

Final Report
Preliminary investigation - *Ombudsman Act 1972*

Complainant	Councillor Don Chapman
Council	City of Onkaparinga
Ombudsman reference	2017/00046
Dates complaints received	29 December 2016 and 15 June 2017
Issues	<ol style="list-style-type: none">1. Whether Mayor Rosenberg breached clause 3.2 of the Code of Conduct for Council Members in relation to Item 14.2 at the council meeting held on 29 November 20162. Whether Mayor Rosenberg breached clauses 3.14 and/or 3.16 of the Code of Conduct for Council Members in relation to Item 14.2 at the council meeting held on 29 November 20163. Whether Mayor Rosenberg breached clause 3.2 of the Code of Conduct for Council Members and/or regulation 4 of the Procedures at Meetings Regulations in relation to Item 4.1 at the special council meeting held on 13 June 2017

Jurisdiction

The complaint alleges breaches of Part 3 of the Code of Conduct for Council Members made pursuant to section 63 of the *Local Government Act 1999* (**the Code of Conduct**).¹ An act of a council member that may constitute grounds for complaint under the Local Government Act is taken to be an 'administrative act' for the purposes of the Ombudsman Act.² A breach of the Code of Conduct amounts to a breach of section 63 of the Local Government Act as well as an administrative act that is made contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from Mayor Lorraine Rosenberg
- considering the *Local Government Act 1999* (**the Act**)
- considering the *Local Government (Procedures at Meetings) Regulations 2013*
- considering the Code of Conduct for Council Members (**the Code of Conduct**)

¹ The Code of Conduct was gazetted on 29 August 2013.

² Section 263A(4) Local Government Act; section 3, Ombudsman Act.

- considering the Local Government Association of South Australia's Obtaining Legal Advice: Guidelines for Mayors/Chairpersons (May 2011)
- considering the City of Onkaparinga's Code of Practice - Proceedings of meetings (2015) (**the Meetings Proceedings Code**)
- providing the complainant and the council with my provisional report for comment, and considering their responses
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.³ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved
...⁴

Response to my provisional report

The complainant responded to my provisional report on 29 August 2017. I summarise his response as follows:

29 November 2016 council meeting

- Mayor Rosenberg has consistently maintained that legal advice is always to be heard in confidence, including in this instance when the advice was more of an explanation than legal advice. Cr Chapman disagrees with this approach
- it is not normal local government practice to move items into confidence that involve a letter from a councillor's legal representative
- Mayor Rosenberg waited five months after the council received the legal advice from Norman Watercourse lawyers to raise the issue of the council's recommendation made at the 24 May 2016 council meeting
- council members were not provided with all relevant information to consider prior to voting at the 29 November 2016 council meeting
- there is no reason why council members could not have been provided with the information they required to make an informed decision
- Mayor Rosenberg has not provided Councillors Jamieson and Kilby with an acceptable verbal or written apology
- given that the letter from Iles Selley Lawyers was received on 16 November 2016 there was ample time for it to be included as an item on the normal agenda and it did not need to be considered as Urgent Business
- it is not Cr Chapman's recollection that during the council meeting held on 29 November 2016, council staff offered to display the minutes of the 24 May 2016 council meeting
- Mayor Rosenberg did not wait twelve minutes for council members to read the Iles Selley letter, rather councillors were given approximately seven minutes which was an inadequate amount of time

³ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

⁴ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

- the reason given by Mayor Rosenberg to my investigation for moving item 14.2 into confidence is incorrect
- he remains of the view that Mayor Rosenberg did not perform and discharge her official duties with reasonable care and diligence.

13 June 2017 council meeting

- the Chief Executive Officer could have prepared a Late Item Report rather than the matter being raised as Urgent Business
- there was adequate time to provide council members with information about this matter prior to the commencement of the council meeting
- the decision to inform the chamber that there was an issue with the Elector Representation Review process had no impact on the public aspect of the process and in Cr Chapman's view, this is another example of Mayor Rosenberg withholding information
- the lack of information provided resulted in council members being anxious and concerned that the tampering concerned them
- he does not agree with the Mayor's view that she does not have to answer questions he posed to her about this issue
- he was not attempting to interfere with the requirements of the ICAC, rather the point of his email to Mayor Rosenberg of 14 June 2017 was to alleviate his concerns about the matter
- he remains of the view that Mayor Rosenberg did not perform and discharge her official duties with reasonable care and diligence and that she breached Regulation 4 of the Procedures at Meetings Regulations.

In response to my provisional report, the Mayor commented on 11 September 2017 that:

- the investigation correctly summarised the events of both complaints
- she continues to be of the view that the complaints are part of ongoing behaviour by Cr Chapman towards her
- she is disappointed that several of the matters raised by Cr Chapman in his complaint were already answered via Questions on Notice or from Elected Member enquiries.

I have considered the responses provided to my provisional report, however they have not caused me to change those views expressed in my provisional report.

Preliminary comments

The complainant has made two separate complaints regarding the actions of Mayor Lorraine Rosenberg. I have determined that the most appropriate course is to investigate and report on those complaints together

Background

1. The complainant made a number of allegations concerning Mayor Rosenberg's conduct at two separate council meetings which I address below.
2. In relation to a council meeting held on 29 November 2016, the complainant alleges that:
 - Mayor Rosenberg moved Item 14.2 as urgent business and asked for the item to be considered in confidence. Item 14.2 concerned a Code of Conduct investigation involving Cr William Jamieson and a resolution of the council dated 24 May 2016.
 - Mayor Rosenberg had received verbal legal advice in relation to the council's recommendation at Item 9.8 of the agenda for the 24 May 2016 council meeting.

While Mayor Rosenberg 'read out' the verbal advice at the meeting on 29 November 2016, a written version of that legal advice was not tabled in order for elected members to fully consider it prior to voting

- elected members were not provided with the minutes of the 24 May 2016 council meeting at the 29 November 2016 meeting so that they could fully consider those minutes prior to voting
 - elected members were not given adequate time to consider all relevant documents
 - as a result of the urgency of considering Item 14.2, several elected members who may have been complainants in the Cr Jamieson investigation were unable to declare a conflict of interest
 - by requesting verbal legal advice Mayor Rosenberg acted without authority and misused council resources
 - Mayor Rosenberg has not provided Crs Jamieson and Kilby with a verbal or written apology as required by the council.
3. In relation to the special council meeting of 13 June 2017 the complainant alleges that:
- Mayor Rosenberg insisted that Item 4.1 be moved into confidence without any explanation. Item 4.1 concerned the Elector Representation Review and issues about potential tampering activities with the submissions in the last public consultation phase.
 - elected members were not provided with any documentation or explanation other than that the matter concerned alleged breaches of sections 90(3)(f) and (g) of the Local Government Act
 - the complainant raised his concerns and posed a number of questions to Mayor Rosenberg the next day, however she did not provide answers to the complainant, instead advising him that his email and the implied threat met the test outlined in section 21 of the *Independent Commissioner Against Corruption Act 2012 (the ICAC Act)* and as a result the email would be reported to the Office for Public Integrity (OPI).
4. I provide further details in relation to those allegations below.

29 November 2016 Meeting - Agenda Item 14.2

5. In May 2015 a complaint was made to the council concerning the conduct of Cr Jamieson during and after the council meeting held on 24 May 2015. I understand that Cr Jamieson received notice of the complaint by letter dated 6 October 2015 and the external investigator's (Mr Ted Byrt) final report was completed and provided to the council on 15 April 2016.
6. Item 9.8 of the Agenda for the council meeting to be held on 24 May 2016 concerned a report in relation to the findings of the investigation. Specifically, Mr Byrt found that Cr Jamieson behaved in a manner that was in breach of the Code of Conduct in relation to three grounds:
- Clause 2.3, by not acting in a reasonable, just, respectful way
 - Clause 2.10, by acting to bully or harass other Council members
 - Clause 2.11, by acting to bully or harass Council staff.
7. Pursuant to Clause 2.25 of the Code of Conduct, the external investigator referred the matter back to the elected members to determine the most appropriate action to take.
8. The minutes of the council meeting held on 24 May 2016 record that the council passed the following resolution in relation to Item 9.8:

That Council resolves:

- a. Not to accept the investigator's findings and justifies not accepting the findings because the time delays in assessing the complaint, notifying the complainant and investigating the complaint were too far outside the boundaries of our Code of Conduct procedure to be fair to both Crs Kilby and Jamieson.
 - b. That the most appropriate course of action is for the Council to apologise to both Councillors for this unfortunate delay and for the stress and anxiety resulting from this delay.
 - c. That the Code of Conduct review report come to Council for consideration as a matter of urgency by the Council meeting in July 2016.
9. On or around 14 November 2016 Mayor Rosenberg received a letter on behalf of Cr Jamieson from his legal representative. The letter, in part, requested Mayor Rosenberg to write a letter of apology to Cr Jamieson. I understand that Mayor Rosenberg also had telephone contact from Cr Jamieson's legal representative seeking a response to the letter.
10. Mayor Rosenberg was of the view that the resolution passed at the 24 May 2016 council meeting constituted the apology, therefore no other apology was required. However, as the letter from Cr Jamieson's legal representative requested a letter of apology be written, the matter needed to be considered by the council.
11. The minutes of the council meeting held on 29 November 2016 recorded the following in relation to Items 14.1 and 14.2:

14.1 Confidential - Code of Conduct investigation

MOVED Cr Themeliotis.

1. That:
 - a. under the provisions of Section 90(2) of the Local Government Act 1999 an order be made that the public, with the exception of staff on duty, be excluded from attendance at the meeting in order to consider this item in confidence.
 - b. the Council is satisfied that it is necessary that the public, with the exception of staff on duty, be excluded to enable the Council to receive [and] discuss the matter at the meeting on the following grounds:

Section 90(3)(h) legal advice;
 - c. accordingly, on this basis the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information or discussion confidential.

Seconded by Cr Olbrich.

CARRIED

Cr Olsen left his seat in the Chamber at 11.15pm.

Cr Jamieson declared a material conflict of interest as a person the subject of the matter and left the meeting at 11.15pm.

Cr Olsen resumed his seat in the Chamber at 11.17pm.

Cr Bray left his seat in the Chamber at 11.26pm.

Cr Bray resumed his seat in the Chamber at 11.27pm.

Cr Hennessy left his seat in the Chamber at 11.36pm.

Cr Hennessy resumed his seat in the Chamber at 11.38pm.

MOVED Cr Hennessy.

3. That the matter of Code of Conduct investigation having been considered by the Council in confidence under sections 90(2) and 90(3)(h) of the Local Government Act 1999 that an order be made under the provisions of section 91(7) and (9) of the Local Government Act 1999 that the Code of Conduct investigation and the minutes of the Council and related documents of the subject matter be kept confidential as they relate to legal advice.
4. That, pursuant to section 91(9)(a) of the Local Government Act 1999, Council delegates the duty to conduct an annual review of the confidentiality order to the Chief Executive Officer, or their sub-delegate.
5. That pursuant to section 91(9)(c) of the Local Government Act 1999, Council delegates the power to revoke the confidentiality order to the Chief Executive Officer, or their sub-delegate.

Seconded by Cr Themeliotis.

CARRIED

Mayor Rosenberg reopened the meeting to the public at 11.40pm.

14.2 Urgent business - Cr Greaves - Code of Conduct investigation

MOVED by Cr Greaves.

That in response to the letter from Iles Selley Lawyers regarding Mr William Jamieson's Code of Conduct investigation, Council direct the Mayor to write informing them that all issues in relation to the resolution of Council dated 24 May 2016 have been resolved.

Seconded by Cr Hennessy.

Cr Chapman MOVED that the question be adjourned to the next Council meeting of 13 December 2016.

Seconded by Cr Schulze.

CARRIED.

12. The council subsequently considered the matter at the council meeting held on 13 December 2016. The minutes record the following at Item 3.2:

Adjourned business - Urgent business - Cr Greaves - Code of Conduct investigation

In accordance with Regulation 19(3) of the *Local Government (Procedures at Meetings) Regulations 2013* item 14.2 "Urgent business - Cr Greaves - Code of Conduct investigation" adjourned from the Council meeting of 29 November 2016 was considered.

Motion from Council meeting 29 November 2016

MOVED Cr Greaves.

That in response to the letter from Iles Selley Lawyers regarding Mr William Jamieson's Code of Conduct investigation, Council direct the Mayor to write informing them that all issues in relation to the resolution of Council dated 24 May 2016 have been resolved.

Seconded by Cr Hennessy.

Cr Jamieson declared a perceived conflict of interest as being personal. Cr Jamieson stated he would receive no benefit or detriment, direct or indirect, personal or pecuniary from considering and voting on this matter and chose to remain in the meeting.

Cr Brown entered the meeting at 7.10pm.

Cr Chapman MOVED that the question be adjourned to after item 15.2 of the agenda.

Seconded by Cr Bray.

Tied vote.

No decision on the formal motion to adjourn.

Cr Parslow MOVED that the MOTION be PUT.

Seconded by Cr Merritt.

Tied vote.

No decision on the formal motion that the motion be put.

Cr Schulze declared a perceived conflict of interest as he provided a submission mentioned in the correspondence. Cr Schulze stated he would receive no benefit or detriment, direct or indirect, personal or pecuniary from considering and voting on this matter and chose to remain in the meeting.

Cr Kilby declared a perceived conflict of interest as a person mentioned in the matter. Cr Kilby stated she would receive no benefit or detriment, direct or indirect, personal or pecuniary from considering and voting on this matter and chose to remain in the meeting.

The substantive MOTION was LOST on the Mayor's casting vote.

Cr Hennessy called a DIVISION and the decision was set aside.

For:

Cr Kilby	Cr Parslow	Cr Wainwright	Cr Themeliotis	Cr Greaves
Cr Nankivell	Cr Merritt	Cr Gunn	Cr Nicholls	

Against:

Cr Swann	Cr Schulze	Cr Holtham	Cr Bray	Cr Deakin
Cr Jamieson	Cr Chapman	Cr Brown	Cr Hennessy	Mayor Rosenberg

LOST.

13. The minutes of the council meeting of 13 December 2016 record the following at item 16:

16 Closure

There being no further business Mayor Rosenberg officially declared the meeting closed at 11.01pm.

The below items listed on the agenda will now be considered at the January 2017 Council meeting.

15.1 Notice of Motion - Cr Bray - Health Issues

15.2 Notice of Motion - Cr Jamieson - Code of Conduct Investigation

15.3 Tier I Event

15.5 Audit, Risk, Value, and Efficiency Committee confidential minutes.

14. According to the complainant, when he queried why Item 15.2 of the 13 December 2016 council meeting was to be treated in confidence, he was advised by Ms Desma Morris, Manager of Governance, in part, the following:

Administration sought legal advice regarding this Notice of Motion. The advice was that the Iles Selley letter was tabled, in confidence, at item 14.1 of the Council's meeting of 29 November 2016 together with a proposed draft response letter prepared by Norman Waterhouse. An order maintaining the confidentiality of the tabled documents was made under Section 91 of the LG Act at that meeting. As the letter is currently the subject of an Order under Section 91 of the LG Act and part of the explanation to Cr Jamieson's Notice of Motion includes material that make reference to the content of the letter we considered the following course necessary so as to avoid contravening the current Section 91 Order and to ensure the Council has sufficient information before it to consider the matter.

15. In Mayor Rosenberg's response to my investigation regarding Item 14.2 she advised that:
- Item 14.2 was moved as urgent business
 - the Mayor or Chair of a meeting is unable to move an item into confidence, rather this requires a motion of the council to do so
 - the motion by the council to move the item into confidence is recorded in the council minutes of 29 November 2016
 - it is normal local government practice to move items into confidence to allow discussion regarding legal advice and/or discussing individuals without their names being in the public arena
 - the council can subsequently release meeting notes and the like if they agree to do so
 - the item was considered as urgent business for a number of reasons including the persistence of Cr Jamieson's legal representative for a response, including two follow up contacts to Mayor Rosenberg in a period of 10 days
 - urgent business is used regularly by councillors to raise an item at the end of a council meeting and the Chair makes a determination on the urgency or otherwise of the item.
16. In relation to the allegation that Mayor Rosenberg received legal advice from Norman Waterhouse Lawyers in relation to Item 9.8 of the 24 May 2016 council meeting but did not table the legal advice for elected members to consider, Mayor Rosenberg responded:
- ...I informed the chamber that staff had informed me they had verbal legal advice on this matter (an apology to Councillors Kilby and Jamieson) and as it was verbal it would be difficult to "table" it, however the legal advice was outlined to the councillors at the meeting held on 29 November 2016 and a draft of the response letter based on legal advice sought by staff was displayed on the screen at that meeting.
17. Further, Mayor Rosenberg advised that in her opinion the legal advice confirmed that the recommendation recorded in the minutes of the council meeting of 24 May 2016 constituted an apology, therefore no other apology was required.
18. In relation to the allegation that Mayor Rosenberg did not provide all elected members with a copy of the council's meeting minutes of the 24 May 2016 meeting so that they could consider them fully prior to voting, she advised my investigation that staff did offer to have the minutes presented on a screen if the council wanted but the offer was not pursued by the councillors present. In any case, Mayor Rosenberg was seeking a response as to whether the councillors wanted her to write a letter of apology or if the council resolution of 24 May 2016 constituted the apology.

19. In relation to the allegation that Mayor Rosenberg did not allow adequate time to consider all relevant documents, she responded:

I tabled the letter and waited 12 minutes for them to read it before asking for any questions. This letter was four pages long. The minutes of the meeting held on 29 November 2016 reflect that the matter commenced at approximately 11pm and did not conclude until 11:44pm....The point of the letter and my question to the council was a very simple one - do you want a letter of apology or not?...

20. In relation to the allegation that as a result of the urgency of the matter in considering Item 14.2 elected members who may have been complainants in the Cr Jamieson investigation were unable to declare a conflict of interest, Mayor Rosenberg responded:

Any councillor could have declared an interest at any time during the discussion and tabling of the letter and in particular after having time to read the letter. It is not unusual for declarations to occur after an item begins. During debate it often happens that someone will expand the conversation into areas that then trigger an interest to be recorded...I also find it of interest that this matter has been in the chamber, with notice on several occasions with varying applications of conflicts being declared by councillors.

21. Mayor Rosenberg advised my investigation that Item 14.2 was moved into confidence at the 29 November 2016 council meeting for a number of reasons including:

- the report in regards to the Cr Jamieson code of conduct investigation named several councillors and staff
- the complete and final version of the report was provided as confidential supporting information on the elected member website and not published in the public report to the council
- in her view the letter received on behalf of Cr Jamieson from Iles Selley Lawyers was the property of Cr Jamieson and at the discretion of Cr Jamieson to disclose publically.

22. Mayor Rosenberg also advised my investigation that the reason the item was considered as urgent business was due to her view that the matter had been finalised. Therefore, when the letter was received from Cr Jamieson's legal representative requesting a letter of apology be written she considered that the matter should be dealt with in a timely manner.

23. In relation to the allegation that Mayor Rosenberg breached Regulation 4 of the Procedures at Meetings Regulations, she responded:

The procedure to enter into confidence was correct and based on sound reasons. The subject of the question to council was a tabled letter supplied to all council members and time was allowed to read and then ask questions about the letter. A summary of the reason for tabling and requesting direction was given. An offer to display the minutes of 24 May 2016 was given and not pursued by the councillors present. There was a lot of time devoted to questions and answers were given to questions raised as evidence in the time noted in the minutes of the meeting.

13 June 2017 Meeting - Agenda Item 4.1

24. The complainant alleges that at the 13 June 2017 special council meeting, Mayor Rosenberg at the last item of business (Item 4.1) insisted that a matter be moved into confidence without any explanation and without provision of any relevant documentation. The matter for discussion concerned the Elector Representation Review (ERR).
25. The ERR is a process to determine whether there would be any benefit to the community from changes to the composition and ward structure of the council. The

council undertook community consultation in relation to the ERR during August and September 2016 and February and March 2017. The final stage of the review process involves the presentation of a proposal report to the Electoral Commission for consideration and certification.

26. The minutes of the council meeting held on 13 June 2017 record the following in relation to agenda Item 4.1:

Urgent business - Confidential - Elector Representation Review - Update

MOVED Cr Greaves.

1. That:
 - a. under the provisions of Section 90(2) of the Local Government Act 1999 an order be made that the public, with the exception of staff on duty, be excluded from attendance at the meeting in order to consider this item in confidence.
 - b. the Council is satisfied that it is necessary that the public, with the exception of staff on duty, be excluded to enable the Council to consider the information at the meeting on the following grounds:

Section 90(3)(f) information the disclosure of which could reasonably be expected to prejudice the maintenance of law, including by affecting (or potentially affecting) the prevention, detection or investigation of a criminal offence, or the right to a fair trial;

and

Section 90(3)(g) matters that must be considered in confidence in order to ensure that the council does not breach any law, order or direction of a court or tribunal constituted by law, any duty of confidence, or other legal obligation or duty;

- c. accordingly, on this basis the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information or discussion confidential.

Seconded by Cr Themeliotis.

MOVED Cr Themeliotis.

2. That the matter of Urgent business - Confidential - Elector Representation Review - Update having been considered by the Council in confidence under sections 90(2) and 90(3)(f) and (g) of the Local Government Act 1999 that an order be made under the provisions of sections 91(7) and (9) of the Local Government Act 1999 that the Urgent business - Confidential - Elector Representation Review - Update and the minutes and the discussion of the Council relating to discussion of the subject matter be kept confidential until the completion of any external investigation in the matter.
3. That, pursuant to section 91(9)(a) of the Local Government Act 1999, Council delegates the duty to conduct an annual review of the confidentiality order to the Chief Executive Officer, or their sub-delegate.
4. That, pursuant to section 91(9)(c) of the Local Government Act 1999, Council delegates the power to revoke the confidentiality order to the Chief Executive Officer, or their sub-delegate.

Seconded by Cr Greaves.

Mayor Rosenberg reopened the meeting to the public at 9.16pm.

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27. On 14 June 2017 the complainant emailed Mayor Rosenberg and the council's Chief Executive Officer, Mr Mark Dowd, raising his concerns with the process of the special council meeting and asking Mayor Rosenberg to answer a number of questions in relation to the special council meeting and the information that was provided to councillors at that meeting.
28. Mayor Rosenberg responded the same day advising the complainant that in her view, the contents of his email met the test outlined in section 21 of the ICAC Act and as a result she intended to report the matter to the Office for Public Integrity. Section 21 prohibits preventing, hindering or obstructing a person in relation to making a complaint or report to ICAC.
29. On 15 June 2017 the complainant emailed Mayor Rosenberg stating that he did not agree with her interpretation of the email and advised that he intended to raise his concerns with my Office.
30. In Mayor Rosenberg's response to my investigation she advised that:
- Mr Dowd was advised of potential discrepancies relevant to the ERR process in the week leading up to the long weekend of 10 - 12 June 2017
 - Mayor Rosenberg was interstate during the period 9 June 2017 to 12 June 2017 and was not informed about this issue until she met with Mr Dowd at approximately 4.05pm on 13 June 2017
 - during that meeting Mr Dowd informed her that he had been made aware that tampering activities may have occurred in relation to submissions to the council's last public consultation phase. As a result Mayor Rosenberg and Mr Dowd went on to discuss:
 - whether or not to inform the elected body of the tampering
 - whether to inform the elected body of the options available to the council knowing that the activity had taken place
 - the risks associated with not reporting to the elected body and having to cancel the remainder of the ERR public submissions without explanation
 - how the elected body would be informed (given a number of factors, including keeping the matter confidential, the need to explain the interference prior to lodging with the OPI and the obligation to report to the OPI)
 - it was agreed that the special council meeting that was due to commence that evening would be the appropriate forum to advise the elected members that there was interference with the ERR submission process and that the interference was serious enough to report to the OPI
 - she raised the issue that, as the meeting was a special council meeting, there was no provision for 'urgent business' or 'late business provisions'
 - advice was sought from the Director of Corporate and City Services who advised:

Use of urgent business was appropriate due to the issue gaining momentum over the preceding long weekend and Council meeting was the first business day following the weekend.

The ERR is a very public process and was contentious amongst councillors leading to a number of changes in direction through formal decision making in the chamber.

The last round of consultation saw councillors being involved with the process in such a manner that potential unlawful practices that were advised during the course of the days leading to the Council meeting required a report to OPI.

Due to the timing of the information coming to hand about the potential unlawful practices of a councillor the resulting effect that this would have on the ERR process was unknown at the time of the Council meeting but was likely to have the effect of

delaying the process as information and guidance from the OPI and lawyers was required to inform next steps.

- given the above information, a decision was made to inform the chamber in basic terms that there was an issue with the ERR process and that it may be delayed
- no detailed information was provided to the chamber regarding the reasons for the potential delay due to the serious nature of the matter and the confidentiality issue
- at the special council meeting councillors discussed moving into confidence and a vote was taken whereby the majority of councillors agreed to move into confidence
- advice from the Director Corporate and City Services was that sections 90(3)(f) and (g) of the Local Government Act were the appropriate sections and were placed on a screen for councillors to see and discuss and accept or reject
- given the short notice of the matter to be addressed at the council meeting, Administration prepared the material to be displayed on the screen for the councillors and she had no involvement in this
- written prior notification was not provided due to the limited time
- it is clear that she was informed of the matter within a close timeframe to the councillors also being advised
- it is evident that the matter was urgent, given that a councillor was about to be reported to the OPI and as a result the ERR process may have been affected, therefore councillors needed to be aware that if this did happen there were reasons why
- there was no decision required of the council, the information provided to the council was for information only (to inform councillors that there had been interference with the ERR process and that the matter would be referred to the OPI)
- there is no obligation for her to provide answers to the questions posed by Cr Chapman about this issue
- the advice which Mayor Rosenberg received from the council's Administration about Cr Chapman's email was that it was an attempt to 'hold up lodgement' to OPI and as such interfered with the requirements of the ICAC Act.

Relevant law

31. Section 90(2) of the Local Government Act provides:

- (2) A council or council committee may order that the public be excluded from attendance at a meeting to the extent (and only to the extent) that the council or council committee considers it to be necessary and appropriate to act in a meeting closed to the public in order to receive, discuss or consider in confidence any information or matter listed in subsection (3) (after taking into account any relevant consideration under that subsection).

32. Sections 90(3)(f), (g) and (h) of the Local Government Act provides:

The following information and matters are listed for the purposes of subsection (2):

- (f) information the disclosure of which could reasonably be expected to prejudice the maintenance of law, including by affecting (or potentially affecting) the prevention, detection or investigation of a criminal offence, or the right to a fair trial
- (g) matters that must be considered in confidence in order to ensure that the council does not breach any law, order or direction of a court or tribunal constituted by law, any duty of confidence, or other legal obligation or duty

- (h) legal advice

33. Section 90(7) of the Local Government Act provides:

If an order is made under subsection (2), a note must be made in the minutes of the making of the order and specifying-

- (a) the grounds on which the order was made; and
- (b) the basis on which the information or matter to which the order relates falls within the ambit of each ground on which the order was made; and
- (c) if relevant, the reasons that receipt, consideration or discussion of the information or matter in a meeting open to the public would be contrary to the public interest.

34. Section 21 of the ICAC Act provides:

21 - Obstruction of complaint or report

A person must not-

- (a) prevent another person from making a complaint or report under this Act about a matter that may involve corruption, misconduct or maladministration in public administration; or
- (b) hinder or obstruct another person in making such a complaint or report.

Maximum penalty: \$10 000 or imprisonment for 2 years.

35. Clause 3.2 of Part 3 of the Code of Conduct provides:

Council members must:

Perform and discharge their official functions and duties with reasonable care and diligence at all times.

36. Clause 3.14 of Part 3 of the Code of Conduct provides:

Misuse of Council resources

Council members using Council resources must do so effectively and prudently.

37. Clause 3.16 of Part 3 of the Code of Conduct provides:

Misuse of Council resources

Council Members must not use public funds or resources in a manner that is irregular or unauthorised.

38. Regulation 4 of the Procedures at Meetings Regulations provides:

4 - Guiding Principles

The following principles (the "Guiding Principles") should be applied with respect to the procedures to be observed at a meeting of a council or a council committee:

- (a) procedures should be fair and contribute to open, transparent and informed decision-making;
- (b) procedures should encourage appropriate community participation in the affairs of the council;
- (c) procedures should reflect levels of formality appropriate to the nature and scope of responsibilities exercised at the meeting;

- (d) procedures should be sufficiently certain to give the community and decision-makers confidence in the deliberations undertaken at the meeting.

39. The Local Government Association of South Australia's Model Policy for Mayors/Chairpersons Seeking Legal Advice provides:

Circumstances in which it is appropriate for the Mayor/Chairperson to seek legal advice

In circumstances in which it is not possible or appropriate for the CEO to seek legal advice, the Mayor/Chairperson should, ideally seek a Council resolution to obtain legal advice. However, where this is not possible, the Mayor/Chairperson may seek the advice independently as set out below.

1.1 Urgent matters relating to a Council Meeting if the CEO is unavailable

While the CEO [and Governance Officer] has a good working knowledge of Council meeting procedures, matters may arise from time to time which require an urgent legal opinion. Where legal advice is required in the absence of the CEO:

- the Mayor/Chairperson may seek legal advice in situations in which a response is required urgently, including for an imminent Council meeting or other urgent matter;
- any legal advice obtained in this way will be reported to the Council at the earliest available meeting (which may be conducted 'in confidence' for this purpose under section 90(3)(h) of the *Local Government Act 1999*);
- the legal advice will also be provided to the CEO (unless this is not appropriate - see below).

40. The council's Meetings Proceedings Code for proceedings at meetings provides the following:

1.2 Decisions of Council

The Council or Council Committee cannot make decisions except by resolution. In the meeting a motion is moved, seconded and debated by the members present, Once debated, the Chair puts the motion to a vote and if carried by a majority of votes, it becomes a resolution of the meeting. Resolutions of the Council are implemented by the Chief Executive Officer (CEO).

4.1.3 Urgent business

The use of 'urgent business' during a meeting is for the purpose of raising a matter of urgency that was not present at the time of the agenda preparation. The raising of new matters in urgent business is not encouraged due to the lack of public notification and transparency.

Members intending to raise items in urgent business should provide the information to the Presiding Member and the CEO prior to the meeting.

41. The council's Meetings Proceedings Code for proceedings at meetings provides the following:

Special meetings of Council

Special meetings of Council may be held at any time. At least four hours' notice is required for a Special meeting of Council.

A request for a Special meeting must be made to the CEO. The request may be made by:

- the Presiding Member of the Council

- at least three elected members of the Council
- a Council Committee at which three members of the Council vote in favour of making the request.

Whether Mayor Lorraine Rosenberg breached clause 3.2 of the Code of Conduct for Council Members in relation to Item 14.2 at the council meeting held on 29 November 2016.

42. The complainant has alleged that Mayor Rosenberg breached clause 3.2 of the Code of Conduct during the council meeting held on 29 November 2016 by moving an item as urgent business and insisting it be considered in confidence without any proper explanation other than on the basis that it involved legal advice. Further, the complainant has alleged that councillors were not provided with relevant documents and not given adequate time in which to consider those documents prior to voting on the matter.
43. Clause 3.2 of the Code requires Mayor Rosenberg to discharge her official functions and duties with reasonable care and diligence.
44. Section 90 of the Local Government Act provides the circumstances under which a matter may be discussed or considered in confidence and as such the public would be excluded from attendance during the discussion or consideration of that matter. Specifically, subsection 90(3)(h) provides for a matter to be discussed in confidence if the matter relates to the consideration of legal advice.
45. I note that Mayor Rosenberg was advised by council staff that they had received verbal legal advice and as such she informed the chamber of this and noted that it would be difficult to table this advice for councillors to consider.
46. As pointed out by Mayor Rosenberg in her response to my investigation, the mechanism for moving an item into confidence is by way of a motion of the council. The minutes of the meeting of 29 November 2016 confirm that a motion of the council was voted on in relation to the discussion involving the code of conduct investigation regarding Cr Jamieson. The motion to consider the item in confidence was subsequently carried by the council. Therefore, I accept that Mayor Rosenberg did not move Item 14.2 into confidence.
47. In relation to the urgency, Mayor Rosenberg told my investigation that following the motion of the council in May 2016 it was her view that the matter had concluded and when she received the letter from Cr Jamieson's legal representative some five months later seeking a written apology she did not see any reason to delay resolution of the matter. I accept that Mayor Rosenberg did not see any reason to delay the matter and was also of the view that previous advice received by the council indicated that a motion on the public minutes could be deemed to be the apology. I also understand that Mayor Rosenberg has since issued a letter of apology to both Councillors Kilby and Jamieson in order to resolve the matter.
48. The use of urgent business under part 4.1.3 of the council's code of practice for meeting procedures is ordinarily used to raise a matter that was not apparent at the time of the Agenda preparation.
49. Having noted the above, the council's code of practice for meeting procedures has been developed as a guide to assist elected members to determine an appropriate

course of action and behaviour during council meetings.⁵ I consider that the council's meeting procedures are broadly worded and that in all of the circumstances, it was reasonably open to Mayor Rosenberg to treat the matter as urgent.

50. Mayor Rosenberg advised my investigation that she received the letter from Cr Jamieson's legal representative seeking a written apology on 14 November 2016. It appears that the council's Administration subsequently sought (verbal) legal advice regarding that letter and the recommendation at Item 9.8 of the 24 May 2016 council meeting and this verbal advice was provided to elected members during the council meeting of 29 November 2016.
51. I note that the complainant states that elected members were unable to declare a conflict of interest as they had not been given adequate time to consider documentation. I acknowledge the concern raised by the complainant, however I note that consideration of the item commenced at approximately 11:00pm or shortly after and did not conclude until 11:40pm when the meeting was reopened to the public. Mayor Rosenberg also told my investigation that once the letter from Iles Selley Lawyers was tabled she waited 12 minutes for elected members to read it before she asked for any questions.
52. Therefore, I consider that a reasonable amount of time was given to this item and in any case there appeared to be nothing preventing the complainant and other councillors from declaring a conflict of interest when they became aware of the subject matter.
53. I also note that the substantive issue in relation to Item 14.2 was adjourned at the 29 November 2016 council meeting and it was not considered again until the next council meeting which occurred on 13 December 2016. Therefore, in the event that the complainant considered that there was a lack of time given to consideration of all of the relevant information at the 29 November 2016 council meeting, he was given ample time to fully consider the matter prior to the next council meeting.
54. On the information before me, my view is that Mayor Rosenberg did not breach clause 3.2 of the Code of Conduct or act in a manner that was contrary to the guiding principles as set out in Regulation 4 of the Procedures at Meeting Regulations in relation to Item 14.2 being considered as confidential and urgent.

Conclusion

In light of the above, my view is that Mayor Rosenberg did not breach section 63 of the Local Government Act and clause 3.2 of Part 3 of the Code of Conduct, and did not act in a manner that was unlawful within the meaning of section 25(1)(a) of the Ombudsman Act.

Whether Mayor Lorraine Rosenberg breached clauses 3.14 and/or 3.16 of the Code of Conduct for Council Members in relation to Item 14.2 at the council meeting held on 29 November 2016

55. The complainant also alleges that Mayor Rosenberg breached clauses 3.14 and 3.16 of the Code of Conduct by seeking legal advice from Norman Waterhouse Lawyers regarding the council motion of 24 November 2016 and that she acted without authority to seek that legal advice.

⁵ City of Onkaparinga, *Code of Practice:- Proceedings of meetings*, 2015.

56. Clauses 3.14 and 3.16 of the Code of Conduct require council members to use resources effectively and prudently and not use public funds or resources in an irregular or unauthorised manner.
57. I consider that there are certain circumstances in which the Mayor may be able to independently seek legal advice as contemplated by the Local Government Association's Model Policy for Mayors/Chairpersons Seeking Legal Advice.
58. Regardless, Mayor Rosenberg notes in her response that she did not seek the legal advice from Norman Waterhouse Lawyers and in fact informed the chamber that she was notified by council staff that they had received verbal legal advice regarding the matter of the apology to Crs Kilby and Jamieson.
59. I also consider that the information provided by the complainant confirms that it was the council's Administration that sought the legal advice from Norman Waterhouse Lawyers, as the complainant mentions a response provided by the Manager Governance which refers to Administration seeking advice regarding the tabling of the Iles Selley letter in confidence at Item 14.1 of the 29 November 2016 council meeting.
60. There is no evidence to support the allegation that Mayor Rosenberg sought legal advice from Norman Waterhouse Lawyers without authority or misused council resources.
61. In any event, I consider that even if Mayor Rosenberg did seek legal advice it would not necessarily have been inappropriate for her to do so, especially noting that the matter involved responding to a letter from Cr Jamieson's legal representative.
62. Therefore, my view is that Mayor Rosenberg did not use public funds in an irregular or unauthorised manner or act in a manner that was in breach of clauses 3.14 or 3.16 of the Code of Conduct.

Conclusion

In light of the above, my view is that Mayor Rosenberg did not breach section 63 of the Local Government Act and clauses 3.14 and 3.16 of Part 3 of the Code of Conduct, and did not act in a manner that was unlawful within the meaning of section 25(1)(a) of the Ombudsman Act.

Whether Mayor Lorraine Rosenberg breached clause 3.2 of the Code of Conduct for Council Members and/or regulation 4 of the Procedures at Meetings Regulations in relation to Item 4.1 at the special council meeting held on 13 June 2017

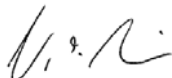
63. The complainant alleged that Mayor Rosenberg breached clause 3.2 of the Code of Conduct and Regulation 4 of the Procedures at Meeting Regulations. Specifically, the complainant asserts that Mayor Rosenberg moved a matter into confidence without proper explanation. The complainant also alleged that Mayor Rosenberg advised councillors that the matter concerned alleged breaches of the Local Government Act, however no detail about the breaches was provided. The complainant raised his concerns with Mayor Rosenberg via email, however she did not address those concerns, instead indicating that she would refer the complainants email to the Office for Public Integrity.
64. As noted above, to move a matter into confidence requires a motion of the council. The minutes of the council meeting of 13 June 2017 confirm that a motion of the council was voted on in relation to a confidential discussion regarding the ERR process. The motion refers to sections 90(3)(f) and 90(3)(g) as the grounds for moving the matter into confidence. While more detail could have been provided to support these grounds, I do

not consider the lack of detail to be significant so as to constitute a breach of clause 3.2 of the Code of Conduct on the part of the Mayor.

65. In Mayor Rosenberg's response to my investigation she provided a timeline of events in which she advised that she was not made aware of the issue regarding the ERR process until approximately 4.00pm on 13 June 2017. I accept the timeline of events provided by Mayor Rosenberg.
66. Although the council's code of practice in relation to the requirement to give notice of a special meeting of the council is ordinarily four hours, I accept that Mayor Rosenberg was not made aware of the matter until 13 June 2017 and both she and the Chief Executive Officer were in a meeting about how to deal with this matter until approximately one hour before the meeting was scheduled to commence.
67. I also accept that Mayor Rosenberg considered that the matter needed to be dealt with in a timely manner and sought advice from the Director Corporate and City Services on the basis that a special meeting of the council had no provisions for urgent or late business.
68. The Director Corporate and City Services advised that the use of urgent business was an appropriate mechanism for dealing with the matter giving consideration to the circumstances. I am of the view that Mayor Rosenberg did not fail to act diligently by relying upon this advice in determining to raise the matter during the special council meeting held on 13 June 2017.
69. I also consider that as the matter that Mayor Rosenberg brought to the attention of councillors was serious she acted in good faith to inform the council accordingly given that there was a likelihood that the ERR process may be affected.
70. Further, as noted above, to move a matter into confidence requires a motion of the council. The minutes of the council meeting of 13 June 2017 confirm that a motion of the council was voted on in relation to a confidential discussion regarding the ERR process.
71. The guiding principles of Regulation 4 of the Procedures at Meetings Regulations, in part, provides that the procedures of meetings should contribute to open, transparent and informed decision making. I note that Item 4.1 of the 13 June 2017 council meeting did not require a decision to be made by the council, rather the item was for information only in the event that the ERR process was delayed and/or cancelled.
72. I acknowledge that Mayor Rosenberg also sought advice from Administration regarding the need to respond to the complainant's email of 14 June 2017 and determined not to provide answers to the complainant on the basis of the advice that she received.
73. I question the appropriateness of Mayor Rosenberg's decision to decline to answer questions from Cr Chapman about this issue and her decision to report his email of 14 June 2017 to the Office for Public Integrity, which in my view appears to be somewhat heavy handed in the circumstances. That said, I do not consider that this in itself constitutes a breach of Part 3 of the Code of Conduct.
74. Therefore, on the information before me I do not consider that Mayor Rosenberg by informing the council of the intention to refer the matter to the OPI without providing specific details breached clause 3.2 of the Code of Conduct or Regulation 4 of the Procedures at Meetings Regulations.

Conclusion

In light of the above, my view is that Mayor Rosenberg did not breach the provisions of section 63 of the Local Government Act and clause 3.2 of Part 3 of the Code of Conduct, and did not act in a manner that was unlawful within the meaning of section 25(1)(a) of the Ombudsman Act.



Wayne Lines
SA OMBUDSMAN

20 October 2017