improper as such conduct:
  - a. was in breach of the Code;
  - b. was of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
  - c. is deserving of a penalty.
97. This element is met.

Cr Southwell intended detriment to be suffered by another person

98. The Panel has only considered this element with respect to Comment 2, Comment 3, Comment 4, Comment 5 and Comment 6.
99. In this case the focus of Cr Southwell's comments appears to be that the Text sent by Mr C Scott directly caused:
  - a. several volunteer firefighters to refuse to discuss the Bushfire and co-operate with the Shire;
  - b. Cr Scott to refuse to discuss the Bushfire and co-operate with the Shire; and
  - c. the Investigation Report to be deficient and unreliable.
100. The various comments when considered along with the December Motion all appear to be being made with the intention to:
  - a. attribute blame to Mr Chris Scott for any problem or defect in the Investigation Report;
  - b. imply that Cr Scott did not act properly in the matter; and
  - c. remove Mr Chris Scott from the position as Chief Bush Fire Control Officer and a Member of the Bush Fire Advisory Committee.
101. The Panel is further aware of the extensive history of animosity between the parties.
102. The Panel considers that, therefore, Cr Southwell made the various comments with the intention of causing a detriment to Mr C Scott and Cr M Scott.
103. This element is met.

Conclusion

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



## **Allegation 6 – January Motion and Reasons for Motion**

### Cr Southwell was an Elected Member at the relevant times

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

106. This element is met.

### Cr Southwell made use of his office as Council Member of the Shire

107. Due to the facts that Cr Southwell:

- a. placed the January Motion along with the relevant “reasons for motion” in the Agenda for the January OCM in his capacity as a councillor of the Shire; and
- b. attended and presided over the January OCM in his capacity as Shire President, the Panel finds that it is more likely than not that Cr Southwell was acting in his capacity as an elected member made use of his office as a council member.

108. This element is met.

### Cr Southwell’s use was improper

109. The Complainant has argued that bringing the January Motion and publishing the reasons for motion was improper as the same:

- a. was a mechanism to place the same on Shire record;
- b. showed no respect for the Council’s prior stance that a similar matter (the December Motion) was appropriate to consider confidentially behind closed doors;
- c. contained derogatory, incorrect, deceptive and detrimental comments;
- d. falsely suggested an inappropriate family collusion between Cr Scott and Mr Scott;
- e. contained an unclear and unsubstantiated reference to withheld official documents; and
- f. included the baseless offensive, disrespectful, knowingly incorrect presumption that the Complainant believed himself not answerable to the Shire.

110. The Panel has reviewed the reasons for the January Motion published in the agenda and refers particularly to the following:

- a. *“Lately, an incident has occurred which damages irreparably the trust which this Council must have in Cr Murray Scott as one of its most senior Fire Brigade leaders.”*
- b. *“Following that meeting, Mr Chris Scott sent the following text message to all Capel Fire Brigade captains: ‘Please contact and instruct all fire fighters who attended the fire on south-west highway four weeks ago not to say anything to the Shire’”*



- c. *Cr Murray Scott, who had been the Fire Control Officer in charge on the day of the incident, and hence a key person who was asked to be interviewed for the inquiry, followed the instruction from his brother and refused to discuss the incident or cooperate with the officer from the Shire who was conducting the inquiry.*
- d. *“Not only did people refuse to talk -- official documents were withheld.”*
- e. *“If he even once decides he is not answerable to this Shire in relation to the performance of the role, then he can no longer continue fill it.”*
- f. *“The person conducting the inquiry said some of those involved failed to co-operate.*

*These included the man in charge on the day in question, Cr Murray Scott.”*

- 111. In this case the January Motion was almost identical in content to the December Motion, except for that Mr C Scott’s name was replaced with Cr M Scott’s name.
- 112. The December Motion had been lost.
- 113. As discussed above, Cr Southwell did not have any reasonable basis for the belief the Cr Scott had not co-operated with the Shire in respect to the Investigation Report.
- 114. Further, nothing in any documentation provided to the Council provided any allegation that Cr Scott had acted inappropriately at any time or had withheld any information or documentation.
- 115. As such, the Panel finds that it is more likely than not that Cr Southwell included assertions and comments in the reasons for motion that:
  - a. he knew were false and misleading;
  - b. were gross over exaggerations; and
  - c. cast aspersions as to Cr Scott’s character and motives.
- 116. The Panel further finds that it is more likely than not that, due to the fact Cr Southwell did not move the January Motion, the inclusion of the January Motion and the reasons for motion in the Agenda was predominately for the purposes of asserting Cr Southwell’s view point in a public and formal forum and not an a unbiased exercise of his power as a councillor.
- 117. The Panel finds it is more likely than not that the conduct was in breach of the Code as:
  - a. Cr Southwell made unsubstantiated allegations which indicated he did not:
    - i. act with reasonable care and diligence; or
    - ii. act with honesty and integrity.
  - b. publishing the January Motion and reasons for motion did not treat Cr Scott with respect and fairness;
  - c. making the allegation that Cr Scott refused to co-operate with the Shire was vexatious;



- d. it was highly likely that publishing the January Motion and reasons for motion would cause Cr Scott unwarranted offence or embarrassment;
  - e. publishing the January Motion and reasons for motion was publicly criticising Cr Scott in a way that cast aspersions on his competence and credibility.
118. The Panel finds it is more likely than not publishing the January Motion and reasons for motion was improper as such conduct:
- a. was in breach of the Code;
  - b. was of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
  - c. is deserving of a penalty.

119. This element is met.

Cr Southwell intended detriment to be suffered by another person

120. Due to the nature of the January Motion and the contents of the reasons for motion the Panel finds that the only reasonable motivation was to cause a personal detriment to Cr Scott.
121. In the event that Cr Southwell wished to improve accountability to the Shire, or the procedures or processes under which the volunteer firefighters operated, then the January Motion and reasons for motion was not a reasonable or responsible way to achieve that goal.
122. As such, the Panel finds, to the required standard that Cr Southwell did intend to cause a detriment to the Complainant when publishing the January Motion and reasons for motion.

123. This element is met.

Conclusion

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

**Allegation 7 – The December Post**

Cr Southwell was an Elected Member at the relevant times

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

126. This element is met.

Cr Southwell made use of his office as Council Member of the Shire

127. Due to the facts that:
- a. Cr Southwell used the Facebook page entitled "*Cr Michael Southwell, Capel Shire President*"; and



- b. the December Post related directly to matters concerning the Shire and Council; and
- c. Cr Southwell was discussing the relevant matters using his knowledge and authority as Shire President,

the Panel finds that it is more likely than not that Cr Southwell was acting in his capacity as an elected member made use of his office as a council member when making the December Post.

128. This element is met.

Cr Southwell's use was improper

129. The Complainant alleges that the December Post is improper as it selectively quotes the text message and repeats various incorrect matters.

130. At the date the December Post was made:

- a. The information referred to in paragraph 76.e and paragraph 76.f above was available to Cr Southwell;
- b. the December OCM had occurred;
- c. the Council had decided that the discussion of the December Motion was appropriate to hold behind closed doors; and
- d. the December Motion had been unsuccessful.

131. In this case the Panel considers the following comments to be improper and in breach of the Code:

- a. *"I stand by my request to council last week to remove our volunteer Fire Brigade chief Mr Chris Scott..."* – this comment fails to respect the decision of Council already made. It is irrelevant whether the same was lost by failure to reach absolute majority or otherwise, it is still a valid decision of Council.
- b. *"Several including Cr Murray Scott refused to co-operate with the inquiry"* – as noted above, Cr Southwell was aware at this stage that this assertion was incorrect.
- c. *"The Motion was not lost. The vote was 4-1 in favour, it failed due to the requirement of an absolute majority."* – this explanation is misleading. The vote is technically still lost.

132. In addition, the image of the Text does not include the entire text which would have provided some additional relevant context to the matter.

133. Where a matter has been considered before Council, and particularly where Council has decided it was appropriate to consider the same privately behind closed doors, it is inappropriate to attempt to circumvent the outcome of that decision by publicly restating the same in a manner that clearly implies the author did not respect or agree with the decision of Council.

134. The Panel finds it is more likely than not that the December Post was improper as such conduct:



- a. was in breach of the Code;
- b. was of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
- c. is deserving of a penalty.

135. This element is met.

Cr Southwell intended detriment to be suffered by another person

136. Due to the fact that, the December Motion had already been lost and the fact that Council had resolved to discuss the relevant matter behind closed doors, the Panel considers that Cr Southwell's predominant purpose for making the December Post was to:

- a. expound and repeat in a very public forum, the implication that Mr Scott's actions were wrongful in an effort to further publicly damage Mr Scott's reputation; and
- b. declare his opinion that the Council had ineptly made the wrong decision.

137. As such, the Panel finds, to the required standard that Cr Southwell did intend to cause a detriment to Mr Scott and to the Council in general when making the December Post.

138. This element is met.

Conclusion

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

**Allegation 8 – The January Post**

Cr Southwell was an Elected Member at the relevant times

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

141. This element is met.

Cr Southwell made use of his office as Council Member of the Shire

142. Due to the facts that:

- a. Cr Southwell used the Facebook page entitled "*Cr Michael Southwell, Capel Shire President*"; and
- b. the January Post related directly to matters concerning the; and
- c. Cr Southwell was discussing the relevant matters using his knowledge and authority as Shire President,



the Panel finds that it is more likely than not that Cr Southwell was acting in his capacity as an elected member made use of his office as a council member when making the January Post.

143. This element is met.

Cr Southwell's use was improper

144. The January Post consisted of the January Motion and the accompanying reasons for motion.

145. The circumstances in which the January Post was made were that Cr Southwell had included the January Motion and reasons as a motion with prior notice in the Agenda for the January OCM. At the January OCM Cr Southwell then declined to move January Motion.

146. The Panel reiterates its findings in paragraphs 113 to 121 above as to the improper nature of the January Motion and certain of the comments contained in the relevant reasons.

147. In addition to this, Cr Southwell had already formally declined move the January Motion at the January OCM. Irrespective of the motives for not eventually moving the same, it was then totally inappropriate, and demonstrated an express disregard of the usual and proper Council processes for making a decision, to repeat the January Motion and reasons in a public forum which denied any other party (but especially Cr Scott) the right to speak against, or not support, the January Motion.

148. The Panel finds it is more likely than not that the January Post was improper as such conduct:

- a. was in breach of the Code;
- b. was of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
- c. is deserving of a penalty.

149. This element is met.

Cr Southwell intended detriment to be suffered by another person

150. For the same reasons set out paragraphs 123 to 125 above, the Panel considers the contents of the December Post to be made with the intention to retirement the Complainant.

151. In addition, Cr Southwell's reckless disregard for the usual and proper processes of making and discussing a motion before Council indicates that he intended to disrespect the Council and their ability to make a considered and proper decision regarding the same.

152. The Panel finds, to the required standard that Cr Southwell did intend to cause a detriment to Cr Scott and to the Council in general when making the January Post.

153. This element is met.



### Conclusion

154. The elements required to find a breach of regulation 7(1)(b) of the Regulations have been met.

### Summary of Panel's Findings

155. In respect to Allegation 1 - Cr Southwell did not commit a breach of Regulation 7(1)(b) of the Regulations and therefore did not commit a minor breach.
156. In respect to Allegation 2 - Cr Southwell did not commit a breach of Regulation 7(1)(b) of the Regulations and therefore did not commit a minor breach.
157. In respect to Allegation 3 - Cr Southwell did not commit a breach of Regulation 7(1)(b) of the Regulations and therefore did not commit a minor breach.
158. In respect to Allegation 4 - Cr Southwell did not commit a breach of Regulation 7(1)(b) of the Regulations and therefore did not commit a minor breach.
159. In respect to Allegation 5 - Cr Southwell did commit a breach of Regulation 7(1)(b) of the Regulations and therefore did commit a minor breach.
160. In respect to Allegation 6 - Cr Southwell did commit a breach of Regulation 7(1)(b) of the Regulations and therefore did commit a minor breach.
161. In respect to Allegation 7 - Cr Southwell did commit a breach of Regulation 7(1)(b) of the Regulations and therefore did commit a minor breach.
162. In respect to Allegation 8 - Cr Southwell did commit a breach of Regulation 7(1)(b) of the Regulations and therefore did commit a minor breach.

### **Signing**

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Tim Fraser (Presiding Member)

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Emma Power (Member)

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Peter Rogers (Member)



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## Local Government Standards Panel

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Complaint Number	SP 2021-041
Legislation	<i>Local Government Act 1995 (WA)</i>
<b>Complainant</b>	<b>Former Councillor Murray Scott</b>
<b>Respondent</b>	<b>Former Councillor Michael Southwell</b>
Local Government	<b>Shire of Capel</b>
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members for Penalty Consideration	Mr Tim Fraser (Presiding Member) Councillor Peter Rogers (Member) Ms Elanor Rowe (Deputy Member)
Heard	24 June 2021 Determined on the documents
Penalty Considered	11 November 2021
Outcome	No Sanction

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### DECISION AND REASONS FOR DECISION

Delivered 11 January 2022

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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 24 June 2021, the Panel found that Councillor Michael Southwell (“Cr Southwell”), a councillor for the Shire of Capel (“the Shire”), committed four minor breaches under the Local Government Act 1995 (WA) (“the Act”) and Regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (“the Regulations”) when he:
  - a. made various improper statements in support of a motion without notice at the Ordinary Council Meeting of 16 December 2020;
  - b. published a motion with notice with “reasons for Motion” in the Agenda for the Ordinary Council Meeting of 20 January 2021;
  - c. made a Facebook Post on 20 December 2020 which contained allegedly misleading comments; and
  - d. made a Facebook Post on 31 January 2021 which restated the motion and reasons for motion previously published in the Agenda for the Ordinary Council meeting of 20 January 2021;(together the “Minor Breaches”).
2. On 18 August 2021, the Panel published its Finding and Reasons for Finding (“Findings”) stating that Cr Southwell had breached Regulation 7. The Panel reviewed all the evidence presented to it and made the following observations:

### **“Allegation 5 – Comments made at December OCM**

92. *The Panel reiterates that even a genuine concern by a Councillor that not all procedures and processes have been correctly followed does not permit that councillor to say anything they wish, or indulge in unsupported speculation, in a public forum.*

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### **Allegation 6 – January Motion and Reasons for Motion**

115. *As such, the Panel finds that it is more likely than not that Cr Southwell included assertions and comments in the reasons for motion that:*
  - a. *he knew were false and misleading;*
  - b. *were gross over exaggerations; and*
  - c. *cast aspersions as to Cr Scott’s character and motives.*

.....

120. *Due to the nature of the January Motion and the contents of the reasons for motion the Panel finds that the only reasonable motivation was to cause a personal detriment to Cr Scott.*

.....

### **Allegation 7 – The December Post**

133. *Where a matter has been considered before Council, and particularly where Council has decided it was appropriate to consider the same privately behind*



*closed doors, it is inappropriate to attempt to circumvent the outcome of that decision by publicly restating the same in a manner that clearly implies the author did not respect or agree with the decision of Council.*

.....

#### **Allegation 8 – The January Post**

147. ....Cr Southwell had already formally declined the move of the January Motion at the January OCM. Irrespective of the motives for not eventually moving the same, it was then totally inappropriate, and demonstrated an express disregard of the usual and proper Council processes for making a decision, to repeat January Motion and reasons in a public forum which denied any other party (but especially Cr Scott) the right to speak against, or not support, the January Motion.

.....

151. *In addition, Cr Southwell’s reckless disregard for the usual and proper processes of making and discussing a motion before Council indicates that he intended to disrespect the Council and their ability to make a considered and proper decision regarding the same.”*

#### **Jurisdiction and Law**

3. Cr Southwell was a councillor at the time of the alleged breaches and was still a councillor when the Panel met on 24 June 2021 to consider whether the alleged breaches in the Complaint occurred.
4. However, at the time the Panel convened, on 11 November 2021, to consider how it should deal with the Minor Breaches, Cr Southwell was no longer an elected member of the Shire.
5. Under the Act, if a Panel finds that a council member has committed a breach, it is required to determine how the breach should be dealt with<sup>1</sup>. Therefore, the Panel proceeded to consider how it should deal with the Minor Breaches at the meeting on 11 November 2021.

#### **Possible Sanctions**

6. 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*

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<sup>1</sup> *Local Government Act 1995 (WA)*, s 5.110(6).



(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).*

7. 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 however indicate that in all circumstances the relevant councillor should not be penalised further.
8. Sub-section 5.110(6)(b)(iv) (in respect of a monetary sanction) was introduced in 2019 to allow the Panel to require a councillor to personally bear the cost of dealing with a complaint, which in other circumstances, would be paid by the local government concerned. This ensures the cost of a breach is borne by the councillor individually, and not simply passed onto the local government and therefore, ultimately, rate payers.

### **Cr Southwell's Submissions**

9. 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>2</sup>
10. In a letter dated 27 August 2021, Cr Southwell was:
  - i. notified of the Panel's Finding of the Minor Breaches;
  - ii. provided with a copy of the Panel's Findings; and
  - iii. offered an opportunity to make submissions as to how the Minor Breaches should be dealt with under section 5.110(6) of the Act.
11. The Department did not receive a response from Cr Southwell in relation to the Panel's Findings.

### **Panel's Consideration**

12. The purpose of the imposition of a sanction under the Act is generally for the protection of the public and the maintenance of standards of council members. Furthermore, it reflects the disapproval of a contravention of the Regulations, dissuades councillors from other local governments from engaging in similar conduct, and facilitates the maintenance of appropriate standards of behaviour by councillors. Guidance on the factors which the Panel may consider in determining the appropriate penalty to impose, include, but are not limited to:

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<sup>2</sup> *Local Government Act 1995 (WA)*, s 5.110(5).



- a. the nature and seriousness of the breaches;
- b. the councillor's motivation for the contravention;
- c. whether or not the councillor has shown any insight and remorse into his / her conduct;
- d. whether the councillor has breached the Act knowingly or carelessly;
- e. the councillor's disciplinary history;
- f. the likelihood or not of the councillor committing further breaches of the Act;
- g. the councillor's personal circumstances at the time of the conduct, and at the time of imposing the sanction;
- h. the need to protect the public through general deterrence and maintain public confidence in local government; and
- i. any other matters which may be regarded as aggravating conduct or mitigating its seriousness.

13. In this case, the Panel found that Cr Southwell breached Regulation 7 when he:

- a. made various improper statements in support of a motion without notice at the Ordinary Council Meeting of 16 December 2020;
- b. published a motion with notice with "reasons for Motion" in the Agenda for the Ordinary Council Meeting of 20 January 2021;
- c. made a Facebook Post on 20 December 2020 which contained allegedly misleading comments; and
- d. made a Facebook Post on 31 January 2021 which restated the motion and reasons for motion previously published in the Agenda for the Ordinary Council meeting of 20 January 2021.

14. The subject of the Minor Breach Findings, was viewed by the Panel as, and considered, a serious matter. Despite that, throughout the proceedings, Cr Southwell did not show any insight or remorse as to the effect his conduct may have had on the Complainant. The Panel also notes that Cr Southwell had previously been found to have committed several other minor breaches.

15. On that basis, the Panel considered it reasonable that a penalty may have been warranted.

16. However, as stated above, at the time when the Panel convened to decide how the breaches were to be dealt with, Cr Southwell had ceased to be an elected member. Therefore, in the circumstances, the Panel finds that the imposition of a penalty would be futile.



## Panel's Decision

17. Having regard to the Findings, the matters set out herein, and the general interests of local government in Western Australia, the Panel's decision on how the Minor Breach is to be dealt with under s5.110(6)(a) of the Act, is that no sanction is to be imposed against Cr Southwell.

A handwritten signature in black ink, appearing to be 'Tim Fraser'.

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Tim Fraser (Presiding Member)

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

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Peter Rogers (Member)

A handwritten signature in black ink, appearing to be 'Elanor Rowe'.

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Elanor Rowe (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 of business or principal office in the State."